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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** **REPLY TO OPPOSITION TO SECOND AMENDMENT CHALLENGE TO PC 12020(a)(1)** **DATE: 11/17/10** **TIME: 8:30 AM** **DEPT.: 33**

I.

INTRODUCTION

Penal Code section 12020(a)(1) is unconstitutional on its face. It prohibits the possession of nunchaku everywhere (except at a school for teaching of the art of self-defense) by everyone at all times. It does not prohibit nunchaku when possessed by felons or when concealed or when possessed on the grounds of a school. The district attorney's opposition tries to reform the law into one that may pass constitutional muster, but that is not within the district attorney's power.

The district attorney first quotes *District of Columbia v. Heller* (2008) 128 S.Ct. 2783, 2816-17, to state that there are some limitations on the Second Amendment. The defense does

not disagree. The Legislature is free to regulate nunchaku just as it is free to regulate firearms. It just cannot regulate them out of existence.

The district attorney then argues that the Second Amendment protects the possession of weapons by law-abiding citizens and not felons. But the Legislature has not done that. Additionally, as will be seen, the law in question is unconstitutional on its face, because it prohibits possession everywhere by everyone. Because the law is unconstitutional on its face, it is invalid even if the Legislature could prohibit felons from possession of nunchaku.

The district attorney then states that the proper level of scrutiny is intermediate scrutiny. However, unlike rational basis scrutiny, the government has the legal burden to determine that law has a substantial relation to significant or important interest. However, the district attorney has failed to explain what that important and significant interest is other than to say nunchaku are, like all weapons, dangerous.

Therefore, the law is unconstitutional on its face and this new case and the violation of probation should be dismissed.

II.

NUNCHAKU ARE NOT DANGEROUS OR UNUSUAL

In *Heller,* the Court explained that the "Second Amendment right, whatever its nature, extends only to certain types of weapons," (*Heller, supra,* 128 S.Ct. at p. 2814), those commonly owned by law-abiding citizens. (*Id., supra,* 128 S.Ct. at p. 2815-16.) This proposition reflects a "historical tradition of prohibiting the carrying of 'dangerous and unusual weapons.' " (*Id., supra,* 128 S.Ct. at p. 2817.) Accordingly, the right to bear arms, as codified in the Second Amendment, affords no protection to "weapons not typically possessed by law-abiding citizens for lawful purposes." (*Id., supra,* 128 S.Ct. at p. 2815-16; *U.S. v. Marzzarella* (2010) 614 F.3d 85, 90-91.)

First of all, all weapons are potentially dangerous. Certainly all firearms are designed to kill instantaneously. Knives, swords, and bows and arrows have also, throughout history, killed

many. Therefore, because one can always say a weapon is dangerous, the fact that the weapon may produce injury does not make it either dangerous or unusual. All weapons may produce injury or death. But some are more dangerous than others.

The prosecution argues that *Marzzarella* holds that a weapon, like nunchaku, are "dangerous and unusual." However, the prosecution's argument is conclusory and fails to discuss *Marzzarella* effectively. *Marzzarella* discussed *United States v. Tagg (2009)* 572 F.3d 1320, 1326, which found no Second Amendment protection for pipe bombs because they could not be used for legitimate lawful purposes and *State v. Chandler (1850)* 5 La. Ann. 489, 489-90, which held that concealed weapons could be prohibited because of their tendency to be used in violent crimes on unsuspecting victims. (*Marzzarella*, *supra*, 614 F.3d at p. 95.)

Marzzarella also discusses this issue further:

> [A] handgun with an obliterated serial number seems distinct from a weapon like a short-barreled shotgun. While a short-barreled shotgun is dangerous and unusual in that its concealability fosters its use in illicit activity, it is also dangerous and unusual because of its heightened capability to cause damage. *See United States v. Amos,* 501 F.3d 524, 532 (6th Cir.2007) (McKeague, J., dissenting) ("With its shorter barrel, a sawed-off shotgun can be concealed under a large shirt or coat. It is the combination of low, somewhat indiscriminate accuracy, large destructive power, and the ability to conceal that makes a sawed-off shotgun useful for only violence against another person ...."); *see also United States v. Upton,* 512 F.3d 394, 404 (7th Cir.2008) (likening sawed-off shotguns to "other dangerous weapons like bazookas, mortars, pipe bombs, and machine guns"). An unmarked firearm, on the other hand, is no more damaging than a marked firearm. (*Marzzarella, supra*, 614 F.3d at p. 95.)

Nunchaku are not like a pipe bomb, bazooka, mortar, machine gun, or sawed-off shotgun. The destructive power of nunchaku is lower, but an indiscriminate use of one of the above weapons could accidentally or intentionally kill or maim scores of people with the merest touch of a trigger or button. Nunchaku, on the other hand, require a significant amount of training to use effectively. Moreover, its use does not shoot a projectile over long distances. A person being struck with nunchaku must be within an arm's reach, and, even if a person is struck, death is far from certain.

But nunchaku are less concealable than a handgun. They are long sticks that will protrude from any pocket. Shortening the sticks of nunchaku for more concealment decreases their range and effectiveness. Moreover, nunchaku are the most "showy" weapons that one can find. When a skilled nunchaku practitioner displays his skills, all eyes turn to him with awe. When one takes into consideration the factors of the lower destructive power and the lack of concealability, as *Marzzarella* did when discussing whether a sawed-off shotgun was dangerous and unusual as noted above, one can clearly see that nunchaku are not dangerous like the typical weapons that the Second Amendment does not protect.

Moreover, nunchaku are not unusual. Every person who obtains a black belt in Taekwondo, one of the most popular forms of martial arts, a type of martial arts that has been an Olympic sport since 2000, must become proficient in the use of nunchaku. At least two members of the office of the public defender in Placer County have blackbelts in Taekwondo. Moreover, there are over 30,000 Taekwondo schools in the United States. Additionally, nunchaku are used in other forms of martial arts throughout the United States. Although nunchaku are not as prevalent as firearms or knives, hundreds of thousands of Americans have been trained using nunchaku. Even the Legislature acknowledges that these weapons are not unusual, because Penal Code section 12020(b) specifically exempts the possession of these weapons from prosecution if possessed on "premises of a school" that teaches the "arts of self-defense". Presumably, if these weapons were so unusual, the Legislature would not have created such an exemption. Moreover, even the police use them as noted in defendant's original moving papers.

Marzzarella stated that, at its core, the Second Amendment protects the right of law-abiding citizens to possess non-dangerous weapons for self-defense in the home. (*Marzzarella, supra*, 614 F.3d at p. 92.) The question of whether a weapon is dangerous or unusual is whether law-abiding citizens possess the type of weapon for self-defense in the home for lawful purposes. (*See Heller, supra*, 128 S.Ct. at p.2816 ["We therefore read *Miller* to say only that the Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes"].) In other words, the Second Amendment protects weapons that a law-abiding

citizen might possess for a lawful purpose.[1] Certainly, the Legislature in making an exemption for use at a school for the art of self-defense and the fact that so many people are trained in the art of nunchaku as part of a curriculum of the art of self defense demonstrate that law-abiding citizens possess nunchaku for a lawful purpose all the time. As such, nunchaku are not dangerous or unusual.

III.
THE SECOND AMENDMENT APPLIES TO WEAPONS NOT CONSIDERED BY THE FOUNDERS.

On page two of the opposition, the district attorney notes in *Heller* that *U.S. v. Miller* (1939) 307 U.S. 174, 179, stated that "the sorts of weapons protected were those 'in common use at the time" and that the *Heller* court took this to mean that this is a limitation on the types of weapons the Second Amendment protects. (*Heller*, supra, 128 S.Ct. at 2816-2817.) This would seem to argue that only weapons in common use in the 18th Century, such a muskets, but not modern handguns, which were the subject of *Heller* and *McDonald*, are protected by the Second Amendment. In fact, this argument actually is completely at odds with *Heller*. *Heller* also stated:

> 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. American Civil Liberties Union,* 521 U.S. 844, 849, 117 S.Ct. 2329, 138 L.Ed.2d 874 (1997), and the Fourth Amendment applies to modern forms of search, *e.g., Kyllo v. United States,* 533 U.S. 27, 35-36, 121 S.Ct. 2038, 150 L.Ed.2d 94 (2001), **the Second Amendment extends, prima facie, to *all instruments* that constitute bearable arms, even those that were not in existence at the time of the founding.** (*Heller*, supra, 128 S.Ct. at pp. 2791 -2792 (2008).)

Clearly, *Heller* stands for the proposition that weapons not considered by the founders are protected. Therefore, the suggestion that *Heller* stands for the proposition that the Second Amendment applies only those weapons in existence in the 18th Century or known to the

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[1] Defense counsel is only aware of one other state that prohibits nunchaku: New York. (See N.Y. Penal Law § 265.01(1).) Therefore, it appears to be lawful to possess nunchaku at home in 48 other states. Therefore, the argument that nunchaku are not possessed lawfully at home in the vast majority of the United States fails.

founders is wrong. Though the founders may or may not have known what nunchaku are, nunchaku are protected under the Second Amendment.

IV.
NUNCHAKU ARE NOT INHERENTLY CONCEALED WEAPONS

On page three and four of the opposition, the district attorney argues that nunchaku are concealed-type weapons and, thus, should be prohibited. The opposition suggests that the Penal Code section 12020(a)(1) attempts to eliminate "concealable firearms, projectiles, and melee weapons capable of inflicting serious harm."

Firstly, the defense fails to see how a billy club is a concealable type weapon. In defense counsel's experience, when a person is charged with a violation of Penal Code section 12020(a)(1), the vast majority of the time, the weapon in question is a billy club. A billy club is not a concealable type weapon, but it is the one for which people are prosecuted the most. Billy clubs can be as big as baseball bats or perhaps only a foot long. However, currently, it is a felony to carry one.[2] While one can potentially conceal any type of weapon, it is unreasonable to argue that a billy club is a concealable type of weapon.

Second, nunchaku are also not concealable-types of weapons. The ones in question had handles which were 10 to 12 inches long, which is typical of nunchaku. It is not something one can merely hide in one's pocket or a purse, like a small caliber handgun, which are clearly protected by the Second Amendment. Nunchaku defy being hidden. When one places them in one's pocket, nunchaku stick out several inches. While they might be confused at first with two billy clubs, when examined, it is clear to everyone what they are. Unlike a cane sword, which is specifically designed to look like a cane, nunchaku are not designed to be hidden inside something or to look like something they are not. By their very nature, they have long handles. They do not work well with shorter handles. Clearly, they are not concealable-type weapons.

Thirdly, they are a "showy" type of weapon. When used by someone trained in their use, a nunchaku demonstration is extraordinarily conspicuous. Eyes turn to see the display as the user

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[2] Defense counsel believes that the prohibition against billy clubs, pursuant to Penal Code section 12020(a)(1), is also unconstitutional.

flings the nunchaku around his head and body. Not only is the weapon not designed to be hidden, it is designed to be displayed prominently.

Fourthly, the district attorney suggests that, because nunchaku were originally farm tools in Okinawa and became useful as weapons after other types of weapons were banned when the Japanese conquered Okinawa, nunchaku were clandestine types of weapons. However, this argument turns the whole spirit of the Second Amendment and even American independence on its head. As defense counsel wrote on page seven of the Points and Authorities Regarding Second Amendment Challenge To PC 12020(a)(1), Okinawa was conquered by the Japanese and the Okinawans wished to throw off the yoke of the Japanese tyranny just as our Founders wished to throw off the yoke of British tyranny in our Revolution. The Japanese, as invaders, prohibited the possession of weapons by the Okinawans, so the Okinawans were forced to use farm tools, which were not banned, such as nunchaku to try to fight off the invaders. The district attorney's argument is that, because nunchaku were farm tools, which the Japanese could not make illegal, they are, therefore, concealable weapons, which Penal Code section 12020(a)(1) allegedly seeks to prohibit. On the contrary, the invasion of one's home by tyrants or by bandits is exactly the reason the Founding Fathers sought to include the Second Amendment in the Bill of Rights. (*Heller, supra*, 128 S.Ct. at p. 2801; *Marzzarella, supra,* 614 F.3d at p. 92.) The Second Amendment does not allow the government to do what the Japanese did to the Okinawans. The idea that the Okinawans were bandits for possessing "clandestine" weapons, when they were merely forced to use farm tools, when fighting for their freedom against unlawful and tyrannical invaders, completely repudiates the concept of freedom and law embodied in the Constitution and the very traditions of freedom in our nation.

Fifthly, the district attorney provides no legislative history to suggest that the Legislature sought to prohibit concealable weapons when it enacted section 12020(a)(1). On the contrary, despite the district attorneys suggestion, the list of section 12020(a)(1) appears to be a hodgepodge of miscellaneous weapons that defies assigning these weapons to a class.

Sixth, had the Legislature merely wanted to ensure that nunchaku or the other weapons enumerated in Penal Code section 12020(a)(1) were not concealed, it might have merely

prohibited the concealing of these weapons, as it did to dirks or daggers in Penal Code section 12020(a)(4). The Legislature did not do that with the weapons of 12020(a)(1). Having prohibited the mere possession of the enumerated weapons in 12020(a)(1), the Legislature was not concerned about the possibility of concealment of these weapons.

The district attorney's argument that nunchaku are concealable type weapons fails.

V.
PROSECUTION RELIANCE ON INTERMEDIATE SCRUTINY IS MISPLACED, BECAUSE IT HAS THE BURDEN TO DEMONSTRATE THAT ITS OBJECTIVE IS AN IMPORTANT ONE AND THAT ITS OBJECTIVE IS ADVANCED BY MEANS SUBSTANTIALLY RELATED TO THE OBJECTIVE.

The government does not get a "free pass" simply because it has established a "categorical ban"; it still must prove that the ban is constitutional, a mandate that flows from *Heller* itself. *Heller* referred to felon disarmament bans only as "presumptively lawful," which, by implication, means that there must exist the possibility that the ban could be unconstitutional in the face of an as-applied challenge. **(***U.S. v. Williams* (2010) 616 F.3d 685, 692 -693.) The challenge to Penal Code section 12020(a)(1) is just such a facial challenge.

The prosecution argues that intermediate scrutiny is the most appropriate level of scrutiny for challenges to arms regulations and prohibitions. In fact, the various cases that have come out since *Heller* and *McDonald* seem to agree. (*U.S. v. Marzzarella* (2010) 614 F.3d 85, 98; *Williams, supra,* 616 F.3d at pp. 692-693.) But even if intermediate scrutiny is the proper test, this does not let the government off the hook. Although intermediate scrutiny is not as stringent as strict scrutiny, it is quite certainly much more stringent that the rational basis test. To pass constitutional muster under intermediate scrutiny, the *government has the burden* of demonstrating that its objective is an important one and that its objective is advanced by means substantially related to that objective. (*Cf. United States v. Skoien* (2010) 614 F.3d 638, 641; U.S. v. Williams (2010) 616 F.3d 685, 692-693.) In intermediate scrutiny, the asserted governmental end must be more than just legitimate. It must be either "significant," "substantial," or "important." (*Marzzarella, supra,* 614 F.3d at p. 98; *See, e.g., Turner Broadcasting System, Inc. v. FCC* (1994) 512 U.S. 622, 662 [114 S.Ct. 2445]; *Ward v. Rock Against Racism* (1989) 491

U.S. 781, 791 [109 S.Ct. 2746, 105 L.Ed.2d 661].) Intermediate scrutiny generally requires the fit between the challenged regulation and the asserted objective be reasonable, although not perfect. (*Marzzarella, supra,* 614 F.3d at p. 98; *See, e.g., Lorillard Tobacco Co. v. Reilly* (2001) 533 U.S. 525, 556 [121 S.Ct. 2404, 150 L.Ed.2d 532]; *NY v. Fox* (1989) 492 U.S. 465, 480 [109 S.Ct. 3028].) The regulation need not be the least restrictive means of serving the interest (*see, e.g., Turner Broad. Sys., supra,* 512 U.S. at 662 [114 S.Ct. 2445]; *Ward, supra,* 491 U.S. at 798 [109 S.Ct. 2746]), but may not burden more than is reasonably necessary. (*Marzzarella, supra,* 614 F.3d at p. 98; *see, e.g., Turner Broad. Sys.,* 512 U.S. at 662 [114 S.Ct. 2445]; *Ward,* 491 U.S. at 800 [109 S.Ct. 2746].)

In *Marzzarella*, the defendant was challenging a law prohibiting the filing off of serial numbers on firearms. The Marzzarella court stated that the law in question served a government purpose in that it enabled the tracing of weapons via their serial numbers and the objective of this Act was "to keep firearms away from the persons Congress classified as potentially irresponsible and dangerous." This was considered an important or substantial government interest. The law also fit reasonably with that interest in that it reached only conduct creating a substantial risk of rendering a firearm untraceable. Because unmarked weapons are functionally no different from marked weapons, the law in question did not limit the possession of any class of firearms. Moreover, because the court could not conceive of a lawful purpose for which a person would prefer an unmarked firearm, the regulation fit closely with the interest in ensuring the traceability of weapons. (*Marzzarella, supra,* 614 F.3d at pp. 98-99.)

However, this is distinguishable from Penal Code section 12020(a)(1), because the purpose of this law is to ensure that no one possesses the enumerated weapons at all to protect themselves. The major difference between the law regarding serial numbers on firearms and 12020 is that the law regarding serial numbers did not limit the possession of any class of weapons, but 12020 completely prohibits the use of nunchaku by anyone. Another difference is that the court could not conceive of a lawful purpose for which a person would prefer an unmarked firearm versus a marked firearm, but there is no such reason for a court to conceive that nunchaku would always be used unlawfully. On the contrary, the legislature states in Penal

Code section 12020, subdivision (b), that the possession of nunchaku when possessed on the "premises of a school" that teaches the "arts of self-defense" is exempted from prosecution under 12020. Therefore, even the legislature contends that nunchaku are an integral part of systems of self-defense. The legislature believes there is a lawful purpose for nunchaku and, among other things, one of the purposes is for "self-defense", yet the central core of the Second Amendment is self-defense and the protection of home and family. (*Heller, supra*, 128 S.Ct. at pages 2801-2802, 2817; *McDonald, supra*, 130 S.Ct. at page 3036.) Obviously, the Legislature's presumed purpose in 12020 seems to fly in the face of the central core of the Second Amendment. But even so, it is the government's burden to explain an important interest and how the law is reasonably fit with the stated purpose. The government has failed to do this here. It does not pass intermediate scrutiny.

In *Williams*, intermediate scrutiny was also used to determine if a federal law prohibiting felons from possessing firearms was unconstitutional under the Second Amendment. The government's stated objective was to keep firearms out of the hands of violent felons, who the government believed were often those most likely to misuse firearms. The Williams court could not say this was not an important objective. The government then needed to show a substantial relationship between its objective of preventing felons from accessing guns and the law, which prohibited violent felons from possessing firearms, but did not prohibit others from possessing firearms. The "government's evidence" passed constitutional muster. (*Williams, supra,* 616 F.3d at pp. 692-693.)

Again, here, the government presents no evidence. The prosecution seeks to place the burden on the defense. That alone fails the intermediate scrutiny test. We do not know what the government's important objective is. Is it to keep nunchaku out of the hands of felons? If so, unlike in *Williams*, the ban on nunchaku is a total ban for everyone (except museums and law enforcement). Presumably, the Legislature's important objective is more than just to keep nunchaku out of the hands of felons, but to keep nunchaku out of the hands of everyone. It is unclear why. Knives, firearms, bows and arrows, and swords, weapons much more dangerous than nunchaku, are not prohibited. Felons can even possess knives, bows and arrows, and swords

under current California law. The Legislature is concerned with prohibiting the possession of guns from felons. The Legislature does not seem to be concerned with keeping other types of weapons out of the hands of felons. If it was so concerned, it would presumably make a law possessing such weapons from being used by felons.[3] Whatever the reason, the total ban on nunchaku is not just less than perfect. It is a complete abrogation of the Second Amendment's protection of arms.

VI.
THE PROSECUTION HAS NOT ARGUED THAT THE TERM "ARMS" IN THE SECOND AMENDMENT ONLY REFERS TO FIREARMS.

Most telling is the fact that the prosecution makes no argument that arms refers only to firearms. In fact, the Supreme Court clearly indicates that arms refers to more than just firearms. (*Heller, supra,* 128 S.Ct. at pages 2791 -2792.) As noted in the original moving papers of the defense, arms refers to anything that one can carry or wear for offense or defense. It can mean a firearm, club, sword, or a suit of armor. The prosecution fails to explain why nunchaku are any different from knives, swords, bows and arrows, or firearms. The reason for this is that nunchaku are no different from those other weapons and are protected by the Second Amendment.

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[3] One should note that the exemption from the prohibition of possession of nunchaku in Penal Code section 12020(b) extends to everyone as long as the person possesses nunchaku in a museum or at a school for the teaching of the art of "self-defense". Thus, a felon has the same right to possess nunchaku under current law as anyone else. If the Legislature was concerned about nunchaku getting into the hands of felons, it would not made the exemptions apply only to non-felons.

VI.
CONCLUSION

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

DATED: November 15, 2010

PLACER COUNTY PUBLIC DEFENDER

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Erik R. Beauchamp
Attorney for Defendant