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James M. MALONEY,

Plaintiff-Appellant,

v.

Andrew CUOMO, in his official capacity as Attorney General of the State of New York, David Paterson, in his official capacity as Governor of the State of New York, Kathleen A. Rice, in her official capacity as District Attorney of the County of Nassau, and their successors,*

Defendants-Appellees.

Docket No. 07-0581-cv.

United States Court of Appeals,
Second Circuit

Argued: Dec. 15, 2008

Decided: Jan. 28, 2009

James M. Maloney, appearing pro se, for Plaintiff-Appellant.

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* Pursuant to Federal Rule of Appellate Procedure 43(c)(2), Governor David Paterson is automatically substituted for former Governor Eliot Spitzer as a defendant in this case.

Karen Hutson, Deputy County Attorney (Lorna B. Goodman, County Attorney, on the brief) for Defendant-Appellee, Kathleen A. Rice, Nassau County District Attorney, Mineola, N.Y.

Before: POOLER, SOTOMAYOR, and KATZMANN, Circuit Judges.

PER CURIAM:

Plaintiff-appellant James Maloney was arrested at his home on August 24, 2000, and charged with possessing a chuka stick in violation of N.Y. Penal Law § 265.01(1). A "chuka stick" (or "nunchaku") is defined 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 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.

Id. § 265.00(14).[1] This charge was dismissed on January 28, 2003, and Appellant pleaded guilty to one count of disorderly conduct. As part of the plea, he agreed to the destruction of the nunchaku seized from his home.

Appellant filed the initial complaint in this action on February 18, 2003, and then an amended

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[1] There are two sections of the New York Penal Law numbered 265.00(14).

complaint on September 3, 2005, seeking a declaration that N.Y. Penal Law §§ 265.00 through 265.02 are unconstitutional insofar as they punish possession of nunchakus in one's home. The district court dismissed the amended complaint as against the New York State Attorney General and the Governor for lack of standing, concluding that neither official is responsible for enforcing the statutes at issue. The district court granted defendant Nassau County District Attorney Kathleen Rice's motion for judgment on the pleadings in relevant part because the Second Amendment does not apply to the States and therefore imposed no limitations on New York's ability to prohibit the possession of nunchakus. Appellant moved for reconsideration on the ground that the district court had failed to consider certain other claims raised in his amended complaint; the district court denied that motion.

On appeal, Appellant challenges only the district court's dismissal of his claims against Rice.[2] He argues, *inter alia*, that New York's statutory ban on the possession of nunchakus violates (1) the Second Amendment because it infringes on his right to keep and bear arms, and (2) the Fourteenth Amendment

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[2] Appellant makes no argument in his brief concerning the district court's dismissal of his claims against the Attorney General and the Governor. We therefore deem any challenges to that aspect of the district court's judgment waived. *See Yueqing Zhang v. Gonzales*, 426 F.3d 540, 541 n. 1 (2d Cir.2005).

because it lacks a rational basis. Neither of these arguments has any merit.

The Second Amendment provides: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. Const. amend. II. The Supreme Court recently held that this confers an individual right on citizens to keep and bear arms. *See District of Columbia v. Heller*, --- U.S. ---, 128 S.Ct. 2783, 2799, 171 L.Ed.2d 637 (2008). It is settled law, however, that the Second Amendment applies only to limitations the federal government seeks to impose on this right. *See*, *e.g.*, *Presser v. Illinois*, 116 U.S. 252, 265, 6 S.Ct. 580, 29 L.Ed. 615 (1886) (stating that the Second Amendment "is a limitation only upon the power of congress and the national government, and not upon that of the state"); *Bach v. Pataki*, 408 F.3d 75, 84, 86 (2d Cir.2005) (holding "that the Second Amendment's 'right to keep and bear arms' imposes a limitation on only federal, not state, legislative efforts" and noting that this outcome was compelled by *Presser*), *cert. denied*, 546 U.S. 1174, 126 S.Ct. 1341, 164 L.Ed.2d 56 (2006). *Heller*, a case involving a challenge to the District of Columbia's general prohibition on handguns, does not invalidate this longstanding principle. *See Heller*, 128 S.Ct. at 2813 n. 23, 128 S.Ct. 2783 (noting that the case did not present the question of whether the Second Amendment applies to the states). And to the extent that *Heller* might be read to question the continuing validity of this principle, we "must follow *Presser* " because "[w]here, as here, a Supreme Court precedent 'has direct application in a case, yet appears to rest on reasons

rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to the Supreme Court the prerogative of overruling its own decisions.'" *Bach*, 408 F.3d at 86 (quoting *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484, 109 S.Ct. 1917, 104 L.Ed.2d 526 (1989)) (alteration marks omitted); *see also State Oil Co. v. Khan*, 522 U.S. 3, 20, 118 S.Ct. 275, 139 L.Ed.2d 199 (1997). Thus, N.Y. Penal Law §§ 265.00 through 265.02 do not violate the Second Amendment.

The Fourteenth Amendment similarly provides no relief for Appellant. "Legislative acts that do not interfere with fundamental rights or single out suspect classifications carry with them a strong presumption of constitutionality and must be upheld if 'rationally related to a legitimate state interest.'" *Beatie v. City of New York*, 123 F.3d 707, 711 (2d Cir.1997) (quoting *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985)). We will uphold legislation if we can identify "some reasonably conceivable state of facts that could provide a rational basis for the legislative action. In other words, to escape invalidation by being declared irrational, the legislation under scrutiny merely must find some footing in the realities of the subject addressed by the law." *Id.* at 712 (internal quotation marks and citations omitted).

The legislative history of section 265.00 makes plain that the ban on possession of nunchakus imposed by section 265.01(1) is supported by a rational basis. Indeed, as Appellant concedes, when the statute was under consideration, various parties

submitted statements noting the highly dangerous nature of nunchakus. For example, New York's Attorney General, Louis J. Lefkowitz, asserted that nunchakus "ha[ve] apparently been widely used by muggers and street gangs and ha[ve] been the cause of many serious injuries." Mem. from Attorney Gen. Louis J. Lefkowitz to the Governor (Apr. 8, 1974). And the sponsor of the bill, Richard Ross, stated that "[w]ith a minimum amount of practice, [the nunchaku] may be effectively used as a garrote, bludgeon, thrusting or striking device. The [nunchaku] is designed primarily as a weapon and has no purpose other than to maim or, in some instances, kill." *See* N.Y. Penal Law § 265.00, practice commentary, definitions ("Chuka stick") (quoting Letter of Assemblyman Richard C. Ross to the Counsel to the Governor (1974)).

Appellant does not dispute that nunchakus can be highly dangerous weapons. Rather, his principal argument is that section 265.01(1) prevents martial artists from using nunchakus as part of a training program. But the fact that nunchakus might be used as part of a martial-arts training program cannot alter our analysis. Where, as here, a statute neither interferes with a fundamental right nor singles out a suspect classification, "we will invalidate [that statute] on substantive due process grounds only when a plaintiff can demonstrate that there is no rational relationship between the legislation and a legitimate legislative purpose." *Beatie*, 123 F.3d at 711. Appellant has not carried this burden. Consequently, in light of the legislature's view of the danger posed by nunchakus, we find that the prohibition against the possession of

nunchakus created by N.Y. Penal Law § 265.01(1) is supported by a rational basis.

We have considered Appellant's remaining arguments and find them to be without merit. Accordingly, for the foregoing reasons, the judgment of the district court is hereby **AFFIRMED**. Appellant's pending motions to strike defendant Kathleen Rice's brief and material in her July 28, 2008 Rule 28(j) letter are hereby **DENIED**.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

JAMES M. MALONEY,

Plaintiffs,

- 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, KATHLEEN A. RICE, in her official capacity as District Attorney of the County of Nassau, and their successors,

Defendants.

ORDER

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03 CV 0786 (ADS) (MLO)

APPEARANCES:

JAMES M. MALONEY
Plaintiff *Pro Se*
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ANDREW CUOMO
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By: Assistant Attorney General, Dorothy O. Nese

LORNA B. GOODMAN
NASSAU COUNTY ATTORNEY'S OFFICE
Attorney for the District Attorney
One West Street
Mineola, New York 11051
By: Deputy County Attorney, Liora M. Ben-Sorek
Deputy County Attorney Tatum J. Fox

SPATT, District J.

In this action, James M. Maloney alleges that New York State's prohibition of the possession of "nunchaku," a hand-held weapon comprised of two short sticks of equal length joined by a rope or a chain, also referred to as "chuka sticks" or "nun-chuks," violates the United States Constitution. On January 17, 2007, the Court granted the State Defendants' motion to dismiss the amended complaint, and granted the District Attorney's motion for judgment on the pleadings. The amended complaint was dismissed against all defendants. Presently before the Court is the plaintiff's motion for reconsideration of the Memorandum of Decision and Order, dated January 17, 2007, pursuant to Local Rule 6.3.

Pursuant to Local Rule 6.3, a party may request reconsideration if counsel believes that there are "matters or controlling decisions" that the Court overlooked. Local Rule 6.3; *see also Hertzner v. Henderson*, 292 F.3d 302, 303 (2d Cir. 2002); *Yurman Design Inc. v. Shieler Trading Corp.*, No. 99 Civ. 9307, 2003 WL 22047849, at *1 (S.D.N.Y. Aug. 28, 2003). "A motion for reconsideration should be granted only where the moving party demonstrates that the Court has overlooked factual matters or controlling precedent that were presented to it on the underlying motion and that would have changed its decision." *In re Worldcom, Inc. Sec. Litig.*, 308 F. Supp. 2d 214, 224 (S.D.N.Y. 2004); *Colodney v. Continuum Health Partners, Inc.*, No. 03-7276, 2004 WL 1857568, at *1 (S.D.N.Y. Aug. 18, 2004); *see also In Re BDC 56 LLC*, 330 F.3d 111, 123 (2d Cir. 2003).

A motion for reconsideration is "narrowly construed and strictly applied so as to avoid repetitive arguments on issues that have been considered fully by the Court." *Dellefave v. Access Temps., Inc.*, No. 99 Civ. 6098, 2001 WL 286771, at *1, 2001 U.S. Dist. LEXIS 3165, at *1 (S.D.N.Y. Mar. 22, 2001); *see also Shrader v. CSX Transp. Inc.*, 70 F.3d 255, 257 (2d Cir. 1995) (stating that reconsideration "should not be granted where the moving party seeks solely to re-litigate an issue already decided"); *In re Houbigant, Inc.*, 914 F. Supp. 997, 1001 (S.D.N.Y.1996) (stating that a Rule 6.3 motion is "not a motion to reargue those issues already considered when a party does not like the way the original motion was resolved").

The plaintiff argues that the Court overlooked the part of the amended complaint alleging that New

York's criminalization of the in-home possession of nunchaku violate (1) "those rights recognized under the doctrine [of] substantive due process"; (2) "those rights recognized by the United States Supreme Court in *Lawrence v. Texas*, 123 S. Ct. 2472 (2003)"; (3) "those rights guaranteed by the Fourteenth Amendment"; and (4) "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 the Declaration of Independence."

Here, the plaintiff failed to meet the high burden required for reconsideration. The right to privacy, whether as defined under the doctrine of substantive due process; as discussed in *Lawrence*; as guaranteed by the Fourteenth Amendment; or as drawn inferentially from the first eight amendments to the Constitution, does not provide the plaintiff with a constitutional right to possess nunchuku within his home. *See Bowers v. Hardwick*, 478 U.S. 186, 195, 106 S. Ct. 2841, 2846, 92 L. Ed. 2d 140 (1986) ("[O]therwise illegal conduct is not always immunized whenever it occurs in the home."), *overruled on other grounds by Lawrence*, 539 U.S. at 578, 123 S. Ct. at 2484; *Stanley v. Georgia*, 394 U.S. 557, 568 n.11, 89 S. Ct. 1243, 1250 n.11, 22 L. Ed. 2d 542 (1969) (invalidating a State's attempt to make mere private possession of obscene material a crime, but stating that the ruling "in no way infringes upon the power of the State or Federal Government to make possession of other items, such as narcotics, firearms, or stolen goods, a crime."); *Scope, Inc. v. Pataki*, 386 F. Supp. 2d 184, 193-94 (W.D.N.Y. 2005) (rejecting privacy challenge to the constitutionality

of a New York State statute pertaining to the sale of guns and the creation of database for guns sold in the state); *Fresno Rifle & Pistol Club, Inc. v. Van de Kamp*, 746 F. Supp. 1415, 1419-20 (E.D.Cal. 1990) (noting that the right to privacy has "never been extended to the private citizen [a] right to possess weapons"; rejecting privacy challenge to the validity of California statutes regulating the manufacture and transfer of assault weapons); *cf. Crowley Cutlery Co. v. United States*, 849 F.2d 273, 278 (7th Cir. 1988) ("Switchblade knives are dangerous, and the due process clause [of the Fifth Amendment] does not forbid the banning of dangerous products."); *Nat'l Org. for Reform of Marijuana Laws (NORML) v. Bell*, 488 F. Supp. 123, 132-33 (D.D.C. 1980) (rejecting the argument that the right of privacy in general and privacy in the home forbids any governmental ban on private possession and use of marijuana).

Furthermore, the plaintiff's reliance on *Lawrence v. Texas*, 539 U.S. 558, 123 S. Ct. 2472, 156 L. Ed. 2d 508 (2003), is misplaced. The question before the Court in *Lawrence* was whether the State of Texas could make it a crime for two persons of the same sex to engage in certain intimate sexual conduct. 539 U.S. at 562, 123 S. Ct. at 2475. The Court held the statute to be unconstitutional, ruling that the substantive aspect of the due process clause protected the right of individuals of the same sex to engage in private, consensual, intimate sexual relations. That case is not controlling here.

Based on the foregoing, it is hereby

ORDERED, that the plaintiff's motion for reconsideration of the Court's January 17, 2007 Memorandum of Decision and Order is denied.

SO ORDERED.

Dated: Central Islip, New York
May 14, 2007

/s/ *Arthur D. Spatt*

ARTHUR D. SPATT
United States District Judge

James M. MALONEY,

Plaintiffs,

v.

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.

No. 03 CV 0786(ADS)(MLO)

United States District Court,

E.D. New York

January 17, 2007

James M. Maloney, Port Washington NY, Plaintiff Pro Se.

Andrew Cuomo, State of New York, Office of the Attorney General, by Dorothy O. Nese, Assistant Attorney General, Mineola, NY, for the State Defendants.

Lorna B. Goodman, Nassau County Attorney's Office, by Liora M. Ben-Sorek, Deputy County Attorney, Tatum J. Fox, Deputy County Attorney, Mineola, NY, for the District Attorney.

MEMORANDUM OF DECISION AND ORDER

SPATT, District Judge.

James M. Maloney, a licensed attorney acting *pro se*, brought this action against New York State Attorney General Eliot Spitzer, New York State Governor George Pataki (together with Spitzer, the "State Defendants"), and Nassau County District Attorney Dennis Dillon (collectively, the "Defendants"), seeking a declaration that certain provisions of the New York State Penal Law that prohibit the in-home possession of "nunchaku" are unconstitutional.

Presently there are two motions before the Court: (1) a motion by the State Defendants to dismiss the amended complaint for (a) lack of subject matter jurisdiction pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure ("Fed. R. Civ. P."); and (b) failure to state a claim pursuant to Fed.R.Civ.P. 12(b)(6); and (2) a motion by the District Attorney to dismiss the complaint for judgment on the pleadings pursuant to Fed.R.Civ.P. 12(c).

I. BACKGROUND

The following facts are taken from the amended complaint. The plaintiff was born in 1959, making him forty-four years old at the time of the commencement of this action. The plaintiff has been a student of martial arts since approximately 1975.

The plaintiff practices several martial arts disciplines, including "Okinawan" styles of karate, "Ving Tsun" or "Wing Chun" style of kung fu, and aikido. Drawing on the various forms of martial arts, the plaintiff developed his own style called "Shafan Ha-Lavan."

The plaintiff's "Shafan Ha-Lavan" martial art incorporates the use of "nunchaku" as a part of the training and technique. "Nunchaku," also referred to as "chuka sticks" or "nun-chuks," is a hand-held weapon, commonly described as being devised of two short sticks of equal length joined by a rope or a chain. The New York criminal statute at issue in this case defines "nunchaku" as follows:

> Chuka stick means 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 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. These devices are also known as nunchakus and centrifugal force sticks.

N.Y. Penal Law § 265.00(14). The plaintiff alleges that he has trained peacefully with the nunchaku since 1975, and has acquired numerous nunchaku during his training. The plaintiff alleges that he only uses the nunchaku within the context of his martial arts training.

On August 24, 2000, the plaintiff was arrested and charged with six violations of the New York Penal Law, including one count of criminal possession of a weapon in the fourth degree for

possessing a nunchaku in his home in violation of New York Penal Law § 265.01. This section states, in part:

> A person is guilty of criminal possession of a weapon in the fourth degree when:
>
> (1) He possesses any firearm, electronic dart gun, electronic stun gun, gravity knife, switchblade knife, pilum ballistic knife, metal knuckle knife, cane sword, billy, blackjack, bludgeon, metal knuckles, chuka stick, sand bag, sandclub, wrist-brace type slingshot or slungshot, shirken or "Kung Fu star."

N.Y. Penal Law § 265.01(1). A violation of section 265.01 is a class A misdemeanor.

The criminal charges for possession of nunchaku was based solely on in-home possession, and 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. Thus, the only criminal activity alleged against the plaintiff was his possession of the nunchaku in his home.

On January 28, 2003, the criminal charges against the plaintiff were dismissed. Although the plaintiff does not indicate the reason the charges were dismissed in the amended complaint, the Court is cognizant from the earlier proceedings in this Court that the criminal possession charges were dismissed in exchange for the plaintiff's guilty plea to one count of disorderly conduct pursuant to New York Penal Law § 240.20(7). The plaintiff received a conditional discharge with regard to the other

pending charges; agreed to the destruction of the nunchaku confiscated at the time of his August 24, 2000 arrest; and paid a fine in the amount of $310.

On February 18, 2003, the plaintiff commenced this action by filing this complaint against the Attorney General and the District Attorney seeking a declaration that sections 265.00 through 265.02 of the New York Penal Law are unconstitutional. Although the plaintiff was charged with violating section 265.01, he is also challenging the constitutionality of section 265.02. Section 265.02 provides that a violation of section 265.01 by a person who has previously been convicted of any crime is a class D felony, rather than a misdemeanor. On April 15, 2003, the plaintiff voluntarily dismissed his cause of action against the District Attorney pursuant to Fed.R.Civ.P. 41(a)(1)(ii), without prejudice. On October 31, 2004, the plaintiff filed a motion for summary judgment against the Attorney General.

On August 31, 2005, the Court issued a Memorandum of Decision and Order denying the plaintiff's motion for summary judgment. The Court held that the plaintiff lacked standing to prosecute this action against the Attorney General. Specifically, the Court stated:

> In a case such as this, where a plaintiff seeks a declaration that a particular statute is unconstitutional, "the proper defendants are the government officials charged with the administration and enforcement of the statute." *Curtis v. Pataki*, No. 96 Civ. 425, 1997 WL 614285, at *5 (Oct. 1, 1997 N.D.N.Y.) (citing *New*

> *Hampshire Right to Life Comm. v. Gardner*, 99 F.3d 8, 13 (1st Cir.1996) (citations omitted)). "It is well established in New York that the district attorney, *and the district attorney alone*, should decide when and in what manner to prosecute a suspected offender." *Baez v. Hennessy*, 853 F.2d 73, 76 (2d Cir.1988) (citations omitted).

Memorandum of Decision and Order, at 8 (emphasis added). Accordingly, the Court concluded that the plaintiff lacked standing under Article III, section 2 of the Constitution and the Declaratory Judgment Act, 28 U.S.C. § 2201. However, the Court *sua sponte* granted the plaintiff leave to serve a supplemental summons and amended complaint "against the entity responsible for the potential prosecution of the plaintiff under the statutes in question."

On September 3, 2005, the plaintiff filed an amended complaint naming the Attorney General, the Governor, and the District Attorney as defendants. The plaintiff challenges the constitutionality of New York's ban on the in-home possession of nunchaku.

II. DISCUSSION

A. As to The Caption

Rule 25(d) provides that "[w]hen a public officer is party to an action in his official capacity and during its pendency . . . ceases to hold office, the action does not abate and the officer's successor is automatically substituted as a party. Proceedings following the substitution shall be in the name of the substituted party." Fed.R.Civ.P. 25(d).

Originally, the amended complaint named former Attorney General Elliot Spitzer, former Governor George Pataki, and former District Attorney Dennis Dillon as defendants. Since the time that the amended complaint was filed, Andrew Cuomo succeeded Eliot Spitzer as Attorney General, Eliot Spitzer replaced George Pataki as Governor, and Kathleen A. Rice succeeded Denis Dillon as the Nassau County District Attorney. Accordingly, the caption on this Memorandum of Decision and Order reflects those substitutions.

B. The Plaintiff's *Pro Se* Status

Although the plaintiff is proceeding *pro se*, he is an attorney duly licensed to practice law in the State of New York, the Second Circuit Court of Appeals, and the United States District Court for the Southern and Eastern Districts of New York. The plaintiff's letterhead, which appears on documents he has submitted in this case, states that he is an "attorney at law" and a "proctor in admiralty." In addition to being admitted to practice in the State and federal courts of New York, the plaintiff's letterhead also indicates that he is admitted in New Jersey, the United States Supreme Court, the United States Courts of Appeal for the Second and Third Circuits, the District of New Jersey, the District of Connecticut, the Northern District of Illinois, the Court of International Trade, and the Court of Federal Claims.

Although the Court normally will hold the pleadings of a *pro se* plaintiff to a less rigorous standard of review than pleadings drafted by counsel, as an experienced attorney the plaintiff's

papers in this case are not entitled to such special consideration. *See Goel v. U.S. Dept. of Justice*, No. 03cv0579, 2003 WL 22047877, *1 (S.D.N.Y. Aug.29, 2003); *Kuriakose v. City of Mount Vernon*, 41 F.Supp.2d 460, 465 (S.D.N.Y.1999); *Guardino v. Am. Sav. & Loan Ass'n of Fla.*, 593 F.Supp. 691, 694 (E.D.N.Y.1984).

C. The Declaratory Judgment Act

Although not raised by the parties, the Court must, as an initial matter, determine whether jurisdiction in this Court is proper. The plaintiff seeks relief under the Declaratory Judgment Act, 28 U.S.C. § 2201. This Act does not itself provide a basis for jurisdiction. *See* 28 U.S.C. § 2201(a) ("In a case of actual controversy *within its jurisdiction* . . . any court of the United States . . . may declare the rights and other legal relations of any interested party.") (emphasis added); *Conn. Yankee Atomic Power Co. v. Town of Haddam Planning and Zoning Comm'n*, 19 Fed. Appx. 21, 22-23, 2001 WL 1167816 *1 (2d Cir.2001). Thus, for jurisdiction to lie, the matter to be determined must satisfy the case or controversy requirement for federal jurisdiction pronounced in Article III, Section 2 of the United States Constitution. *Id.* (citing *Niagara Mohawk Power Corp. v. Tonawanda Band of Seneca Indians*, 94 F.3d 747, 752 (2d Cir.1996)).

A declaratory judgment action presents an actual controversy if "the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment."

Duane Reade, Inc. v. St. Paul Fire and Marine Ins. Co., 411 F.3d 384, 388 (2d Cir.2005); *In re Prudential Lines Inc.*, 158 F.3d 65, 70 (2d Cir.1998) (quoting *Maryland Cas. Co. v. Pac. Coal & Oil Co.*, 312 U.S. 270, 273, 61 S.Ct. 510, 512, 85 L.Ed. 826 (1941)). A plaintiff seeking declaratory relief cannot rely solely on past injury to satisfy this requirement, but must show a likelihood that the challenged conduct will occur again in the future. *McCormick v. School Dist. of Mamaroneck*, 370 F.3d 275, 284 (2d Cir.2004); *Deshawn E. by Charlotte E. v. Safir*, 156 F.3d 340, 344 (2d Cir.1998).

In this case, the Declaratory Judgment Act is satisfied because the plaintiff has already been arrested once under the allegedly unconstitutional statute, and intends to continue using nunchaku in his martial arts training, which he considers to be constitutionally protected activity. *See Steffel v. Thompson*, 415 U.S. 452, 462, 94 S.Ct. 1209, 1217, 39 L.Ed.2d 505 (1974) (Brennan, J.) (discussing the desire to avoid putting a plaintiff to the choice of "intentionally flouting state law" or "forgoing what he believes to be constitutionally protected activity in order to avoid becoming enmeshed in a criminal proceeding.").

D. Motion to Dismiss Standards

1. Rule 12(b)(1)

When considering a motion to dismiss for lack of subject matter jurisdiction under Fed.R.Civ.P. 12(b)(1), the Court may consider affidavits and other materials beyond the pleadings to resolve jurisdictional questions. *Robinson v. Gov't of Malaysia*, 269 F.3d 133, 140 n. 6 (2d Cir.2001).

Under Rule 12(b)(1), the Court must accept as true all material factual allegations in the complaint, but will not draw inferences favorable to the party asserting jurisdiction. *Shipping Fin. Servs. Corp. v. Drakos*, 140 F.3d 129, 131 (2d Cir.1998).

2. Rule 12(b)(6)

Fed.R.Civ.P. 12(b)(6) allows a court to dismiss a complaint for "failure to state a claim on which relief can be granted." In deciding such a motion, the Court must take the allegations of the complaint to be true and "draw all reasonable inferences in favor of the plaintiff." *Bernheim v. Litt*, 79 F.3d 318, 321 (2d Cir.1996). In this regard, a complaint will not be dismissed unless "'it appears beyond doubt, even when the complaint is liberally construed, that the plaintiff can prove no set of facts which would entitle him to relief.'" *Scutti Enters., LLC. v. Park Place Entm't Corp.*, 322 F.3d 211, 214 (2d Cir.2003) (quoting *Jaghory v. N.Y. State Dep't of Educ.*, 131 F.3d 326, 329 (2d Cir.1997)); *Desiderio v. Nat'l Ass'n of Sec. Dealers*, 191 F.3d 198, 202 (2d Cir.1999).

3. Rule 12(c)

The standard for reviewing a motion for judgment on the pleadings under Fed.R.Civ.P. 12(c) is analogous to the rules pursuant to Rule 12(b)(6). *Patel v. Contemporary Classics of Beverly Hills*, 259 F.3d 123, 126 (2d Cir.2001). The Court must determine whether "the moving party is entitled to judgment as a matter of law." *Burns Int'l Sec. Servs., Inc. v. Int'l Union United Plant Guard Workers of Am.*, 47 F.3d 14, 16 (2d Cir.1995). As with a 12(b)(6) motion to dismiss, the issue is not whether the plaintiff will ultimately prevail but

whether the plaintiff is entitled to offer evidence to support the claims. *Villager Pond, Inc. v. Town of Darien*, 56 F.3d 375, 378 (2d Cir.1995).

E. The Attorney General and the Governor are not Proper Defendants

The Court previously held in this case that the plaintiff lacks standing to sue the Attorney General because the plaintiff has no reasonable fear of prosecution by this official. *See Maloney v. Spitzer*, 03cv0786, Memorandum of Decision and Order (Aug. 31, 2005); *accord Curtis v. Pataki*, No. 96 Civ. 425, 1997 WL 614285, at *5 (N.D.N.Y. Oct. 1, 1997) (dismissing claims against Governor for failure to state a claim because Governor had no responsibility for administering or enforcing the challenged statute) (citation omitted); *cf. Baez v. Hennessy*, 853 F.2d 73, 76 (2d Cir.1988) ("It is well established in New York that the district attorney, and the district attorney alone, should decide when and in what manner to prosecute a suspected offender.").

Notwithstanding the Court's August 31, 2005 Order, the plaintiff argues that the Attorney General is a proper defendant because the amended complaint "seeks contingent equitable relief, . . . in a form such as an affirmative injunction requiring the Attorney General to notify any persons who received notice that their home possession of nunchaku is illegal . . . that they may not be criminally prosecuted for the simple possession of nunchaku in their own homes." Pls. Br. at 20. The Court does not agree that this request for "contingent" relief creates standing on the part of the plaintiff against the

Attorney General. Accordingly, the plaintiff's claims against the Attorney General are dismissed.

Similarly, the Court sees no basis for the plaintiff to assert his claims against the Governor. As with the Attorney General, the Governor is not involved in the enforcement of the statutes that the plaintiff is challenging. Thus, the claims against the Governor should be dismissed. *See Wang v. Pataki*, 164 F.Supp.2d 406, 410 (S.D.N.Y.2001) (dismissing Governor as a defendant in a suit raising a challenge to the constitutionality of a state statute where there were no allegations that the Governor had any connection with the enforcement of the statute "other than the general duty to take care that the laws be faithfully executed"); *see also Romeu v. Cohen*, 121 F.Supp.2d 264, 272 (S.D.N.Y.2000); *Warden v. Pataki*, 35 F.Supp.2d 354, 359 (S.D.N.Y.) (citations omitted), aff'd, 201 F.3d 430, 1999 WL 1012404 (2d Cir.1999); *cf. Shell Oil Co. v. Noel*, 608 F.2d 208, 211-12 (1st Cir.1979) ("The mere fact that a governor is under a general duty to enforce state laws does not make him a proper party defendant in every action attacking the constitutionality of a state statute. Nor is the mere fact that an attorney general has a duty to prosecute all actions in which the state is interested enough to make him a proper defendant in every such action.") (citations omitted). Accordingly, the State Defendants' motion to dismiss the complaint is granted.

F. As to the District Attorney's Motion for Judgment on the Pleadings

Having dismissed the plaintiff's complaint against the State Defendants, the only defendant

that remains is the District Attorney. The plaintiff's amended complaint challenges the constitutionality of New York's weapons-possession law, as applied to the in-home possession of nunchaku by the plaintiff, on three independent grounds: (1) the free speech clause of the First Amendment; (2) the Second Amendment's right to bear arms; and (3) "unenumerated" rights found in the Ninth Amendment. The District Attorney argues that she is entitled to judgment on the pleadings on all three causes of action.

1. As to the First Amendment

The first amendment provides, in part, that "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I. This provision protects not only actual speech, but also "expressive" or "symbolic" conduct. *See Virginia v. Black*, 538 U.S. 343, 358, 123 S.Ct. 1536, 1547, 155 L.Ed.2d 535 (2003); *Spence v. Washington*, 418 U.S. 405, 409, 94 S.Ct. 2727, 41 L.Ed.2d 842 (1974); *United States v. O'Brien*, 391 U.S. 367, 377, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968). However, the First Amendment does not protect all conduct that a person intends to be expressive or symbolic. *O'Brien*, 391 U.S. at 376, 88 S.Ct. at 1678. Whether particular conduct is worthy of First Amendment protection depends on whether the actor intended "to convey a particularized message," and whether the surrounding circumstances are such that "the likelihood was great that the message would be understood by those who viewed it." *Spence*, 418 U.S. at 410-11, 94 S.Ct. at 2730.

In this case, the plaintiff alleges that the "peaceful training with and twirling of the nunchaku [in the privacy of one's own home] is expressive conduct, which is protected by the First Amendment to the Constitution of the United States." (Am. Compl.¶¶ 40, 46.) In her motion for judgment on the pleadings, the District Attorney does not make a genuine effort do dispute the plaintiff's contention that his use of the nunchaku constitutes protected speech. Instead, citing religious-exercise cases, the District Attorney argues that New York State's blanket ban on the possession of nunchaku is a reasonable restriction on the plaintiff's expression, and necessary to satisfy a legitimate government objective. *See People v. Singh*, 135 Misc.2d 701, 516 N.Y.S.2d 412 (1987) (holding that a New York law prohibiting, with some exceptions, the wearing or carrying of knives did not violate a Sikh's freedom to practice his religion, which required him to carry a sword called a "Kirpan"); *see also United States v. Lee*, 455 U.S. 252, 261, 102 S.Ct. 1051, 1057, 71 L.Ed.2d 127 (1982) (holding that the collection of social security taxes did not violate the First Amendment free exercise rights of an employer who was a member of the Old Order Amish). Notwithstanding the District Attorney's failure to challenge the plaintiff regarding the nature of his alleged "speech," it is the opinion of the Court that the plaintiff's conduct in this case is not speech, and therefore the plaintiff fails to state a claim under the First Amendment.

To be clear, the plaintiff does not allege that he has or will try to convey any "particularized" message through his use of the nunchaku. *See*

Spence, 418 U.S. at 410-11, 94 S.Ct. at 2730. The plaintiff uses the nunchaku "to develop dexterity and coordination." (Compl.¶ 16.) The plaintiff began training with the weapon, based in part, on its effectiveness in disarming an assailant armed with a knife or other sharp instrument. (Compl.¶ 17). There are no allegations that the use of the nunchaku are integral to anything resembling either actual or symbolic speech.

The Supreme Court has held that the First Amendment protects a wide variety of conduct, including many forms of entertainment. *See, e.g., Texas v. Johnson*, 491 U.S. 397, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989) (flag burning); *Spence*, 418 U.S. 405, 94 S.Ct. 2727 (affixing a peace symbol to a flag); *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 89 S.Ct. 935, 22 L.Ed.2d 162 (1969) (marching); *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969) (wearing armbands); *see also, e.g., Schad v. Mount Ephraim*, 452 U.S. 61, 65, 101 S.Ct. 2176, 2181, 68 L.Ed.2d 671 (1981) ("Entertainment, as well as political and ideological speech, is protected; motion pictures, programs broadcast by radio and television, and live entertainment, such as musical and dramatic works, fall within the First Amendment guarantee"); *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 569, 115 S.Ct. 2338, 2345, 132 L.Ed.2d 487 (1995) (remarking that examples of painting, music, and poetry are "unquestionably shielded").

However, lower federal courts and state courts have generally been unwilling to extend First Amendment protection to sports or athletics. *See*

Justice v. Nat'l Collegiate Athletic Assoc., 577 F.Supp. 356, 374 (D.Ariz.1983) ("[P]laintiff's argument that the players have been denied a constitutional right to expression through football is unfounded"); *MacDonald v. Newsome*, 437 F.Supp. 796, 798 (E.D.N.C.1977) (holding that surfing is not protected under the First Amendment); *Murdock v. City of Jacksonville*, 361 F.Supp. 1083, 1095-96 (M.D.Fla.1973) (holding that wrestling is not "pure" speech, free speech, "akin to free speech," or a symbolic act protected by the Constitution); *Top Rank, Inc. v. Fla. State Boxing Comm'n*, 837 So.2d 496, 498 (Fla.Dist.Ct.App.2003) ("[T]he act of boxing does not involve either pure or symbolic speech.") (citation omitted); *Sunset Amusement Co. v. Board of Police Comm'rs of Los Angeles*, 7 Cal.3d 64, 101 Cal.Rptr. 768, 496 P.2d 840, 845-46 (1972) (ruling that roller-skating is not a constitutionally protected activity and stating that "no case has ever held or suggested that simple physical activity falls within the ambit of the First Amendment, at least in the absence of some element of communicating or advancing ideas or beliefs."). *But cf. Post Newsweek Stations-Connecticut v. Travelers Ins. Co.*, 510 F.Supp. 81, 86 (D.Conn.1981) (stating that entertainment in the form of the exposition of an athletic exercise, in this case world-class figure skating, "is on the periphery of protected speech").

As the Court stated in *Justice*: "In its most basic form, athletic competition does not constitute pure speech; rather, participation in athletic competition constitutes physical activity or conduct." *Justice*, 577 F.Supp. at 374. Although the activity in this case is not competition, the Court sees no reason to

distinguish between public competition and at home training or practice for purposes of the First Amendment.

The Court recognizes and accepts that the martial arts generally, and perhaps use of nunchaku in particular, have a rich history and are culturally significant to many people in many parts of the world. Under some circumstances an individual's participation in martial arts, and the attendant use of related equipment such as nunchaku, might warrant some degree of First Amendment protection. But there is nothing in the amended complaint or the plaintiff's papers to suggest that should be the case here. The plaintiff alleges that he uses the nunchaku for physical training and for self-defense. Under these circumstances, it is the opinion of the Court that the plaintiff is similar to the boxer and wrestler engaged in a strictly physical and unprotected activity. As such, the amended complaint on its face fails to satisfy the first requirement of the *Spence* test. Accordingly, the District Attorney's Rule 12(c) motion to dismiss the plaintiff's first cause of action is granted.

2. As to the Second and Ninth Amendments

The plaintiff's remaining causes of action alleging violations of the Second and Ninth Amendments are easily disposed of. The Second Amendment provides that "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. Const. amend. II. With regard to the plaintiff's claim that New York's ban on possessing nunchaku violates the Second Amendment, the Court looks to

the Second Circuit's decision in *Bach v. Pataki*, 408 F.3d 75 (2d Cir.2005). The plaintiff in *Bach*, a non-resident of the State of New York, challenged a New York statute that restricts the issuance of handgun licenses to only New York residents. In rejecting the plaintiff's Second Amendment challenge, the Court held "that the Second Amendment's 'right to keep and bear arms' imposes a limitation on only federal, not state, legislative efforts." *Id.* at 84. *Bach* is controlling here. The Second Amendment imposes no limitation on New York State's ability to ban the possession of certain weapons, including the nunchaku. Accordingly, the District Attorney's motion to dismiss the plaintiff's second cause of action is granted.

The Ninth Amendment provides that "The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people." U.S. Const. amend. II. Similar to the Second Amendment, the Ninth Amendment is only applicable against federal, and not state, actors. *See Rini v. Zwirn*, 886 F.Supp. 270, 289-90 (E.D.N.Y.1995) (citing Laurence H. Tribe, American Constitutional Law § 11-2, at 772-73 (2d ed.1988)). In addition, the Ninth Amendment is considered "a rule of construction" that does not give rise to individual rights. *See United States v. Bifield*, 702 F.2d 342, 349 (2d Cir.1983); *see also Clynch v. Chapman*, 285 F.Supp.2d 213, 219 (D.Conn.2003) (dismissing Ninth Amendment cause of action for failure to state a claim); *Rini*, 886 F.Supp. at 289-90 (dismissing Section 1983 cause of action based on a violation of the Ninth Amendment). So while the Ninth Amendment may

provide the basis for recognition of un-enumerated 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. *See Gibson v. Matthews*, 926 F.2d 532, 537 (6th Cir.1991) (dismissing the plaintiff's Ninth Amendment claim on the ground that "the ninth amendment does not confer substantive rights in addition to those conferred by other portions of our governing law"); *DeLeon v. Little*, 981 F.Supp. 728, 734 (D.Conn.1997) (holding that "'the [Ninth Amendment] does not guarantee any constitutional right.'" (quotation omitted)); *Mann v. Meachem*, 929 F.Supp. 622, 634 (N.D.N.Y.1996) (dismissing the plaintiff's section 1983 claim to the extent that it was based upon a violation of the Ninth Amendment because "[t]he Ninth Amendment is recognized as a rule of construction and does not protect any specific right.") (citation omitted). Accordingly, the District Attorney's motion to dismiss the plaintiff's third cause of action is granted.

III. CONCLUSION

Based on the foregoing, it is hereby

ORDERED, that the State Defendants' motion to dismiss the amended complaint is granted; and it is further

ORDERED, that the District Attorney's motion for judgment on the pleadings is granted; and it is further

ORDERED, that the amended complaint is dismissed; and it is further

ORDERED, that the Clerk of the Court is directed to close this case.

SO ORDERED.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

JAMES M. MALONEY,

Plaintiff,

- against -

ELIOT SPITZER, in his official capacity as Attorney General of the State of New York, and his successors,

Defendants.

MEMORANDUM OF DECISION AND ORDER

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03 Civ. 0786

APPEARANCES:

JAMES M. MALONEY, ESQ.
Pro Se Plaintiff
33 Bayview Avenue
Port Washington, New York 11050

ELIOT SPITZER
Attorney General of the State of New York
200 Old Country Road, Suite 460
Mineola, New York 11501
By: Dorothy Oehler Nese, Assistant Attorney General

SPATT, District Judge.

This action seeks a declaration that sections 265.00 and 265.02 of the New York Penal Law which prohibit the in home possession of nunchaku are unconstitutional as violative of the First, Second, Fifth, Eighth, Ninth, and Fourteenth Amendments to the Constitution of the United States.

Presently before the Court is a motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure ("Fed. R. Civ. P.") by the Plaintiff James M. Maloney ("Maloney" or the "Plaintiff").

I. BACKGROUND

On February 18, 2003, Maloney, an attorney proceeding pro se, commenced this action pursuant to 28 U.S.C. §§ 1331 and 2201 against New York Attorney State Attorney General Eliot Spitzer ("Attorney General" or the "Defendant"), and Nassau County District Attorney Denis Dillon ("Dillon") in their official capacities seeking a declaratory judgment that the above mentioned New York State Penal Laws are unconstitutional. The Plaintiff subsequently discontinued the action against Dillon in the interest of saving the taxpayer's money.

The following facts are taken from the parties' Rule 56.1 statements and supporting affidavits and are not in dispute unless otherwise stated.

In 2000 and 2002, the Attorney General reached settlements in two civil rights lawsuits against out of state martial arts equipment suppliers which had provided a product called nunchaku to New York residents by mail order and internet sales. New

York Penal Law § 265.00(14) defines nunchaku as follows:

> Chuka stick means 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 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. These devices are also known as nunchakus and centrifugal force sticks.

As part of these settlements, the suppliers were required to provide the Attorney General with a list of New York customers who had purchased nunchaku from the companies. Also, the suppliers had to deliver written notice to their New York customers advising them to surrender these weapons to law enforcement agencies. The Plaintiff did not indicate whether he received such a notice.

On August 24, 2000, Maloney was arrested and charged with six violations of the New York Penal Law, including one count of criminal possession of a weapon in the fourth degree, for possessing a nunchaku in his home in violation of New York Penal law §265.01. This section states in part:

> A person is guilty of criminal possession of a weapon in the fourth degree when:
>
> (1) He possesses any firearm, electronic dart gun, electronic stun gun, gravity knife, switchblade

> knife, pilum ballistic knife, metal knuckle knife, cane sword, billy, blackjack, bludgeon, metal knuckles, chuka stick, sand bag, sandclub, wrist-brace type slingshot or slungshot, shirken or "Kung Fu star" . . . .

It is 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. Thus, the only criminal activity alleged against the Plaintiff was his possession of the nunchaku in his home.

On January 28, 2003, the Plaintiff pled guilty to one count of disorderly conduct pursuant to New York Penal Law § 240.20(7), and received a conditional discharge with regard to the other pending charges. In connection with that plea of guilty, the Plaintiff agreed to the destruction of the nunchaku that had been confiscated during his August 24, 200 [sic] arrest. The Plaintiff was also fined $310.

On February 18, 2003, the Plaintiff commenced this action. The complaint alleges that sections 265 through 265.02, insofar as they apply to the possession of nunchaku in one's home are unconstitutional and "[u]njustly restrain and deprive the Plaintiff and other residents of New York from pursuing and obtaining happiness and safety." The Plaintiff now moves for summary judgment seeking a declaration that these statutes are unconstitutional. The Defendant opposes this

motion on the grounds that the Court does not have subject matter jurisdiction over this case under Article II, and the Plaintiff fails to state a cause of action for a constitutional violation.

II. DISCUSSION

A. Applicable Law

A motion for summary judgment should be granted only when "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *see Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 2550, 91 L. Ed.2d 265 (1986). The moving party bears the burden of establishing the absence of a genuine issue of material fact. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256, 106 S. Ct. 2505, 2514, 91 L. Ed.2d 202 (1986); *Niagara Mohawk Power Corp. v. Jones Chemical Inc.*, 315 F.3d 171, 175 (2d Cir. 2003) (quoting *Anderson*, 477 U.S. at 252, 106 S. Ct. 2505, 91 L. Ed. 2d 202).

In deciding a motion for summary judgment, the Court must view the evidence in the light most favorable to the non-moving party and must draw all permissible inferences from the submitted affidavits, exhibits, interrogatory answers, and depositions in favor of that party. *See Anderson*, 477 U.S. 242, 255; *Vann v. City of New York*, 72 F.3d 1040, 1048-49 (2d Cir. 1995). Disputed facts that are not material to the issue at hand will not defeat summary judgment. *See Anderson*, 477 U.S. at 248, 106 S. Ct. at 2510; *Lane v. New York State Electric & Gas Corp.*, 18 F.3d 172, 176 (2d Cir. 1994).

Finally, even though the Plaintiff is proceeding pro se, he is an attorney duly licensed to practice law in the State of New York and in the United States District Court for the Eastern District of New York. As such, the Plaintiff is not entitled to the same leeway as generally afforded to pro se litigants who are not attorneys. *See Goel v. United States DOJ.*, No. 03 Civ. 0579, 2003 U.S. Dist. LEXIS 15066, at *5 (S.D.N.Y. Aug. 27, 2003); *Smith v. Plati*, 258 F.3d 1167, 1174 (10th Cir. 2001) ("While we are generally obliged to construe pro se pleadings liberally, we decline to do so here because [the plaintiff] is a licensed attorney.").

B. As to Standing

The Attorney General argues that the Plaintiff does not have standing to pursue this case, in part because the Attorney General is not responsible for the enforcement of the Penal Law in question. The Court agrees.

Article III of the Constitution limits federal jurisdiction to cases and controversies. Indeed, standing "is an essential and unchanging part of the case-or-controversy requirement of Article III." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S. Ct. 2130, 119 L. Ed.2d 351 (1992). The party invoking federal jurisdiction bears the burden of establishing the elements of standing." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). These elements are as follows:

> First, the plaintiff must have suffered an injury in fact — an invasion of a legally protected interest which is (a)

> concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of . . . Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

McCormick ex rel. McCormick v. School Dist. of Mamaroneck, 370 F.3d 275 (2d Cir. 2004) (quoting *Lujan*, 504 U.S. at 560-61).

To satisfy the first element, namely that there be an "injury in fact," the Plaintiff must establish that the alleged injury is concrete, particularized, and "must affect the plaintiff in a personal and individual way." *Defenders of Wildlife*, 504 U.S. at 560 n. 1, 112 S. Ct. 2130; *see also Raines v. Byrd*, 521 U.S. 811, 819, 117 S. Ct. 2312, 138 L. Ed.2d 849 (1997) ("We have consistently stressed that a plaintiff's complaint must establish that he has a 'personal stake' in the alleged dispute, and that the alleged injury suffered is particularized as to him."); *Innovative Health Systems, Inc. v. City of White Plains*, 117 F.3d 37 (2d Cir. 1997). This requirement limits federal jurisdiction to real conflicts so as to "preclude the courts from gratuitously rendering advisory opinions with regard to events in dispute that have not matured to a point sufficiently concrete to demand immediate adjudication and thus may never materialize as actual controversies." *Dow Jones v. Harrods, Ltd.*, 237 F. Supp. 2d 394, 405 (2d Cir. 2002), affd., 346 F.3d 357 (2d Cir. 2003).

In order to establish the existence of an actual controversy in an action seeking a declaration that a criminal statute is unconstitutional, the plaintiff must show either: (1) that they have been arrested, prosecuted, or threatened with prosecution under the statute at issue, or (2) that they have some reasonable fear, which is not "purely imaginative or speculative," of being prosecuted under the statute in the future. *Cherry v. Koch*, 126 A.D.2d 346, 351, 514 N.Y.S. 2d 30, 33 (1987). It is well established that a plaintiff does not have to wait until he is threatened with prosecution before he may challenge a criminal statute that directly operates against him. Doe v. Bolton, 410 U.S. 179, 188 (1973). Rather, the Plaintiff must establish only that he has "an actual and well-founded fear that the law will be enforced against it." *Vt. Right to Life Comm. v. Sorrell,* 221 F.3d 376, 382 (2d Cir., 2000), citing Virginia v. American Booksellers Ass'n, 484 U.S. 383, 393, 98 L. Ed. 2d 782, 108 S. Ct. 636 (1988).

In the case at bar, in addition to having already been arrested and prosecuted for the possession of nunchaku in his home, there is no dispute that he intends to posses nunchaku in his home, "provided that he may do so lawfully." Plf. Mem. In Sup. 7-8. Nevertheless, because the Attorney General, the only remaining defendant in this case, is not the party responsible for the potential prosecution of the Plaintiff, as set forth below, his motion for summary judgment against the Attorney General is denied.

In a case such as this, where a plaintiff seeks a declaration that a particular statute is unconstitutional, "the proper defendants are the government officials charged with the

administration and enforcement of the statute." *Curtis v. Pataki*, No. 96 Civ. 425, 1997 WL 614285, at *5 (Oct. 1, 1997 N.D.N.Y.) (citing *New Hampshire Right to Life Committee v. Gardner*, 99 F.3d 8, 13 (1st Cir.1996) (citations omitted)). "It is well established in New York that the district attorney, and the district attorney alone, should decide when and in what manner to prosecute a suspected offender." *Baez v. Hennessy*, 853 F.2d 73, 76 (2d Cir. 1988) (citations omitted). In fact, "since 1796 the Legislature has never accorded general prosecutorial power to the Attorney General[."] Indeed, this Court has pointed out that "the Attorney-General has no . . . general authority [to conduct prosecutions] and is without any prosecutorial power except when specifically authorized by statute." *People v. Gilmour*, 98 N.Y.2d 126, 130, 746 N.Y.S.2d 114, 773 N.E.2d 479 (2002) (internal quotations and citations omitted). Thus, the choice as to whether to prosecute is entirely within the discretion of a district attorney. *People v. Eboli*, 34 N.Y.2d 281, 289, 357 N.Y.S.2d 435, 313 N.E.2d 746 (1974).

Although New York Executive Law § 63(3) allows "'the head of any . . . department, authority, division or agency' to activate the Attorney General's prosecutorial powers," *Gilmour*, 98 N.Y.2d at 132 (citing N.Y. Exec. § 63(3)), in this case, there is no evidence or assertion that any such request has been made or is likely to be made in the future. Even though the Attorney General settled two civil cases with out of state martial arts retailers, the Court finds that the Attorney General has no responsibility for administering or enforcing the criminal statutes

in question, and that he is not an appropriate defendant in this case.

Accordingly, the motion by the Plaintiff for summary judgment is denied on the basis that the Court has no subject matter jurisdiction over this matter because the Plaintiff has no reasonable fear of prosecution by the Attorney General [sic]

C. Leave to Amend

Rule 15(a) of the Federal Rules of Civil Procedure states that leave to amend a pleading "shall be freely given when justice so requires." In that regard, even if not requested by the Plaintiff, the Court may *sua sponte* grant leave to amend. *Straker v. Metropolitan Transit Authority*, 333 F. Supp.2d 91, 102 (E.D.N.Y. 2004). Accordingly, the Plaintiff is granted leave to serve a supplemental summons and amended complaint against the entity responsible for the potential prosecution of the Plaintiff under the statutes in question. The Plaintiff is directed to serve and file the supplemental and amended complaint within 30 days from the date of this order.

III. CONCLUSION

Based on the foregoing, it is hereby

ORDERED, that the motion by the Plaintiff for summary judgment against the defendant Eliot Spitzer pursuant to Fed. R. Civ. P. 56 is **DENIED**; and it is further

ORDERED, that the Plaintiff is granted 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 within 30 days from the date of this order; and it is further

ORDERED, that failure to serve and file a supplemental summons and amended complaint within the specified time period will result in dismissal of this action.

SO ORDERED.

Dated: Central Islip, New York
August 31, 2005

____ARTHUR D. SPATT____

United States District Judge

JAMES M. MALONEY (JM-3352)
Plaintiff *pro se*
33 Bayview Avenue
Port Washington, New York 11050
Telephone: (516) 767-1395

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

JAMES M. MALONEY,

Plaintiff,

- against -

ELIOT SPITZER, in his official capacity as Attorney General of the State of New York, GEORGE PATAKI, in his official capacity as Governor of the State of New York, and DENIS DILLON, in his official capacity as District Attorney of the County of Nassau, and their successors,

Defendants.

AMENDED VERIFIED COMPLAINT

Case No. 03 Civ. 0786 (ADS)(MLO)

JAMES M. MALONEY, proceeding *pro se*, and pursuant to the Memorandum of Decision and Order

of the Honorable Arthur D. Spatt dated August 31, 2005 (the "8/31 Order"), as and for his amended verified complaint against the above-named defendants solely in their official capacity, alleges:

PARTIES

1. At the commencement of this action and at all times hereinafter mentioned, Plaintiff was and is a natural person, a citizen of the United States, and a resident of the State of New York, of the County of Nassau, and of this District.

2. At the commencement of this action and at all times hereinafter mentioned, Defendant ELIOT SPITZER was and is a natural person and was and is the Attorney General of the State of New York.

3. At the commencement of this action and at all times hereinafter mentioned, Defendant GEORGE PATAKI was and is a natural person and was and is the Governor of the State of New York.

4. The Governor is charged by Article IV, section 3 of the Constitution of the State of New York with the duty to take care that the laws are faithfully executed, and accordingly has sufficient connection with the enforcement of statutes to make him a proper defendant in a suit for declaratory relief challenging the validity of certain applications of New York statutes.

5. At the commencement of this action and at all times hereinafter mentioned, Defendant DENIS DILLON was and is a natural person and was and is the District Attorney of the County of Nassau (hereinafter, the "District Attorney").

6. The District Attorney is the personal responsible for the potential prosecution of Plaintiff under the criminal statutes in question. As more fully appears herein, Defendant DENIS DILLON has actually prosecuted Plaintiff under said criminal statutes.

JURISDICTION AND VENUE

7. This action arises under the Constitution of the United States. This Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1331, and has the power to render declaratory judgment and further relief pursuant to the provisions of 28 U.S.C. §§ 2201-2202.

8. Venue is properly placed in the United States District Court for the Eastern District of New York pursuant to 28 U.S.C. § 1391(b).

GENERAL BACKGROUND

9. On or about August 24, 2000, Plaintiff possessed in his home one or more martial arts devices known as nunchaku or "chuka sticks," consisting of foot-long wooden sticks connected by a cord, the possession of which is defined as a crime by sections 265.00 *et seq*. of the Penal Law of the State of New York, as more fully appears herein.

10. On or about August 24, 2000, The People of the State of New York, through the office of Defendant DENIS DILLON, charged Plaintiff with criminal possession of a weapon in the fourth degree, a Class A misdemeanor defined at section 265.01 of the Penal Law of the State of New York, based on Plaintiff's possession within his home of a nunchaku

that was found by Nassau County Police in Plaintiff's home.

11. The aforementioned criminal charge for possession of a nunchaku was based solely on allegations of simple possession of said nunchaku in Plaintiff's home, and was not supported by any allegations that Plaintiff had: (a) used said nunchaku in the commission of a crime; (b) carried or displayed the nunchaku in public; or (c) engaged in any other improper or prohibited conduct in connection with said nunchaku except for such simple possession within his home, nor is any such conduct an element of the defined crime.

12. The aforementioned criminal charge for possession of a nunchaku remained pending against Plaintiff for a period of approximately 29 months, until it was eventually dismissed on or about January 28, 2003.

13. Upon information and belief, said dismissal was not based on any explicit or implicit recognition by the District Attorney that said statutes, as applied against Plaintiff and defining as a crime the simple possession of nunchaku within one's home, are or were unconstitutional.

PLAINTIFF'S BACKGROUND AND STANDING TO SUE

14. Plaintiff has been a student of the martial arts since approximately 1975, when he began studying Uechi-Ryu, an Okinawan style of karate, under the tutelage of Vincent Pillari in Fort Lee, New Jersey. Plaintiff has subsequently studied various styles of martial arts, including other Okinawan styles of karate, the Ving Tsun or "Wing

Chun" style of kung fu, and aikido. Drawing from these and other influences, Plaintiff formulated his own martial arts style, known as Shafan Ha-Lavan, beginning in 1998. Shafan Ha-Lavan incorporates the use of the nunchaku as an integral and essential part of its training and technique.

15. Since 1975, Plaintiff has trained in a peaceful manner with the nunchaku, and has acquired numerous nunchaku, which are or were his personal property.

16. Plaintiff has never used a nunchaku to inflict harm or physical injury on another human being or on an animal, and has used nunchaku only for socially acceptable purposes within the context of martial arts, and to develop physical dexterity and coordination.

17. Plaintiff first became interested in the nunchaku, and began training with it in 1975, in part because the weapon is particularly effective in defense against an assailant armed with a knife or other sharp instrument, and in part because Plaintiff's father, John Maloney, had been fatally stabbed in 1964, when Plaintiff was five years old.

18. Since 1980, Plaintiff has served honorably as, and remains, a commissioned officer in the U.S. Naval Reserve. From 1986 to 1995, he served as a paramedic in New York City's 911 Emergency Medical Services system, and observed numerous instances of serious injury or fatality due to wounds inflicted by assailants armed with knives and other sharp instruments.

19. Plaintiff has ties to and roots in the State of New York (including being licensed to practice law in

all of the State's courts and in four federal courts sitting therein, consisting of two District Courts, the Court of Appeals for the Second Circuit, and the Court of International Trade) and cannot conveniently relocate, nor does he wish to do so.

20. Because Plaintiff was charged with a Class A misdemeanor for the simple possession of a nunchaku in his own home, and for more than two years lived under the constant threat of being imprisoned for up to one year in punishment therefor, Plaintiff must reasonably either: (1) forgo possession of any nunchaku within his own home; (2) move from the State; or (3) risk being the target of another prosecution for disobeying the same law.

21. In addition to having already been arrested and prosecuted for the possession of nunchaku in his home, Plaintiff intends to possess nunchaku in his home provided that he may do so lawfully. Thus, Plaintiff is forced to choose between risking further criminal prosecution and forgoing what may be constitutionally protected conduct (i.e., possessing nunchaku in his home for legitimate purposes).

22. Plaintiff accordingly has standing to seek declaratory judgment on the question of the constitutionality of those New York statutes that criminalize the simple possession of nunchaku within one's home.

THE NUNCHAKU AND ITS REGULATION BY VARIOUS GOVERNMENTS

23. Upon information and belief, the nunchaku was originally a farm implement, and was developed centuries ago for use as a weapon on the island of

Okinawa after invading oppressive governments attempted to disarm the people there.

24. Upon information and belief, 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.

25. 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.

26. The nunchaku, in comparison with most other arms, including firearms, is relatively safe and innocuous, such that a child or person untrained in the weapon's proper use would be unable to inflict serious injury upon him- or herself, either accidentally or intentionally.

27. Accordingly, nunchaku kept in the home, even if not secured in a locked compartment, are far less likely to be associated with serious injury or fatality than are most other weapons or even common household objects such as kitchen knives and scissors.

28. Upon information and belief, the States of Connecticut, Massachusetts and Pennsylvania all have enacted statutes defining as a crime the possession of nunchaku in certain places, such as in a vehicle (Connecticut General Statutes § 29-38), on one's person in public areas (Massachusetts General

Laws, Chapter 269, § 10), or on school grounds (Pennsylvania Statutes § 13-1317.2(g)).

29. Upon information and belief, no state other than New York and California has defined and prosecuted as a crime the mere possession of nunchaku within one's own home.

30. New York Penal Law § 265.00 (14) (one of two subsections so numbered) defines a "chuka stick" (i.e., nunchaku) in substantial part as follows: "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 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 . . ."

31. New York Penal Law §§ 265.01 and 265.02 define the possession of a "chuka stick" (i.e., nunchaku) as a Class A misdemeanor and as a Class D felony, respectively, and make no exception from criminal liability for the simple possession of a nunchaku or "chukka stick" within one's own home. As alleged in paragraphs 9 through 11, *supra*, the District Attorney interpreted § 265.01 as reaching such simple possession in prosecuting Plaintiff.

32. Upon information and belief, the New York bill that made mere possession of nunchaku, even in one's own home, a crime, was signed into law on April 16, 1974, and became effective on September 1, 1974.

33. Upon information and belief, a memorandum from the State of New York Executive Department's Division of Criminal Justice Services to the office of

the Governor dated April 4, 1974, pointed out that nunchaku have legitimate uses in karate and other martial-arts training, and opined 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 true copy of said memorandum is annexed hereto as Exhibit 1.

34. Upon information and belief, the memorandum annexed hereto as Exhibit 1 was received by the office of the Governor on April 9, 1974, before the bill banning nunchaku in New York was signed into law.

35. Upon information and belief, a letter and report from the Committee on the Criminal Court of the New York County Lawyers' Association to the Governor dated May 3 and April 29, 1974, respectively, opined that "[w]hile the possession of [nunchaku] with demonstrable criminal intent is a proper subject of legislation, the proposed legislation goes further, making the mere possession (even absent criminal intent) a criminal offense. If it is the desire of the legislature to prohibit the use of nunchakus in criminal conduct, a more narrowly drawn statute can be fashioned to achieve this end." True copies of said letter and report annexed hereto as Exhibit 2.

36. Upon information and belief, the letter and report annexed hereto as Exhibit 2 were received by the office of the Governor on May 7, 1974, after the bill banning nunchaku in New York had already been signed into law.

37. Since 1974, courts outside the State of New York have recognized that nunchaku have socially acceptable uses. In 1981, an Arizona appellate court sustaining a conviction for criminal possession of nunchaku 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).

38. A District of Columbia appellate court 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).

39. In 1984, an Ohio appellate court 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).

CONSTITUTIONAL BASES FOR THE CHALLENGE

40. This action challenges the constitutionality of the application of the aforementioned New York statutes to criminalize possession of nunchaku in one's own home without criminal intent on three independent bases, corresponding to the first three causes of action.

41. The first basis is that peaceful training with and twirling of the nunchaku is expressive conduct, which conduct is protected by the First Amendment to the Constitution of the United States ("First Amendment").

42. The second basis is that the application of the aforementioned New York statutes to criminalize possession of nunchaku in one's own home without criminal intent would violate rights specifically conferred by the Second Amendment to the Constitution of the United States ("Second Amendment"), provided that the Second Amendment guarantees a personal right and is applicable as against the states.

43. The third basis is that the application of the aforementioned New York statutes to criminalize possession of nunchaku in one's own home without criminal intent would violate unenumerated rights, including those involving protection of the person from unwarranted government intrusions into a dwelling or other private place, as recently recognized by the United States Supreme Court in *Lawrence v. Texas*, 123 S. Ct. 2472 (2003).

44. As more fully appears herein, unenumerated rights are specifically guaranteed by the Ninth

Amendment to the Constitution of the United States ("Ninth Amendment"), but have largely been recognized in American constitutional jurisprudence under the doctrine of substantive due process. Either approach may draw inferentially from the first eight amendments to the Constitution of the United States and/or from other sources in establishing the scope and content of rights not enumerated.

FIRST CAUSE OF ACTION

45. Plaintiff repeats and realleges each and every allegation set forth in the foregoing paragraphs 1 through 44 as if fully set forth herein.

46. New York Penal Law §§ 265.00 through 265.02, to the extent that said statutes criminalize the simple possession of nunchaku within one's home and therefore criminalize peaceful training with and twirling of the nunchaku in the privacy of one's own home, violate the provisions of the First Amendment of the Constitution of the United States.

SECOND CAUSE OF ACTION

47. Plaintiff repeats and realleges each and every allegation set forth in the foregoing paragraphs 1 through 44 as if fully set forth herein.

48. New York Penal Law §§ 265.00 through 265.02, to the extent that said statutes criminalize the simple possession of nunchaku within one's home, violate the provisions of the Second Amendment of the Constitution of the United States.

49. In *Bach v. Pataki*, 408 F. 3d 75 (2d Cir. 2005), the Second Circuit held that the Second Amendment is inapplicable to the states.

50. Upon information and belief, a petition for panel rehearing and petition for rehearing *en banc* were filed by the Plaintiff-Appellant in *Bach v. Pataki*, and said petitions were denied.

51. Upon information and belief, the denial of said petitions was issued as a Mandate on August 4, 2005, thereby starting the 90-day period for the Plaintiff-Appellant in *Bach v. Pataki* to petition the United States Supreme Court for *certiorari*. A true copy of the Mandate is annexed hereto as Exhibit 3.

52. Given the foregoing, and the resultant possibility of reversal of *Bach v. Pataki*, this cause of action is not frivolous even though it is not actually viable at the time of filing this amended verified complaint.

THIRD CAUSE OF ACTION

53. Plaintiff repeats and realleges each and every allegation set forth in the foregoing paragraphs 1 through 44 as if fully set forth herein.

54. New York Penal Law §§ 265.00 through 265.02, to the extent that said statutes criminalize the simple possession of nunchaku within one's home, violate unenumerated rights, including, without limitation: (a) those rights guaranteed by the Ninth Amendment; (b) those rights recognized under the doctrine substantive due process; (c) those rights recognized by the United States Supreme Court in *Lawrence v. Texas*, 123 S. Ct. 2472 (2003); (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.

FOURTH CAUSE OF ACTION (AS AGAINST THE ATTORNEY GENERAL)

55. Plaintiff repeats and realleges each and every allegation set forth in the foregoing paragraphs 1 through 54 as if fully set forth herein.

56. Upon information and belief, in 2000 and 2002, the Attorney General reached settlements in two civil lawsuits against out-of-state martial arts equipment suppliers, Family Defense Products, Inc. of Ocala, Florida, and Bud K World Wide, Inc. of Moultrie, Georgia (collectively, the "Companies"), which had provided nunchaku to New York residents by mail order and/or Internet sales.

57. Upon information and belief, as part of these settlements, the Companies were required to provide the Attorney General with a list of the names and addresses of all New York customers who had ever purchased nunchaku from the Companies.

58. Upon information and belief, as part of these settlements, the Companies also were required to deliver written notice to their New York customers advising them to surrender their weapons to law enforcement agencies. A true copy of the draft form of one such written notice is annexed hereto as Exhibit 4.

59. Should this Court find that those portions of sections 265.00 through 265.02 of the New York Penal Law that define and punish as a crime the simple possession of nunchaku within one's home are unconstitutional and of no force and effect, the

statutes themselves would remain unchanged unless the legislature amended them.

60. Many persons who received the written notices described above would likely still be under the impression that simple possession of nunchaku in their own homes for peaceful use in martial arts training is illegal and could subject them to up to a year in prison.

61. Such persons would also be aware that the State of New York has their names and addresses by virtue of the Attorney General's settlements as described above.

62. Accordingly, equity would require that such persons be notified of any decision by a court protecting their right to possess nunchaku in their own homes for peaceful use in martial arts training.

63. Further, because the Attorney General received a list of the names and addresses of New York customers who had purchased nunchaku from the Companies (see paragraph 57, above), notifying those persons of such a decision would not be unduly burdensome.

64. Under the provisions of 28 U.S.C. § 2202, this Court has the power to grant the relief sought herein.

WHEREFORE, Plaintiff respectfully requests that this Court:

(1) assume jurisdiction over this action;

(2) declare that those portions of sections 265.00 through 265.02 of the New York Penal Law that define and punish as a crime the simple

possession of nunchaku within one's home are unconstitutional and of no force and effect;

(3) grant appropriate equitable relief as described in the Fourth Cause of Action, such as an affirmative injunction requiring the Attorney General to notify any persons who received the notice described in paragraph 58, above, that they may not be criminally prosecuted for the simple possession of nunchaku in their own homes for peaceful use in martial arts training; and

(4) grant such other, further, and different relief as this Court may deem just and proper.

Dated: September 3, 2005
Port Washington, New York

/s/

JAMES M. MALONEY (JM-3352)
Plaintiff *pro se*
33 Bayview Avenue
Port Washington, New York 11050

(516) 767-1395

JAMES M. MALONEY (JM-3352)
Plaintiff *pro se*
33 Bayview Avenue
Port Washington, New York 11050
Telephone: (516) 767-1395

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

JAMES M. MALONEY,

Plaintiff,

- against -

ELIOT SPITZER, in his official capacity as Attorney General of the State of New York, and DENIS DILLON, in his official capacity as District Attorney of the County of Nassau, and their successors,

Defendants.

CIVIL COMPLAINT

Case No. CV 03 786

James M. Maloney, an attorney at law admitted to practice before this Honorable Court, proceeding *pro se*, as and for his complaint against the above-

named defendants in their official capacity, hereby affirms under penalty of perjury as follows:

PARTIES

1. At the commencement of this action and at all times hereinafter mentioned, Plaintiff was and is a natural person, a citizen of the United States, and a resident of the State of New York, of the County of Nassau, and of this District.

2. At the commencement of this action and at all times hereinafter mentioned, Defendant ELIOT SPITZER was a natural person and was the Attorney General of the State of New York, with offices within this District located at Mineola and Hauppauge, and Defendant DENIS DILLON was a natural person and was the District Attorney of the County of Nassau (hereinafter, the "District Attorney"), with offices within this District located at Mineola.

JURISDICTION AND VENUE

3. This action arises under the Constitution of the United States. This Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1331, and has the power to render declaratory judgment, the only relief sought herein, pursuant to the provisions of 28 U.S.C. § 2201.

4. Venue is properly placed in the United States District Court for the Eastern District of New York pursuant to 28 U.S.C. § 1391(b).

GENERAL BACKGROUND

5. On or about August 24, 2000, Plaintiff possessed in his home one or more martial arts devices known as nunchaku or "chuka sticks,"

consisting of foot-long wooden sticks connected by a cord, the possession of which is defined as a crime by sections 265.00 *et seq.* of the Penal Law of the State of New York, as more fully appears herein.

6. On or about August 24, 2000, The People of the State of New York charged Plaintiff with one count of criminal possession of a weapon in the fourth degree, a Class A misdemeanor defined at section 265.01 of the Penal Law of the State of New York, based on Plaintiff's possession within his home of a nunchaku that was seized by Nassau County Police while Plaintiff was absent from his home.

7. The aforementioned criminal charge for possession of a nunchaku was based solely on allegations of simple possession of said nunchaku in Plaintiff's home, and was not supported by any allegations that Plaintiff had: (a) used said nunchaku in the commission of a crime; (b) carried the nunchaku in public; or (c) engaged in any other improper or prohibited conduct in connection with said nunchaku except for such simple possession within his home, nor is any such conduct an element of the defined crime.

8. The aforementioned criminal charge for possession of a nunchaku remained pending against Plaintiff for a period of approximately 29 months, until it was eventually dismissed on or about January 28, 2003.

9. Upon information and belief, said dismissal was not based on any explicit or implicit recognition by the District Attorney that said statutes, as applied against Plaintiff and defining as a crime the

simple possession of nunchaku within one's home, are or were unconstitutional.

PLAINTIFF'S BACKGROUND AND STANDING TO SUE

10. Plaintiff has been a student of the martial arts since approximately 1975, when he began studying Uechi-Ryu, an Okinawan style of karate, under the tutelage of Vincent Pillari in Fort Lee, New Jersey. Plaintiff has subsequently studied various styles of martial arts, including other Okinawan styles of karate, the Ving Tsun or "Wing Chun" style of kung fu, and aikido. Drawing from these and other influences, Plaintiff formulated his own martial arts style, known as Shafan Ha-Lavan, beginning in 1998. Shafan Ha-Lavan incorporates the use of the nunchaku as an integral and essential part of its training and technique.

11. Since 1975, Plaintiff has trained in a peaceful manner with the nunchaku, and has acquired numerous nunchaku, which are or were his personal property.

12. Plaintiff has never used a nunchaku to inflict harm or physical injury on another human being or on an animal, and has used nunchaku only for socially acceptable purposes within the context of martial arts, and to develop physical dexterity and coordination.

13. Plaintiff first became interested in the nunchaku, and began training with it in 1975, in part because the weapon is particularly effective in defense against an assailant armed with a knife or other sharp instrument, and in part because

Plaintiff's father, John Maloney, had been fatally stabbed in 1964, when Plaintiff was five years old.

14. Since 1980, Plaintiff has served honorably as, and remains, a commissioned officer in the U.S. Naval Reserve. From 1986 to 1995, he served as a paramedic in New York City's 911 Emergency Medical Services system, and observed numerous instances of serious injury or fatality due to wounds inflicted by assailants armed with knives and other sharp instruments.

15. Plaintiff has ties to and roots in the State of New York (including being licensed to practice law in all of the State's courts and in four federal courts sitting therein, consisting of two District Courts, the Court of Appeals for the Second Circuit, and the Court of International Trade) and cannot conveniently relocate, nor does he wish to do so.

16. Because Plaintiff was charged with a Class A misdemeanor for the simple possession of a nunchaku in his own home, and for more than two years lived under the constant threat of being imprisoned for up to one year in punishment therefor, Plaintiff must reasonably either: (1) forgo possession of any nunchaku within his own home; (2) move from the State; or (3) risk being the target of another prosecution for disobeying the same law.

17. Plaintiff accordingly has standing to seek declaratory judgment on the question of the constitutionality of those New York statutes that criminalize the simple possession of nunchaku within one's home, as those statutes have been applied to prosecute Plaintiff.

THE NUNCHAKU AND ITS REGULATION BY VARIOUS GOVERNMENTS

18. Upon information and belief, the nunchaku was originally an agricultural implement used for threshing rice, and was developed centuries ago for use as a weapon on the island of Okinawa after invading oppressive governments attempted to disarm the people there.

19. Upon information and belief, 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.

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.

21. The nunchaku, in comparison with most other arms, including firearms, is relatively safe and innocuous, such that a child or other person untrained in the weapon's proper use would be unable to inflict serious injury upon him- or herself, either accidentally or intentionally.

22. Accordingly, nunchaku kept in the home, even if not secured in a locked compartment, are far less likely to be associated with serious injury or fatality than are most other weapons or even common household objects such as kitchen knives and scissors.

23. Upon information and belief, the States of Connecticut, Massachusetts and Pennsylvania all have enacted statutes defining as a crime the possession of nunchaku in certain places, such as in a vehicle (Connecticut General Statutes § 29-38), on one's person in public areas (Massachusetts General Laws, Chapter 269, § 10), or on school grounds (Pennsylvania Statutes § 13-1317.2(g)).

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.

25. New York Penal Law § 265.00 (14) (one of two subsections so numbered) defines a "chuka stick" (i.e., nunchaku) in substantial part as follows: "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 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 . . ."

26. New York Penal Law §§ 265.01 and 265.02 define the possession of a "chuka stick" (i.e., nunchaku) as a Class A misdemeanor and as a Class D felony, respectively, and make no exception from criminal liability for the simple possession of a nunchaku or "chuka stick" within one's own home. As alleged in paragraphs 6 through 8, *supra*, the District Attorney interpreted § 265.01 as reaching such simple possession in prosecuting Plaintiff.

FIRST CAUSE OF ACTION

27. Plaintiff repeats and realleges each and every allegation set forth in the foregoing paragraphs 1 through 26 as if fully set forth herein.

28. New York Penal Law §§ 265.00 through 265.02, to the extent that said statutes criminalize the simple possession of nunchaku within one's home, unjustly restrain and deprive Plaintiff and other residents of New York from pursuing and obtaining happiness and safety.

SECOND CAUSE OF ACTION

29. Plaintiff repeats and realleges each and every allegation set forth in the foregoing paragraphs 1 through 28 as if fully set forth herein.

30. New York Penal Law §§ 265.00 through 265.02, to the extent that said statutes criminalize the practice and display of nunchaku-based martial arts, violate the provisions of the First Amendment of the Constitution of the United States.

THIRD CAUSE OF ACTION

31. Plaintiff repeats and realleges each and every allegation set forth in the foregoing paragraphs 1 through 30 as if fully set forth herein.

32. New York Penal Law §§ 265.00 through 265.02, to the extent that said statutes criminalize the simple possession of nunchaku within one's home, violate the provisions of the Second Amendment of the Constitution of the United States.

FOURTH CAUSE OF ACTION

33. Plaintiff repeats and realleges each and every allegation set forth in the foregoing paragraphs 1 through 32 as if fully set forth herein.

34. New York Penal Law §§ 265.00 through 265.02, to the extent that said statutes criminalize the simple possession of nunchaku within one's home and thereby constitute a regulatory taking of private property without just compensation, violate the provisions of the Fifth Amendment of the Constitution of the United States.

FIFTH CAUSE OF ACTION

35. Plaintiff repeats and realleges each and every allegation set forth in the foregoing paragraphs 1 through 34 as if fully set forth herein.

36. New York Penal Law §§ 265.00 through 265.02, to the extent that said statutes, together with provisions in Article 70 of the Penal Law, permit or require the imposition of unduly harsh penalties for the simple possession of nunchaku within one's home, violate the provisions of the Eighth Amendment of the Constitution of the United States.

SIXTH CAUSE OF ACTION

37. Plaintiff repeats and realleges each and every allegation set forth in the foregoing paragraphs 1 through 36 as if fully set forth herein.

38. New York Penal Law §§ 265.00 through 265.02, to the extent that said statutes criminalize the simple possession of nunchaku within one's home and the peaceful use of such nunchaku

therein, violate the provisions of the Ninth Amendment of the Constitution of the United States.

SEVENTH CAUSE OF ACTION

39. Plaintiff repeats and realleges each and every allegation set forth in the foregoing paragraphs 1 through 38 as if fully set forth herein.

40. New York Penal Law §§ 265.00 through 265.02, to the extent that said statutes criminalize the simple possession of nunchaku within one's home, violate the provisions of the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States.

EIGHTH CAUSE OF ACTION

41. Plaintiff repeats and realleges each and every allegation set forth in the foregoing paragraphs 1 through 40 as if fully set forth herein.

42. New York Penal Law §§ 265.00 through 265.02, to the extent that said statutes criminalize the simple possession of nunchaku within one's home and do so without a rational basis for furthering any legitimate state interest, violate the provisions of the Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States.

NINTH CAUSE OF ACTION

43. Plaintiff repeats and realleges each and every allegation set forth in the foregoing paragraphs 1 through 42 as if fully set forth herein.

44. New York Penal Law §§ 265.00 through 265.02, to the extent that said statutes criminalize the simple possession of nunchaku within one's

home, violate the provisions of the Privileges and Immunities Clause of the Fourteenth Amendment of the Constitution of the United States.

WHEREFORE, Plaintiff respectfully requests that this Court:

(1) assume jurisdiction over this action; and

(2) declare that those portions of sections 265.00 through 265.02 of the New York Penal Law that define and punish as a crime the simple possession of nunchaku within one's home are unconstitutional and of no force and effect.

Plaintiff additionally prays for such other, further, and different relief as this Court may deem just and proper.

I declare under penalty of perjury under the laws of the United States of America that the foregoing statements of fact are true and correct to the best of my knowledge.

Dated: Port Washington, New York
February 18, 2003

/s/

JAMES M. MALONEY (JM-3352)
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For further information
please communicate with:
Gregory J. Perrin, Esq.
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New York, N. Y. 10007
349-1390

May 3, 1974

Hon. Malcolm Wilson
Executive Chamber
Albany, N. Y. 12224

My dear Sir:

The Committee on the Criminal Court of the New York County Lawyers' Association has disapproved the following bill and believes that it should not become law:

A. 8359-A
A. 8667-A

A copy of a report recommending disapproval is enclosed.

Very truly yours,

BENJAMIN LEVINE
Chairman, Committee on State Legislation

INTRODUCED BY ASSEMBLYMAN MANNIX
INTRODUCED BY SENATORS, PISANI,
ACKERSON, GORDON, FLYNN, KNORR
INTRODUCED BY ASSEMBLYMAN ROSS; Multi-sponsored by: ASSEMBLYMEN BROWN, HURLEY, LEVY, LOPRESTO, MANNIX, SUCHIN, VOLKER, ABRAMSON
INTRODUCED BY SENATORS BARCLAY, PADAVAN

April 29, 1974 Report No. 184 A. 8359-A
Same as S. 7685
A. 8667-A
Same as S. 9034

NEW YORK COUNTY LAWYERS' ASSOCIATION
14 Vesey Street - New York 10007

Report of Committee on the Criminal Court on Assembly Bill 8359-A same as Senate Bill 7685, Assembly Bill 8667-A same as Senate Bill 9034, which seek to amend Sections 265.00, 265.05, 265.10, 265.15 of the Penal Law with regard to the possession of certain weapons.

RECOMMENDATION: DISAPPROVAL

Both of these bills seek to add "nunchakus" to the list of weapons the possession of which is proscribed by Article 265 of the Penal Law.

Both bills have been amended and recommitted by substitute bill in Assembly. The amendments, in both cases, removed from the proposed legislation the presumption, from mere possession, of an intent to use the proscribed device unlawfully against

another. In place of this presumption, both bills now make unlawful the mere possession of nunchakus, without regard to the issue of unlawful intent.

While it is true that nonchakus, chuka sticks and like objects are capable of use in criminal conduct, it is the sense of this Committee that they are not properly included in the provisions of Article 265 of the Penal Law as proposed.

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 nunchakus in criminal conduct, a more narrowly drawn statute can be fashioned to achieve this end.

Respectfully submitted,

COMMITTEE ON THE CRIMINAL COURT
Gregory J. Perrin, Chairman

Report prepared for
the Committee by
MR. ALAIN M. BOURGEOIS

STATE OF NEW YORK
DEPARTMENT OF LAW
ALBANY 12224

Louis J. Lefkowitz
ATTORNEY GENERAL

MEMORANDUM FOR THE GOVERNOR

Re: Assembly 8667-A

Penal Law, section 265.05, subdivision 9, lists weapons, dangerous instruments and appliances, the possession of which with intent to use unlawfully, constitutes (1) a Class A misdemeanor or (2) a Class D felony if the possessor has previously been convicted of any crime.

The purpose of this bill would be to amend Penal Law, section 265.05, subdivision 9, by adding the "Chuka stick" to the class of weapons listed under that section. Additionally, Penal Law, section 265.10, subdivisions 1 and 2 which pertain to the manufacture and transportation of prohibited instruments, respectively, would also be amended by adding the "Chuka stick". Penal Law, section 265.16, subdivision 3, which relates to the presence of prohibited items (e.g., weapons, dangerous instruments and appliances) in an automobile, would also be amended adding the "Chuka stick" to its provisions.

This act would take effect on the first day of September next succeeding the date on which it shall have become law. A definition of "Chuka stick"

would be added by this bill to Penal Law, section 265.00, subdivision 14. A portion of the definition of a "Chuka stick" states that it is a device "* * * consisting of two or more lengths of rigid material joined together with a thong, rope or chain * * *". This phrase could possibly be construed to include some harmless items such as a child's jump rope or skip rope. However, an additional phrase in the definition would require that it be a "* * * device designed primarily as a weapon * * *". This phrase would appear to avoid any confusion in the definition with items not intended to fall within the act's purview.

This bill would place controls on the use of an instrument, "i.e., the Chuka stick" which has apparently been widely used by muggers and street gangs and has been the cause of many serious injuries.

A similar bill was introduced during the 1973 Legislative Session but it did not come out of the Codes Committee during the 1973 Session.

I find no legal objection to this bill.

Dated: April 8, 1974

Respectfully submitted,

/s/
LOUIS J. LEFKOWITZ
Attorney General

MEMORANDUM

STATE OF NEW YORK
EXECUTIVE DEPARTMENT
DIVISION OF CRIMINAL JUSTICE SERVICES

April 4, 1974

TO: Michael Whiteman
FROM: Archibald R. Murray
RE: A. 8667-A

Purpose

To amend a number of sections in Article 265 of the Penal Law to penalize the possession of, manufacture or dealing in "chuka sticks."

Discussion

This bill proposes to outlaw the possession, manufacture or shipment of "chuka sticks," as that device is defined in bill section 1. By placing the basic prohibition in Penal Law section 265.05 (3), the possession of chuka sticks is made per se criminal, i.e., no *mens rea* is required and the crime, therefore, is one of absolute liability. 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.

It is our understanding that chuka sticks are also used in karate and other "martial arts" training. 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. There are alternative ways in which the problem can be handled. If it is desired to keep chuka sticks in the *per se* prohibited class, an exception could be drafted for those who possess them for lawful martial arts training. Such a course is employed for switchblade and gravity knives, which are also prohibited in this same subdivision (P.L. sec. 265.05[3]). In their case, section 265.20(5) permits their possession for hunting or fishing by a person who has a hunting or fishing license.

A second, and more appropriate, alternative would be to treat chuka sticks under Penal Law section 265.05(9) where, to constitute the crime, possession must be coupled with "an intent to use the same unlawfully against another." This would put chuka sticks in the same category as other objects which are potential weapons but which also have legitimate uses, such as knives and razors.

It should be noted that the first version of this bill (A. 8667) in fact pursued precisely this latter course.

A technical — probably typographical — error appears on page 1, line 4. The word "designated" probably should read "designed."

Recommendation

In view of the foregoing, we cannot recommend approval of this bill in its present form.

THE ASSEMBLY
STATE OF NEW YORK
ALBANY

RICHARD C. ROSS
ASSEMBLYMAN 88TH DISTRICT
FISKE PLACE
MOUNT VERNON, NEW YORK 10580

April 2, 1974

Hon. Michael Whiteman
Executive Chambers
Albany, New York 12224

Re: A-8667-A

Dear Mr. Whiteman:

This will acknowledge receipt of your request for my comments and recommendations concerning my above numbered bill now before the Governor for executive action.

Currently, the law prohibits the possession of a billy, blackjack, bludgeon, metal knuckles, sandbag, sandclub or slungshot. Any person who has in his possession one of these devices is guilty of a class A misdemeanor and is guilty of a class D felony if he has previously been convicted of any crime. The law does not specifically prohibit the possession of a device known as a "chuka stick" which in the past few years has been appearing throughout communities within the State. 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. Unfortunately, there has been disagreement among prosecutors as to the criminal liability attendant to the possession of the chuka stick. The proposed legislation to control the possession and use, as well as the manufacture and transport of chuka sticks would insure uniformity of prosecution which currently varies from county to county within the state of New York.

The said bill was amended to conform to the needs and demands of various municipalities and organizations seeking to include chuka sticks within the definition of dangerous weapons. It has the support of the city of New York and all police associations throughout the state.

Favorable action by the Governor is respectfully requested.

Very truly yours,

/s/
Richard C. Ross

DISTRICT ATTORNEYS ASSOCIATION
STATE OF NEW YORK

April 1, 1974

Honorable Michael Whiteman
Executive Chamber
State Capitol
Albany, New York 12224

Re: 8667-A

Dear Mr. Whiteman:

The District Attorneys Association of the State of New York approves of the above bill, which defines a "chuka stick" and makes possession of one a class A misdemeanor or, in certain circumstances, a class D felony.

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.

Yours truly,

/s/
B. Anthony Morosco
Legislative Secretary

BAM: pag

THE DISTRICT ATTORNEY OF DUTCHESS COUNTY
COURTHOUSE
POUGHKEEPSIE, N.Y. 12601
(914) 485-9880

April 1, 1974

Hon. Michael Whiteman
Executive Chamber
State Capitol
Albany, New York 12224

Gentlemen:

I have been asked by the Bar Association to comment on Assembly 8667-A, a bill which amends Penal Law Section 265.00 to define a “chuka stick”. It appears that weapons of this kind are used in the same criminal manner and with a frequency that now approximates other per se contraband weapons set forth in Subdivision 3 of Penal Law Section 265.05. There is no conceivable innocent used for this device and, accordingly, there can be no possible invasion of anyone’s right to use it innocently. For that reason I feel that the legislation is salutary and recommend its approval.

Very truly yours,

/s/
ALBERT M. ROSENBLATT
District Attorney

AMR/tp

PERTINENT STATUTORY PROVISION

(Not Reproduced in Body of Petition)

New York Penal Law Section 265.20 (McKinney 2008) provides the following exemptions to the prohibitions on possession in Section 265.01:

§ 265.20 Exemptions

a. Sections 265.01, 265.02, 265.03, 265.04, 265.05, 265.10, 265.11, 265.12, 265.13, 265.15 and 270.05 shall not apply to:

1. Possession of any of the weapons, instruments, appliances or substances specified in sections 265.01, 265.02, 265.03, 265.04, 265.05 and 270.05 by the following:

(a) Persons in the military service of the state of New York when duly authorized by regulations issued by the adjutant general to possess the same.

(b) Police officers as defined in subdivision thirty-four of section 1.20 of the criminal procedure law.

(c) Peace officers as defined by section 2.10 of the criminal procedure law.

(d) Persons in the military or other service of the United States, in pursuit of official duty or when duly authorized by federal law, regulation or order to possess the same.

(e) Persons employed in fulfilling defense contracts with the government of the United States or agencies thereof when possession of the same is necessary for manufacture, transport, installation and testing under the requirements of such contract.

(f) A person voluntarily surrendering such weapon, instrument, appliance or substance, provided that such surrender shall be made to the superintendent of the division of state police or a member thereof designated by such superintendent, or to the sheriff of the county in which such person resides, or in the county of Nassau or in the towns of Babylon, Brookhaven, Huntington, Islip and Smithtown in the county of Suffolk to the commissioner of police or a member of the police department thereof designated by such commissioner, or if such person resides in a city, town other than one named in this subparagraph, or village to the police commissioner or head of the police force or department thereof or to a member of the force or department designated by such commissioner or head; and provided, further, that the same shall be surrendered by such person in accordance with such terms and conditions as may be established by such superintendent, sheriff, police force or department. Nothing in this paragraph shall be construed as granting immunity from prosecution for any crime or offense except that of unlawful possession of such weapons, instruments, appliances or substances surrendered as herein provided. A person who possesses any such weapon, instrument, appliance or substance as an executor or administrator or any other lawful possessor of such property of a decedent may continue to possess such property for a period not over fifteen days. If such property is not lawfully disposed of within such period the possessor shall deliver it to an appropriate official described in this paragraph or such property may be delivered to the superintendent of state police. Such officer shall

hold it and shall thereafter deliver it on the written request of such executor, administrator or other lawful possessor of such property to a named person, provided such named person is licensed to or is otherwise lawfully permitted to possess the same. If no request to deliver the property is received by such official within one year of the delivery of such property, such official shall dispose of it in accordance with the provisions of section 400.05 of this chapter.

2. Possession of a machine-gun, large capacity ammunition feeding device, firearm, switchblade knife, gravity knife, pilum ballistic knife, billy or blackjack by a warden, superintendent, headkeeper or deputy of a state prison, penitentiary, workhouse, county jail or other institution for the detention of persons convicted or accused of crime or detained as witnesses in criminal cases, in pursuit of official duty or when duly authorized by regulation or order to possess the same.

3. Possession of a pistol or revolver by a person to whom a license therefor has been issued as provided under section 400.00 or 400.01 of this chapter; provided, that such a license shall not preclude a conviction for the offense defined in subdivision three of section 265.01 of this article.

4. Possession of a rifle, shotgun or longbow for use while hunting, trapping or fishing, by a person, not a citizen of the United States, carrying a valid license issued pursuant to section 11-0713 of the environmental conservation law.

5. Possession of a rifle or shotgun by a person other than a person who has been convicted of a

class A-I felony or a violent felony offense, as defined in subdivision one of section 70.02 of this chapter, who has been convicted as specified in subdivision four of section 265.01 to whom a certificate of good conduct has been issued pursuant to section seven hundred three-b of the correction law.

6. Possession of a switchblade or gravity knife for use while hunting, trapping or fishing by a person carrying a valid license issued to him pursuant to section 11-0713 of the environmental conservation law.

7. Possession, at an indoor or outdoor shooting range for the purpose of loading and firing, of a rifle or shotgun, the propelling force of which is gunpowder by a person under sixteen years of age but not under twelve, under the immediate supervision, guidance and instruction of (a) a duly commissioned officer of the United States army, navy, air force, marine corps or coast guard, or of the national guard of the state of New York; or (b) a duly qualified adult citizen of the United States who has been granted a certificate as an instructor in small arms practice issued by the United States army, navy, air force or marine corps, or by the adjutant general of this state, or by the national rifle association of America, a not-for-profit corporation duly organized under the laws of this state; or (c) a parent, guardian, or a person over the age of eighteen designated in writing by such parent or guardian who shall have a certificate of qualification in responsible hunting, including safety, ethics, and landowner relations-hunter relations, issued or honored by the department of environmental conservation; or (d) an agent of the department of

environmental conservation appointed to conduct courses in responsible hunting practices pursuant to article eleven of the environmental conservation law.

7-a. Possession and use, at an indoor or outdoor pistol range located in or on premises owned or occupied by a duly incorporated organization organized for conservation purposes or to foster proficiency in small arms or at a target pistol shooting competition under the auspices of or approved by the national rifle association for the purpose of loading and firing the same, by a person duly licensed to possess a pistol or revolver pursuant to section 400.00 or 400.01 of this chapter of a pistol or revolver duly so licensed to another person who is present at the time.

7-b. Possession and use, at an indoor or outdoor pistol range located in or on premises owned or occupied by a duly incorporated organization organized for conservation purposes or to foster proficiency in small arms or at a target pistol shooting competition under the auspices of or approved by the national rifle association for the purpose of loading and firing the same, by a person who has applied for a license to possess a pistol or revolver and pre-license possession of same pursuant to section 400.00 or 400.01 of this chapter, who has not been previously denied a license, been previously convicted of a felony or serious offense, and who does not appear to be, or pose a threat to be, a danger to himself or to others, and who has been approved for possession and use herein in accordance with section 400.00 or 400.01 of this chapter; provided however, that such possession shall be of a pistol or revolver duly licensed to and shall be used under the

supervision, guidance and instruction of, a person specified in paragraph seven of this subdivision and provided further that such possession and use be within the jurisdiction of the licensing officer with whom the person has made application therefor or within the jurisdiction of the superintendent of state police in the case of a retired sworn member of the division of state police who has made an application pursuant to section 400.01 of this chapter.

7-c. Possession for the purpose of loading and firing, of a rifle, pistol or shotgun, the propelling force of which may be either air, compressed gas or springs, by a person under sixteen years of age but not under twelve, under the immediate supervision, guidance and instruction of (a) a duly commissioned officer of the United States army, navy, marine corps or coast guard, or of the national guard of the state of New York; or (b) a duly qualified adult citizen of the United States who has been granted a certificate as an instructor in small arms practice issued by the United States army, navy or marine corps, or by the adjutant general of this state, or by the national rifle association of America, a not-for-profit corporation duly organized under the laws of this state; or (c) a parent, guardian, or a person over the age of eighteen designated in writing by such parent or guardian who shall have a certificate of qualification in responsible hunting, including safety, ethics, and landowner relations-hunter relations, issued or honored by the department of environmental conservation.

7-d. Possession, at an indoor or outdoor shooting range for the purpose of loading and firing, of a rifle, pistol or shotgun, the propelling force of which may

be either air, compressed gas or springs, by a person under twelve years of age, under the immediate supervision, guidance and instruction of (a) a duly commissioned officer of the United States army, navy, marine corps or coast guard, or of the national guard of the state of New York; or (b) a duly qualified adult citizen of the United States who has been granted a certificate as an instructor in small arms practice issued by the United States army, navy or marine corps, or by the adjutant general of this state, or by the national rifle association of America, a not-for-profit corporation duly organized under the laws of this state; or (c) a parent, guardian, or a person over the age of eighteen designated in writing by such parent or guardian who shall have a certificate of qualification in responsible hunting, including safety, ethics, and landowner relations-hunter relations, issued or honored by the department of environmental conservation.

7-e. Possession and use of a pistol or revolver, at an indoor or outdoor pistol range located in or on premises owned or occupied by a duly incorporated organization organized for conservation purposes or to foster proficiency in small arms or at a target pistol shooting competition under the auspices of or approved by an association or organization described in paragraph 7-a of this subdivision for the purpose of loading and firing the same by a person at least fourteen years of age but under the age of twenty-one who has not been previously convicted of a felony or serious offense, and who does not appear to be, or pose a threat to be, a danger to himself or to others; provided however, that such possession shall be of a

pistol or revolver duly licensed to and shall be used under the immediate supervision, guidance and instruction of, a person specified in paragraph seven of this subdivision.

8. The manufacturer of machine-guns, assault weapons, large capacity ammunition feeding devices, disguised guns, pilum ballistic knives, switchblade or gravity knives, billies or blackjacks as merchandise and the disposal and shipment thereof direct to a regularly constituted or appointed state or municipal police department, sheriff, policeman or other peace officer, or to a state prison, penitentiary, workhouse, county jail or other institution for the detention of persons convicted or accused of crime or held as witnesses in criminal cases, or to the military service of this state or of the United States.

9. The regular and ordinary transport of firearms as merchandise, provided that the person transporting such firearms, where he knows or has reasonable means of ascertaining what he is transporting, notifies in writing the police commissioner, police chief or other law enforcement officer performing such functions at the place of delivery, of the name and address of the consignee and the place of delivery, and withholds delivery to the consignee for such reasonable period of time designated in writing by such police commissioner, police chief or other law enforcement officer as such official may deem necessary for investigation as to whether the consignee may lawfully receive and possess such firearms.

9-a. a. Except as provided in subdivision b hereof, the regular and ordinary transport of pistols or

revolvers by a manufacturer of firearms to whom a license as a dealer in firearms has been issued pursuant to section 400.00 of this chapter, or by an agent or employee of such manufacturer of firearms who is otherwise duly licensed to carry a pistol or revolver and who is duly authorized in writing by such manufacturer of firearms to transport pistols or revolvers on the date or dates specified, directly between places where the manufacturer of firearms regularly conducts business provided such pistols or revolvers are transported unloaded, in a locked opaque container. For purposes of this subdivision, places where the manufacturer of firearms regularly conducts business includes, but is not limited to places where the manufacturer of firearms regularly or customarily conducts development or design of pistols or revolvers, or regularly or customarily conducts tests on pistols or revolvers, or regularly or customarily participates in the exposition of firearms to the public.

b. The transportation of such pistols or revolvers into, out of or within the city of New York may be done only with the consent of the police commissioner of the city of New York. To obtain such consent, the manufacturer must notify the police commissioner in writing of the name and address of the transporting manufacturer, or agent or employee of the manufacturer who is authorized in writing by such manufacturer to transport pistols or revolvers, the number, make and model number of the firearms to be transported and the place where the manufacturer regularly conducts business within the city of New York and such other information as the commissioner may deem necessary. The

manufacturer must not transport such pistols and revolvers between the designated places of business for such reasonable period of time designated in writing by the police commissioner as such official may deem necessary for investigation and to give consent. The police commissioner may not unreasonably withhold his consent.

10. Engaging in the business of gunsmith or dealer in firearms by a person to whom a valid license therefor has been issued pursuant to section 400.00.

11. Possession of a firearm or large capacity ammunition feeding device by a police officer or sworn peace officer of another state while conducting official business within the state of New York.

12. Possession of a pistol or revolver by a person who is a member or coach of an accredited college or university target pistol team while transporting the pistol or revolver into or through New York state to participate in a collegiate, olympic or target pistol shooting competition under the auspices of or approved by the national rifle association, provided such pistol or revolver is unloaded and carried in a locked carrying case and the ammunition therefor is carried in a separate locked container.

13. Possession of pistols and revolvers by a person who is a nonresident of this state while attending or traveling to or from, an organized competitive pistol match or league competition under auspices of, or approved by, the National Rifle Association and in which he is a competitor, within forty-eight hours of such event or by a person who is a non-resident of the state while attending or

traveling to or from an organized match sanctioned by the International Handgun Metallic Silhouette Association and in which he is a competitor, within forty-eight hours of such event, provided that he has not been previously convicted of a felony or a crime which, if committed in New York, would constitute a felony, and further provided that the pistols or revolvers are transported unloaded in a locked opaque container together with a copy of the match program, match schedule or match registration card. Such documentation shall constitute prima facie evidence of exemption, providing that such person also has in his possession a pistol license or firearms registration card issued in accordance with the laws of his place of residence. For purposes of this subdivision, a person licensed in a jurisdiction which does not authorize such license by a person who has been previously convicted of a felony shall be presumed to have no prior conviction. The superintendent of state police shall annually review the laws of jurisdictions within the United States and Canada with respect to the applicable requirements for licensing or registration of firearms and shall publish a list of those jurisdictions which prohibit possession of a firearm by a person previously convicted of a felony or crimes which if committed in New York state would constitute a felony.

13-a. Except in cities not wholly contained within a single county of the state, possession of pistols and revolvers by a person who is a nonresident of this state while attending or traveling to or from, an organized convention or exhibition for the display of or education about firearms, which is conducted

under auspices of, or approved by, the National Rifle Association and in which he is a registered participant, within forty-eight hours of such event, provided that he has not been previously convicted of a felony or a crime which, if committed in New York, would constitute a felony, and further provided that the pistols or revolvers are transported unloaded in a locked opaque container together with a copy of the convention or exhibition program, convention or exhibition schedule or convention or exhibition registration card. Such documentation shall constitute prima facie evidence of exemption, providing that such person also has in his possession a pistol license or firearms registration card issued in accordance with the laws of his place of residence. For purposes of this paragraph, a person licensed in a jurisdiction which does not authorize such license by a person who has been previously convicted of a felony shall be presumed to have no prior conviction. The superintendent of state police shall annually review the laws of jurisdictions within the United States and Canada with respect to the applicable requirements for licensing or registration of firearms and shall publish a list of those jurisdictions which prohibit possession of a firearm by a person previously convicted of a felony or crimes which if committed in New York state would constitute a felony.

14. Possession in accordance with the provisions of this paragraph of a self-defense spray device as defined herein for the protection of a person or property and use of such self-defense spray device under circumstances which would justify the use of

physical force pursuant to article thirty-five of this chapter.

(a) As used in this section "self-defense spray device" shall mean a pocket sized spray device which contains and releases a chemical or organic substance which is intended to produce temporary physical discomfort or disability through being vaporized or otherwise dispensed in the air or any like device containing tear gas, pepper or similar disabling agent.

(b) The exemption under this paragraph shall not apply to a person who:

(i) is less than eighteen years of age; or

(ii) has been previously convicted in this state of a felony or any assault; or

(iii) has been convicted of a crime outside the state of New York which if committed in New York would constitute a felony or any assault crime.

(c) The department of health, with the cooperation of the division of criminal justice services and the superintendent of state police, shall develop standards and promulgate regulations regarding the type of self-defense spray device which may lawfully be purchased, possessed and used pursuant to this paragraph. The regulations shall include a requirement that every self-defense spray device which may be lawfully purchased, possessed or used pursuant to this paragraph have a label which states: "WARNING: The use of this substance or device for any purpose other than self-defense is a criminal offense under the law. The contents are dangerous - use with care. This device shall not be

sold by anyone other than a licensed or authorized dealer. Possession of this device by any person under the age of eighteen or by anyone who has been convicted of a felony or assault is illegal. Violators may be prosecuted under the law."

15. Possession and sale of a self-defense spray device as defined in paragraph fourteen of this subdivision by a dealer in firearms licensed pursuant to section 400.00 of this chapter, a pharmacist licensed pursuant to article one hundred thirty-seven of the education law or by such other vendor as may be authorized and approved by the superintendent of state police.

(a) Every self-defense spray device shall be accompanied by an insert or inserts which include directions for use, first aid information, safety and storage information and which shall also contain a toll free telephone number for the purpose of allowing any purchaser to call and receive additional information regarding the availability of local courses in self-defense training and safety in the use of a self-defense spray device.

(b) Before delivering a self-defense spray device to any person, the licensed or authorized dealer shall require proof of age and a sworn statement on a form approved by the superintendent of state police that such person has not been convicted of a felony or any crime involving an assault. Such forms shall be forwarded to the division of state police at such intervals as directed by the superintendent of state police. Absent any such direction the forms shall be maintained on the premises of the vendor and shall be open at all reasonable hours for inspection by any

peace officer or police officer, acting pursuant to his or her special duties. No more than two self-defense spray devices may be sold at any one time to a single purchaser.

16. The terms "rifle," "shotgun," "pistol," "revolver," and "firearm" as used in paragraphs three, four, five, seven, seven-a, seven-b, nine, nine-a, ten, twelve, thirteen and thirteen-a of this subdivision shall not include a disguised gun or an assault weapon.

b. Section 265.01 shall not apply to possession of that type of billy commonly known as a "police baton" which is twenty-four to twenty-six inches in length and no more than one and one-quarter inches in thickness by members of an auxiliary police force of a city with a population in excess of one million persons or the county of Suffolk when duly authorized by regulation or order issued by the police commissioner of such city or such county respectively. Such regulations shall require training in the use of the police baton including but not limited to the defensive use of the baton and instruction in the legal use of deadly physical force pursuant to article thirty-five of this chapter. Notwithstanding the provisions of this section or any other provision of law, possession of such baton shall not be authorized when used intentionally to strike another person except in those situations when the use of deadly physical force is authorized by such article thirty-five.

[c. *Redesignated b.*]

c. Sections 265.01, 265.10 and 265.15 shall not apply to possession of billies or blackjacks by persons:

1. while employed in fulfilling contracts with New York state, its agencies or political subdivisions for the purchase of billies or blackjacks; or

2. while employed in fulfilling contracts with sister states, their agencies or political subdivisions for the purchase of billies or blackjacks; or

3. while employed in fulfilling contracts with foreign countries, their agencies or political subdivisions for the purchase of billies or blackjacks as permitted under federal law.

d. Subdivision one of section 265.01 and subdivision four of section 265.15 of this article shall not apply to possession or ownership of automatic knives by any cutlery and knife museum established pursuant to section two hundred sixteen-c of the education law or by any director, officer, employee, or agent thereof when he or she is in possession of an automatic knife and acting in furtherance of the business of such museum.