ATTORNEY MALONEY: James Maloney, Appellant. When these briefs were filed over a year ago, I made Second Amendment arguments that perhaps were the work of someone who was insane, but now I find I'm in good company because the Supreme Court in *District of Columbia v. Heller* has said that the Second Amendment guarantees an individual right. That's something that was history--

JUDGE POOLER: Do you believe that that overcomes the long line of cases that says that doesn't apply to the states?

ATTORNEY MALONEY: Well, that's exactly what I want to get to, Your Honor, is the incorporation issue. I would hope--I would've hoped--that the Panel would ask for additional briefing on this. A 28(j) letter was really not enough, but assuming this is it, I'm going to go through that now. If we look at footnote 23 of *Heller*, the Court says: "With respect to *Cruikshank*'s continuing validity on incorporation"--a question obviously not presented by that case, because it was D.C.--"we note that *Cruikshank* also said that the First Amendment did not apply against the States and did not engage in the sort of Fourteenth Amendment inquiry *required* by our later cases." That language really indicates that those cases do not have continuing validity because they did not engage in that Fourteenth Amendment analysis. That "required" also implies very strongly, and maybe even mandates, that every federal court making this consideration engage in those Fourteenth Amendment analyses.

JUDGE KATZMANN: How would you respond, though, to the argument that the language that you've just read indicates that the Supreme Court expressly declined to hold that the Second Amendment applied to the states?

ATTORNEY MALONEY: Well, they simply could not have held that because that issue was not before them. This was District of Columbia, which is not a state, and they could only comment on the continuing validity of *Cruikshank* and *Presser*, so I suppose it's dicta, but it's Supreme Court dicta, and it's guidance to the lower courts. I think--

JUDGE SOTOMAYOR: But are we entitled? I think we have abundant case law that says we have to follow Supreme Court precedent that's directly on point. You're admitting *Heller*'s not directly on point, that we have precedent that says we have to give due respect to the states' rights to declare certain weapons illegal.

ATTORNEY MALONEY: Right. You have precedent, *Cruikshank*, this is precedent from the Nineteenth Century, it's precedent that is universally accepted as no longer good because it didn't engage in that, so I think this is a rare, maybe the only, exception. Here you have a situation where (a) these cases are obviously discredited, they arose in the era when there was no incorporation, (b) the Supreme Court has expressly said, in this *Heller* opinion, that these case didn't engage in that inquiry--

JUDGE SOTOMAYOR: Isn't your biggest problem that even if there's an incoporat[ed] right, the right to bear arms, nunchaku sticks are not what the Founding Fathers were considering arms?

ATTORNEY MALONEY: Well, actually, the Supreme Court is very clear on that--

JUDGE SOTOMAYOR: Except in the way they're used . . .

JUDGE POOLER: And even *Heller* has an exception for dangerous and unusual weapons, doesn't it?

ATTORNEY MALONEY: Well that's, actually, that exception is only to carriage. My challenge is only to permission--to use in the home. But I want to address the arms question more broadly first because the Supreme Court was quite clear in saying: "The 18th-Century meaning is no different from the meaning today." I'm reading here from 2792 of 128 S. Ct. 2783. That's the cite. It's also page 7 of the Slip Opinion. "The 18th-Century meaning is no different from the meaning today." Then they quote an 18th-Century meaning. Arms are "any thing that a man wears for his defence, or takes into his hands, or useth in wrath to cast at or strike another." It could be a bullet-proof vest. That could be an "arm." It could be a sword. It could be a bow and arrow. All these are "arms," and there's something very, very scary about the idea of criminalizing something because it's a weapon, and saying it's not an "arm" entitled to protection under this right. That's like saying something, some medium is offensive because of its content, but it's not "speech" for the purposes of the First Amendment. It's a little funny to say, "We're prohibiting these things because they're weapons, but they're not 'arms.'" And as far as the other elements that are required for an "arm" to be protected by the Second Amendment, the Supreme Court is quite clear. It must have a reasonable connection to a militia. Certainly the nunchaku had a connection to a militia even before the founding of this nation, when Okinawa was invaded and they were used as a weapon by a militia, but even more in modern times, the Orcutt police nunchaku--and you'll find this in the Appendix--has been used by police forces throughout the United States. It has had military application, so it's certainly a connection to a militia. As far as being in general use by law-abiding citizens, the other element that the Supreme Court articulated in *Heller*, certainly many martial artists around the country and the world possess these in their homes for training in martial arts, so there is really no doubt--in my mind, anyway, of course, obviously there is some doubt here, but--these are "arms" for purposes of the Second Amendment. The incorporation question is troublesome. This Panel would probably be very bold to say that it has the power to do that, but then again, our tradition, our constitutional tradition, is one of protecting *rights*, and here we have a *right* at issue, and the right has been held not to be incorporated as against the states, but the precedent that held that is 125 years old, is widely accepted as fully discredited, and the Supreme Court has said that the Fourteenth Amendment analysis is *required*, so I think that "required" means something, and I don't think the court would be usurping its authority. Now, Justice Sotomayor alluded to the other precedent, and certainly--I mean, I'm going to read something, I guess more for the benefit of my adversary here: *Rodriguez de Quijas v. Shearson/American Express*, 490 U.S. 477 (1989): "If a precedent of this Court 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 this Court the prerogative of overruling its own decisions." OK, they have said that. That was 1989. Interestingly, though, more recently, in 1995, *Hubbard v. United States*, 514 U.S. 695, over an objection by the dissent, the Supreme Court endorsed a line of cases, in which this Circuit participated, that found an "exception" to a prior ruling. The "exception" was a nice way of, you know, disregarding the precedent, and the dissent realized that and made the argument, and in the footnote the majority said, you know, that's OK, we think it's not going to encourage the Second--not the Second Circuit, the lower courts in general--to disregard our precedent. I think this court has that power. One last point, and that is, if it's troublesome, but if you believe--and I hope that you do-

-that possession of a pair of sticks for training in martial arts in one's own home should not subject one to criminal sanctions and is against our constitutional . . . having constitutional traditions that protect the inviolability of the home and a long line of cases--if you feel that the Second Amendment is not the way you can go, but you would like to do something, I do have my unenumerated rights [arguments] fully briefed and I would hope that this Panel considers them carefully. Thank you.

JUDGE POOLER: Thank you. You've reserved one minute f[or] rebuttal. We'll hear from the defendant.

ATTORNEY HUTSON: Good morning, Your Honors.

JUDGE POOLER: You can lower that podium, so . . .

[Podium height is adjusted.]

JUDGE KATZMANN: Do you think we should remand in light of *Heller*?

ATTORNEY HUTSON: I think you should remand in lieu of finding that nunchaku are "arms" within the meaning of the Second Amendment, but I think it's clear from the District--excuse me, the Supreme Court's--opinion in *Heller* that nunchaku are not "arms" and so there is no need to remand. The Supreme Court specifically said that dangerous and unusual weapons may continue to be prohibited--not regulated, prohibited--and referred to a Texas case from the 1860s or the 1870s that discussed the types of weapons like nunchaku--not specifically nunchaku, I have to concede--but dirks, daggers, brass knuckles, that sort of thing, and they're not "arms" that a militia or soldier--militia man or woman or soldier--would have dashed to battle with, and--

JUDGE POOLER: You think we don't have to grapple with whether the incorporation doctrine still has vitality and *Heller*--we don't have to deal with *Heller* at all, is what you're saying?

ATTORNEY HUTSON: I don't think you have to, I think you can sidestep it. I'm not sure this is the right case to grapple with the incorporation doctrine and whether the Second Amendment should be incorporated against the states, but even when the Supreme Court suggested that *Cruikshank* was no longer applicable because the Court hadn't discussed the incorporation doctrine or had erroneously even said the First Amendment is not incorporated, the Supreme Court did discuss later decisions--for example, Presser against Illinois--in which the incorporation doctrine had been discussed and had affirmed that the Second Amendment is not incorporated through the states. One could also find that incorporation is not required here by looking at the Duncan against Louisiana tests, the most notable of it being, look at what the 13 state constitutions permitted at the time of the Second Amendment, and only one of the state constitutions, Pennsylvania, specifically had a provision permitting arms as an individual right for self-defense. The other states specifically referred to arms being permitted for use in the militia, and not in terms that could be misunderstood as in the Second Amendment, but in specific terms that those states said--

JUDGE POOLER: Opposing counsel has made an argument about personal rights that inure to him in his home. Do you find that at all compelling?

ATTORNEY HUTSON: Not at all, Your Honors, and that's one of the ways that the court can also sidestep the incorporation issue. Clearly, Mr. Maloney was in his home and the nunchaku were in his home when they were seized. In other papers, he said that they were under his couch. But he wasn't defending himself in his home, quite the opposite, so I think that's another way of finding that the Second Amendment simply doesn't apply to the right asserted here. There was no self-defense here, no immediate self-defense, so in addition to the fact that nunchaku are not "arms" within this country's use of "arms," in addition Mr. Maloney was not defending himself in his home.

JUDGE POOLER: Would it make a difference if he had been, if there was a home invasion and he used the nunchaku to defend himself and his family? But he still wouldn't have it, because the government wants to take them away . . .

ATTORNEY HUTSON: That's right. I think that nunchaku are not permitted under any circumstances--

JUDGE POOLER: So the self-defense argument doesn't make a difference?

ATTORNEY HUTSON: It doesn't make a difference. It's another . . . if . . . it isn't present in this case. It could be a case where it would be present, but it's not this case--

JUDGE POOLER: Once you take them away, they won't be available for the self-defense.

ATTORNEY HUTSON: That's correct. That's correct.

JUDGE KATZMANN: At the time that . . . section 265.01 was being considered with respect to adding the nunchaku, there was some debate, wasn't there? There were those who said that in fact it's used for martial arts training, that it has legitimate uses? There was the testimony of Archibald Murray, there was the position of the Committee on the Criminal Court of the New York [County] Lawyers' Association, which opposed criminalizing its possession without the need to show criminal intent?

ATTORNEY HUTSON: Yes, there was debate in the New York State Legislature, and many people were heard on whether nunchaku should be prohibited. In addition to the memoranda that you've cited, the New York City Mayor, the New York State Governor, and others--the DAs of the various counties--were adamant that--it was in 1974 approximately when this was adopted--that nunchaku were being increasingly used as weapons by street gangs and muggers, and that was a reason, that is the reason for their prohibition. Now, since the Court, the Supreme Court in *U.S. v. Salerno* has already found that protecting the public against crime is a compelling state interest, under that standard I believe the United States Supreme Court, even in light of *Heller*, would uphold the prohibition of nunchaku. It's not necessary for every state to treat nunchaku the same. There are factors present in New York, and California is one other state I'm aware of that absolutely prohibits nunchaku, the states don't have to agree for their prohibition on a particular type of weapon to be upheld when there's a compelling state interest in public safety as there is here and as there was found to be in New York, and in fact, New York believes, still, that there is such a strong public safety interest in keeping these nunchaku off the street that the Attorney General's Office entered into a settlement a few years ago with manufacturers who were bringing nunchaku into the state by

selling them to New York residents, and part of the settlement was that these companies send letters to the people they had sold the nunchaku to advising them that they must surrender them to the police, so this isn't a view by New York that what was present in 1974 is no longer applicable today. Nunchaku are still dangerous weapons that the state has a compelling interest in keeping off the streets.

JUDGE POOLER: Thank you, counsel.

ATTORNEY HUTSON: Thank you, Your Honors.

JUDGE POOLER: Mr. Maloney, you've reserved one minute for rebuttal.

ATTORNEY MALONEY: Yes. First of all, on the issue of . . . on the question about the "dangerous and unusual weapons," counsel cited in her 28(j) letter, and just now, a Texas case about brass knuckles, that sort of thing. That case involved carriage of these weapons in public, not in the home. The Supreme Court said about the dangerous and unusual weapons . . . the Second Amendment "does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes, such as short-barreled shotguns." It was keeping in line with *U.S. v. Miller*, and it was also talking about weapons that had amazing destructive dangerous capacity, and there were some other examples given by the Court in *Heller*: machine guns, bazookas, OK? Here we're talking about two sticks connected by a cord, not anything with an inherent firepower or dangerous explosive power, anything like that. Something that requires skill, and something that's really primarily a defensive weapon. As an offensive weapon, a baseball bat--as the horrible events of Friday tell us--a baseball bat is much more dangerous, because the momentum and mass can fracture a skull. Nunchaku really can't. I mean, they can inflict little wounds, and they can move very quickly, so they're excellent defensive weapons. If someone comes at you with a knife, you can hit their hand, and you might break the metacarpals here [indicating], but you would not--it's very difficult to kill someone with them other than by choking, I mean, but that's--you could choke anybody with anything, I mean, a piece of rope. As to the remand, let me just address that real quick. My record, the record here . . . the Appendix contains it on, let's see, page A-90 and A-91. There's ample evidence that the nunchaku had a connection to a militia--military and police use--and that they are in use by law-abiding citizens throughout the country. It is true that *only* California and New York prohibit possession in-home. If the court feels that more fact finding is necessary, it could remand on that issue to see if nunchaku are in conformity with *Heller*. I don't think it's really necessary because the record is ample, but on the other hand there was no discovery, there was really no need for discovery below, and so, on that thought, I'd just like again to remind the court that there is an unenumerated-rights approach that can be taken in lieu of the Second Amendment, if the court would like to go that route.

JUDGE POOLER: Thank you very much, counsel. We'll reserve decision.