

JONATHAN RICHTER, State Bar No. 151817

PLACER COUNTY PUBLIC DEFENDER

11760 Atwood Road, Suite 4

Auburn, CA 95603

(530) 889-0280

Erik R. Beauchamp, State Bar No. 221229

Deputy Public Defender

Counsel for Defendant,

DASVIR BAINS

SUPERIOR COURT OF CALIFORNIA

IN AND FOR PLACER COUNTY

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff,

vs.

DASVIR BAINS,

Defendant

Case No.: **62-099166; 62-096825**

**POINTS AND AUTHORITIES
REGARDING SECOND AMENDMENT
CHALLENGE TO PC 12020(a)(1)**

I.

INTRODUCTION

Defendant challenges the constitutionality of the prohibition of the possession of nunchaku based on the defendant's right to bear arms guaranteed by the Constitution under the Second Amendment. As will be seen, (1) the right to keep and bear arms under the Second Amendment applies to the states; (2) the right to keep and bear arms includes an individual's right to possess those arms individually in one's residence; (3) the arms protected by the Second Amendment are not limited to firearms; and (4) nunchaku are a type of arm protected by the Second Amendment. Because Penal Code section 12020(a)(1) prohibits the mere possession of nunchaku and the Second Amendment protects an individual's right to possess nunchaku from

1 federal or state action, Penal Code section 12020(a)(1) must be struck down as unconstitutional.
2 Because there is no prohibition either in statute or in Mr. Bains' terms of probation that prohibits
3 Mr. Bains from possessing nunchaku, count one of the complaint in 62-099166, which charges a
4 violation of Penal Code section 12020(a)(1), possession of nunchaku, and the Non-Drug Related
5 Petition for Revocation of Probation filed June 30, 2010, must be dismissed.

6 **II.**

7 **FACTS**

8 For the purposes of the Second Amendment challenge, the facts are relatively simple.
9 During a probation search of Mr. Bains' residence, a Roseville Police officer searched
10 defendant's dresser in his room. In the bottom drawer, the officer discovered nunchaku.
11 Defendant allegedly admitted that he knew about them, but he said nothing about using them
12 recently. Defendant was arrested for a violation of Penal Code section 12020(a)(1) and for an
13 outstanding warrant. Defendant is currently charged in 62-099166 with one count of Penal Code
14 section 12020(a)(1), possession of nunchaku, and a Non-Drug Related Petition for Revocation of
15 Probation alleges that defendant failed to obey all laws and seeks to terminate defendant from his
16 Proposition 36 sentence. Because of defendant's strike prior from 1998, if convicted and/or the
17 petition were found true, he would almost certainly be sent to prison for up to nine years and four
18 months.

19 ///

20 ///

21 ///

22 ///

23 ///

24 ///

25 ///

1 **ARGUMENT¹**

2 **III.**

3 **THE SECOND AMENDMENT APPLIES TO THE STATES**

4 The Second Amendment to the United States Constitution states:

5 A well regulated Militia, being necessary to the security of a free State, the
6 right of the people to keep and bear Arms, shall not be infringed.

7 In *McDonald v. City of Chicago, Ill.* (2010) 130 S.Ct. 3020, 3050, the US Supreme Court
8 held that the second amendment applies to the states.

9 **IV.**

10 **THE RIGHT TO KEEP AND BEAR ARMS UNDER THE SECOND AMENDMENT
11 PROTECTS AN INDIVIDUAL’S RIGHT TO KEEP ARMS IN HIS RESIDENCE**

12 The Supreme Court has also held that the Second Amendment protects an individual’s
13 right to keep arms in his residence. In *McDonald, supra*, 130 S.Ct. at page 3050, the Supreme
14 Court struck down two laws in Illinois that made it illegal to possess handguns at all.

15 Specifically,

16 [A Chigago] City ordinance provide[d] that “[n]o person shall ... possess
17 ... any firearm unless such person is the holder of a valid registration

18 ¹ The court may take note of a recent case originating in the Eastern District of New York that made its way to the
19 U.S. Supreme Court and dealt with Nunchaku. In *Maloney v. Cuomo* (2007) 470 F.Supp.2d 205, a martial arts
20 practitioner sought a declaration invalidating New York’s ban on the possession of nunchaku on the basis, among
21 other arguments, that the ban violated Mr. Maloney’s right to keep and bear arms. The Federal District Court never
22 answered the question regarding whether nunchaku were “arms” under the Second Amendment nor whether Mr.
23 Maloney had an individual right to bear arms. Specifically, the Federal District Court held that the Second
24 Amendment did not apply to the states and thus the New York law could not be invalid under the Second
25 Amendment. (*Id., supra*, 470 F.Supp.2d at page 214.) Maloney then appealed to the Second Circuit Court of
Appeals. The Second Circuit similarly held that the Second Amendment only applies to the Federal government and
affirmed the judgment of the district court. The question as to whether nunchaku qualified as “arms” under the
Second Amendment was never considered. (*Maloney v. Cuomo* (C.A. 2 2009) 554 F.3d 56, 58.) Maloney then
sought certiorari at the U.S. Supreme Court. It was granted. However, after deciding *McDonald*, the U.S. Supreme
Court vacated the judgment of the Second Circuit and remanded the case to the Second Circuit “for further
consideration in light of” *McDonald*. (*Maloney v. Rice* (2010) 130 S.Ct. 3541.) The Second Circuit then remanded
the case to the district court for further proceedings (*Maloney v. Cuomo* (C.A. 2 2010) 2010 WL 3199686) and the
case remains at the district court level today. Although the question regarding whether nunchaku are arms under the
Second Amendment remains undecided in the case, this case shows that the issue is serious enough to merit
significant consideration by the highest courts in the land.

1 certificate for such firearm.” Chicago, Ill., Municipal Code § 8-20-040(a)
2 (2009). The Code then prohibit[ed] registration of most handguns, thus
3 effectively banning handgun possession by almost all private citizens who
4 reside in the City. § 8-20-050(c). Like Chicago, Oak Park makes it
5 “unlawful for any person to possess ... any firearm,” a term that includes
6 “pistols, revolvers, guns and small arms ... commonly known as
7 handguns.” Oak Park, Ill., Municipal Code §§ 27-2-1 (2007), 27-1-1
8 (2009). (McDonald, *supra*, 130 S.Ct. at page 3025.)

9 The *McDonald* Petitioners wished to keep handguns in their homes, but were prohibited
10 from doing so by the ordinances in question. (*Id.*, *supra*, 130 S.Ct. at page 3025.) Again, the
11 Supreme Court struck down this law that prohibited the petitioners from keeping handguns
12 individually in their residences. (*Id.*, *supra*, 130 S.Ct. at page 3050.)

13 *McDonald* refers to the Supreme Court’s decision in *District of Columbia v. Heller*
14 (2008) 128 S.Ct. 2783. Both decisions state that self-defense is a basic right, recognized by many
15 legal systems from ancient times to the present day, and in *Heller*, the Supreme Court held that
16 individual self-defense is “the *central component*” of the Second Amendment right. (*Heller*,
17 *supra*, 128 S.Ct., at pages 2801-2802; see also *id.*, *supra*, 128 S.Ct. at page 2817 (stating that the
18 “inherent right of self-defense has been central to the Second Amendment right”). (See also
19 *McDonald*, *supra*, 130 S.Ct. at page 3036.)

20 In *Heller*, the facts are as follows:

21 The District of Columbia generally prohibit[ed] the possession of
22 handguns. It [was] a crime to carry an unregistered firearm, and the
23 registration of handguns [was] prohibited. See D.C.Code §§ 7-
24 2501.01(12), 7-2502.01(a), 7-2502.02(a)(4) (2001). Wholly apart from
25 that prohibition, no person [was permitted to] carry a handgun without a
license, but the chief of police [could] issue licenses for 1-year periods.
See §§ 22-4504(a), 22-4506. District of Columbia law also require[d]
residents to keep their lawfully owned firearms, such as registered long
guns, “unloaded and disassembled or bound by a trigger lock or similar
device” unless they [were] located in a place of business or are being used
for lawful recreational activities. See § 7-2507.02.

Respondent Dick Heller [was] a D.C. special police officer authorized to
carry a handgun while on duty at the Federal Judicial Center. He applied
for a registration certificate for a handgun that he wished to keep at home,
but the District refused. (*Heller*, *supra*, 128 S.Ct. at page 2788.)

1 The U.S. Supreme Court struck down the ban on handguns kept in a person's home in the
2 District of Columbia. (*Id., supra*, 128 S.Ct. at pages 2821 -2822.)

3 The Heller court stated that the right to keep and bear arms is not just to be done in an
4 organized and state-sponsored militia, but was a right that "is exercised individually and belongs
5 to all Americans." (*Heller, supra*, 128 S.Ct. at pages 2790 -2791.) Therefore, it is clear that the
6 Second Amendment protects the right to keep and bear "arms" individually in one's home.

7 **V.**
8 **THE DEFINITION OF "ARMS" IN THE SECOND AMENDMENT**
9 **INCLUDES MORE THAN JUST "FIREARMS"**

10 *Heller* defines arms as more than just firearms when it states:

11 Before addressing the verbs "keep" and "bear," we interpret their object:
12 "Arms." The 18th-century meaning is no different from the meaning
13 today. The 1773 edition of Samuel Johnson's dictionary defined "arms" as
14 "weapons of offence, or armour of defence." 1 Dictionary of the English
15 Language 107 (4th ed.) (hereinafter Johnson). Timothy Cunningham's
16 important 1771 legal dictionary defined "arms" as "any thing that a man
17 wears for his defence, or takes into his hands, or useth in wrath to cast at
18 or strike another." 1 A New and Complete Law Dictionary (1771); see
19 also N. Webster, American Dictionary of the English Language (1828)
20 (reprinted 1989) (hereinafter Webster) (similar).

21 The term was applied, then as now, to weapons that were not specifically
22 designed for military use and were not employed in a military capacity.
23 For instance, Cunningham's legal dictionary gave as an example of usage:
24 "Servants and labourers shall use bows and arrows on *Sundays*, & c. and
25 not bear other arms." See also, *e.g.*, An Act for the trial of Negroes, 1797
Del. Laws ch. XLIII, § 6, p. 104, in 1 First Laws of the State of Delaware
102, 104 (J. Cushing ed.1981 (pt. 1)); see generally *State v. Duke*, 42 Tex.
455, 458 (1874) (citing decisions of state courts construing "arms").
Although one founding-era thesaurus limited "arms" (as opposed to
"weapons") to "instruments of offence *generally* made use of in war,"
even that source stated that all firearms constituted "arms." 1 J. Trusler,
The Distinction Between Words Esteemed Synonymous in the English
Language 37 (1794) (emphasis added).

Some have made the argument, bordering on the frivolous, that only those
arms in existence in the 18th century are protected by the Second
Amendment. We do not interpret constitutional rights that way. Just as the
First Amendment protects modern forms of communications, *e.g.*, *Reno v.*

1 *American Civil Liberties Union*, 521 U.S. 844, 849, 117 S.Ct. 2329, 138
2 L.Ed.2d 874 (1997), and the Fourth Amendment applies to modern forms
3 of search, e.g., *Kyllo v. United States*, 533 U.S. 27, 35-36, 121 S.Ct. 2038,
4 150 L.Ed.2d 94 (2001), the Second Amendment extends, prima facie, to
5 all instruments that constitute bearable arms, even those that were not in
6 existence at the time of the founding. (*Heller, supra*, 128 S.Ct. at pages
7 2791 -2792.)

8 The court's definition begins with Samuel Johnson's 1773 dictionary definition that arms
9 are "weapons of offence, or armour of defence." No mention is made to suggest that arms only
10 include firearms. Then, we see a 1771 legal dictionary which defined "arms" as "any thing that a
11 man wears for his defence, or takes into his hands, or useth in wrath to cast at or strike another."
12 Nothing suggests a limitation to firearms. In fact, using something to "cast" or "strike" another
13 sounds more like a club-type weapon or a sword than a firearm. Then, the Supreme Court quotes
14 a sentence from the 1771 legal dictionary defining arms, which reads: "Servants and labourers
15 shall use bows and arrows on *Sundays*, & c. and not bear other arms." "Other arms" might be
16 firearms, but the definition of arms includes bows and arrows.

17 The *Heller* court in that section takes great pains to try to include firearms in its definition
18 of "arms" and to keep "arms" from meaning merely military style weapons. (*Id.*) The
19 consequence of this is that "arms", according to the U.S. Supreme Court, means an offensive or
20 defensive weapon that one can carry on one's person. Clearly, the Supreme Court means that
21 "arms" are defined as handheld weapons that are not just firearms.

22 VI.

23 NUNCHAKU ARE PROTECTED BY THE SECOND AMENDMENT

24 A. History of Nunchaku

25 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. The use of
nunchaku as a weapon appears to have originated in Okinawa in the early seventeenth century
around the time of a Japanese invasion of that island. (Stephen Halbrook, *Oriental Philosophy*,

1 *Martial Arts and Class Struggle*, 2 *Social Praxis*, 139-40 (1974)[hereafter “Martial Arts”]; see
2 also George Kerr, *OKINAWA: THE HISTORY OF AN ISLAND PEOPLE*, 156-160 (1958).

3 To suppress the possibility of internal dissent in a type of abuse of power familiar to the
4 Founding Fathers in our country, the Japanese government prohibited the conquered from
5 carrying or possessing weapons. (*Id.*; see also Paul Crompton, *THE COMPLETE MARTIAL*
6 *ARTS* 63 (1989) [hereafter “Crompton”].) In response, martial arts systems were developed
7 using non-prohibited items such as farm tools. (Martial Arts at 140; Crompton at 63.) Nunchaku
8 were among those improvised weapons, evolving from a rice-threshing device or from a crude
9 bridle for an agricultural beast of burden. (Martial Arts at 140; *More Police are Using*
Nunchakus, *Phila. Inquirer*, A05 (Feb. 5, 1989) [hereafter “Police Nunchakus”].)

10 Although nunchaku can be used offensively, it originated as and is utilized by modern
11 martial artists primarily as a means of self-defense. (Martial Arts at page 140.) Unsurprisingly,
12 then, nunchaku are also currently used by over two-hundred police forces across the country for
13 control of and/or self-defense against unarmed attackers.²

14 **B. Nunchaku Meet the Definition of Arms and Are Protected Under the Second** 15 **Amendment to the Constitution**

16 The definition of “arms”, as defined by *McDonald* and *Heller, supra*, is an offensive or
17 defensive weapon that one can carry on one’s person. Nunchaku readily meet that definition.
18 Nunchaku are simply a form of the articulated club/baton — with a name unfamiliar to English

21 ² See generally *Police Nunchakus* (“Hundreds of police officers now swear by the weapon.”). For
22 instance, Sergeant Kevin Orcutt, a Colorado policeman, has developed a popular training
23 system for nunchaku use by law enforcement officers as a nonlethal technique to control and
24 subdue. Since 1985, nearly 200 law enforcement agencies across the country have employed his
25 “Orcutt Police Nunchaku system.” See <http://www.orcuttopn.com/about.htm> [last visited
September 5, 2010].) The Denver Police Department has touted the use of Orcutt’s system. (See
Denver Police Department *2000-2002 Accomplishments*, 15 (Jan. 1, 2003), available at
<http://www.denvergov.org/Portals/295/documents/Accompfinal.pdf> [last visited September 5,
2010].)

1 ears. (Iain Hogg, THE ENCYCLOPEDIA OF WEAPONRY, 11 (2006)).³ Moreover, the
2 destructive power of all forms of blunt club-like weapons is far less than that of the handguns
3 rightly held protected in *Heller* and *McDonald*. As noted above, they have been used by police
4 departments all over the country. They are used in self-defense classes all over the country. Self-
5 Defense marital arts techniques, such as Taekwondo, use nunchaku. Nunchaku competitions are
6 an integral part of self-defense martial arts competitions that are held regularly, perhaps weekly,
7 in many parts of California and the United States.

8 Moreover, the legislature states in Penal Code section 12020, subdivision (b), that the
9 possession of nunchaku when possessed on the “premises of a school” that teaches the “arts of
10 self-defense” is exempted from prosecution under 12020. Therefore, even the legislature
11 contends that nunchaku are an integral part of systems of self-defense.

12 As noted above, the central core of the right to keep and bear arms under the Second
13 Amendment is self-defense and the protection of home and family. (*Heller, supra*, 128 S.Ct. at
14 pages 2801-2802, 2817; *McDonald, supra*, 130 S.Ct. at page 3036.) Because nunchaku clearly
15 have a history of militia use, as in Okinawa, in self-defense in all types of self-defense marital
16 arts schools throughout California and the United States, and are used by police throughout the
17 United States as a non-lethal weapon, and these weapons can be used in self-defense and in the
18 protection of the home and family, nunchaku readily fit into the definition of “arms” under the
19 Second Amendment.

20 ///

21 ///

22 ///

23 ³ Indeed, every rifle can serve as a club in a pinch. The Bunker Hill patriots used them in just that
24 way after running out of gunpowder during the third British assault. (Alan Axelrod, THE REAL
25 HISTORY OF THE AMERICAN REVOLUTION: A NEW LOOK AT THE PAST (2007) 134.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

VII.

**PENAL CODE SECTION 12020(A)(1) SHOULD BE DECLARED
UNCONSTITUTIONAL AS IT APPLIES TO NUNCHAKU, BECAUSE
IT PROHIBITS THE MERE POSSESSION OF NUNCHAKU.**

A. Applicable Statutes

Penal Code section 12020, subdivision (a)(1) states in part:

Any person in this state who does any of the following is punishable by imprisonment in a county jail not exceeding one year or in the state prison:

- (1) Manufactures or causes to be manufactured, imports into the state, keeps for sale, or offers or exposes for sale, or who gives, lends, or possesses * * * any nunchaku * * * .

Penal Code section 12020, subdivision (c)(3), defines nunchaku as:

an instrument consisting of two or more sticks, clubs, bars or rods to be used as handles, connected by a rope, cord, wire, or chain, in the design of a weapon used in connection with the practice of a system of self-defense such as karate.

Penal Code section 12020, Subdivision (b), also states:

Subdivision (a) does not apply to any of the following:

* * *

- (3) The possession of a nunchaku on the premises of a school which holds a regulatory or business license and teaches the arts of self-defense.

- (4) The manufacture of a nunchaku for sale to, or the sale of a nunchaku to, a school which holds a regulatory or business license and teaches the arts of self-defense. * * *

Penal Code section 12020, subdivision (b), also exempts from prosecution historical societies, entertainment productions, law enforcement, and those that sell to those entities.

Nothing in Penal Code section 12020 or any other statute exempts from prosecution use in the home or elsewhere for self-defense, defense of one's family, or defense of one's home.

///

///

///

1 **B. The Prohibition of the Possession of Nunchaku Pursuant to Penal Code**
2 **section 12020(a)(1) Should be Declared Unconstitutional As a Violation of Defendant's**
3 **Second Amendment Right to Keep and Bear Arms.**

4 Penal Code section 12020, Subdivision (a)(1) prohibits the possession of nunchaku in all
5 situations with the exception of possession nunchaku on the premises of a school that teaches the
6 arts of self-defense and possession for entertainment productions, by law enforcement, and by
7 historical societies. However, as noted above, the core of the Second Amendment is the use of
8 arms to protect oneself and one's home and family. Although there are exceptions to Penal Code
9 section 12020(a)(1), none of the exceptions address the core of the Second Amendment.

10 Therefore, Penal Code section 12020(a)(1), at least as it applies to nunchaku, infringes upon an
11 individuals' right to keep and bear arms under the Second Amendment of the U.S. Constitution.
12 Because the U.S. Constitution trumps all state laws (See *Marbury v. Madison* (1803) 1 Cranch
13 137), this court should declare Penal Code section 12020(a)(1), at least as it applies to nunchaku,
14 unconstitutional and dismiss Count One of the complaint and the Non-Drug Related Petition for
15 Revocation of Probation filed June 30, 2010.

16 **VIII.**

17 **CONCLUSION**

18 Defendant requests the court to declare Penal Code section 12020, subdivision (a)(1),
19 unconstitutional, at least as it applies to nunchaku, because it infringes on the defendant's right
20 to bear arms under the Second Amendment of the Constitution. Because there is no other law
21 that prohibits defendant from possession of nunchaku and the terms of probation do not prohibit
22 defendant from possessing nunchaku, defendant requests that the court dismiss Count One of
23 the complaint and the Non-Drug Related Petition for Revocation of Probation.

24 DATED: December 17, 2010

PLACER COUNTY PUBLIC DEFENDER

25 _____
Erik R. Beauchamp
Attorney for Defendant

1 I declare under penalty of perjury under the laws of the State of California that the
2 foregoing is true and correct of my own personal knowledge. This Declaration was executed on
3 September 7, 2010, at Auburn, California.

4 _____
5 Erik R. Beauchamp
6 Attorney at Law
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25