

**UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT  
CIVIL APPEAL PRE-ARGUMENT STATEMENT (FORM C)**

1. SEE NOTICE ON REVERSE

2. PLEASE TYPE OR PRINT

3. STAPLE ALL ADDITIONAL PAGES

Case Caption:  John Copeland, Pedro Perez and Native Leather, Ltd., Plaintiffs vs. Cyrus Vance Jr., in his Official Capacity as the New York County District Attorney, and City of New York	District Court or Agency:  Southern District of New York	Judge:  Katherine B. Forrest
	Date the Order or Judgment Appealed from was Entered on the Docket:  January 27, 2017	District Court Docket No.:  11 Civil 3918 KBF
	Date the Notice of Appeal was Filed:  February 16, 2017	Is this a Cross Appeal?  <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No

<b>Attorney(s) for Appellant(s):</b>  <input checked="" type="checkbox"/> Plaintiff <input type="checkbox"/> Defendant	Counsel's Name: Daniel L. Schmutter Address: Hartman & Winnicki P.C. 74 Passaic Street Ridgewood, NJ 07450 Telephone No.: 201-967-8040 Fax No.: 201-967-0590 E-mail: dschmutter@hartmanwinnicki.com
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<b>Attorney(s) for Appellee(s):</b>  <input type="checkbox"/> Plaintiff <input checked="" type="checkbox"/> Defendant	Counsel's Name: Patricia Bailey Address: New York County District Attorney 1 Hogan Place New York, NY 10013 Telephone No.: 212-335-9000 Fax No.: 212-335-4390 E-mail: bailey@dany.nyc.gov dowdelle@dany.nyc.gov
	Counsel's Name: Louise Lippin Address: New York City Corporation Counsel 100 Church Street New York, NY 10007 Telephone No.: 212-788-0790 Fax No.: 212-791-9714 E-mail: llippin@law.nyc.gov

Has Transcript Been Prepared?	Approx. Number of Transcript Pages:	Number of Exhibits Appended to Transcript:	Has this matter been before this Circuit previously? <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No  If Yes, provide the following: Knife Rights, Inc., John Copeland, Pedro Perez, Knife Rights Foundation Inc. and Native Leather Ltd. vs. Case Name: Cyrus Vance, Jr. in his Official Capacity as the New York County District Attorney and City of New York 2d Cir. Docket No.: 13-4840-cv      Reporter Citation: (i.e., F.3d or Fed. App.)
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**ADDENDUM "A": COUNSEL MUST ATTACH TO THIS FORM: (1) A BRIEF, BUT NOT PERFUNCTORY, DESCRIPTION OF THE NATURE OF THE ACTION; (2) THE RESULT BELOW; (3) A COPY OF THE NOTICE OF APPEAL AND A CURRENT COPY OF THE LOWER COURT DOCKET SHEET; AND (4) A COPY OF ALL RELEVANT OPINIONS/ORDERS FORMING THE BASIS FOR THIS APPEAL, INCLUDING TRANSCRIPTS OF ORDERS ISSUED FROM THE BENCH OR IN CHAMBERS.**

**ADDENDUM "B": COUNSEL MUST ATTACH TO THIS FORM A LIST OF THE ISSUES PROPOSED TO BE RAISED ON APPEAL, AS WELL AS THE APPLICABLE APPELLATE STANDARD OF REVIEW FOR EACH PROPOSED ISSUE.**

**PART A: JURISDICTION**

I. <u>Federal Jurisdiction</u>		2. <u>Appellate Jurisdiction</u>	
<input type="checkbox"/> U.S. a party	<input type="checkbox"/> Diversity	<input checked="" type="checkbox"/> Final Decision	<input type="checkbox"/> Order Certified by District Judge (i.e., Fed. R. Civ. P. 54(b))
<input checked="" type="checkbox"/> Federal question (U.S. not a party)	<input type="checkbox"/> Other (specify): _____	<input type="checkbox"/> Interlocutory Decision Appealable As of Right	<input type="checkbox"/> Other (specify): _____

**IMPORTANT. COMPLETE AND SIGN REVERSE SIDE OF THIS FORM.**

PART B: DISTRICT COURT DISPOSITION (Check as many as apply)		
<b>1. Stage of Proceedings</b> <input type="checkbox"/> Pre-trial <input type="checkbox"/> During trial <input checked="" type="checkbox"/> After trial	<b>2. Type of Judgment/Order Appealed</b> <input type="checkbox"/> Default judgment <input type="checkbox"/> Dismissal/FRCP 12(b)(1) lack of subject matter juris. <input type="checkbox"/> Dismissal/FRCP 12(b)(6) failure to state a claim <input type="checkbox"/> Dismissal/28 U.S.C. § 1915(e)(2) frivolous complaint <input type="checkbox"/> Dismissal/28 U.S.C. § 1915(e)(2) other dismissal <input type="checkbox"/> Dismissal/other jurisdiction <input type="checkbox"/> Dismissal/merit <input checked="" type="checkbox"/> Judgment / Decision of the Court <input type="checkbox"/> Summary judgment <input type="checkbox"/> Declaratory judgment <input type="checkbox"/> Jury verdict <input type="checkbox"/> Judgment NOV <input type="checkbox"/> Directed verdict <input type="checkbox"/> Other (specify):	<b>3. Relief</b> <input type="checkbox"/> Damages: Sought: \$ _____ Granted: \$ _____ Denied: \$ _____ <input checked="" type="checkbox"/> Injunctions: <input type="checkbox"/> Preliminary <input type="checkbox"/> Permanent <input checked="" type="checkbox"/> Denied

PART C: NATURE OF SUIT (Check as many as apply)			
<b>1. Federal Statutes</b> <input type="checkbox"/> Antitrust <input type="checkbox"/> Bankruptcy <input type="checkbox"/> Banks/Banking <input checked="" type="checkbox"/> Civil Rights <input type="checkbox"/> Commerce <input type="checkbox"/> Energy <input type="checkbox"/> Commodities <input type="checkbox"/> Other (specify): _____ <input type="checkbox"/> Communications <input type="checkbox"/> Consumer Protection <input type="checkbox"/> Copyright <input type="checkbox"/> Patent <input type="checkbox"/> Trademark <input type="checkbox"/> Election <input type="checkbox"/> Soc. Security <input type="checkbox"/> Environmental <input type="checkbox"/> Freedom of Information Act <input type="checkbox"/> Immigration <input type="checkbox"/> Labor <input type="checkbox"/> OSHA <input type="checkbox"/> Securities <input type="checkbox"/> Tax	<b>2. Torts</b> <input type="checkbox"/> Admiralty/ Maritime <input type="checkbox"/> Assault / Defamation <input type="checkbox"/> FELA <input type="checkbox"/> Products Liability <input type="checkbox"/> Other (Specify):	<b>3. Contracts</b> <input type="checkbox"/> Admiralty/ Maritime <input type="checkbox"/> Arbitration <input type="checkbox"/> Commercial <input type="checkbox"/> Employment <input type="checkbox"/> Insurance <input type="checkbox"/> Negotiable Instruments <input type="checkbox"/> Other Specify	<b>4. Prisoner Petitions</b> <input type="checkbox"/> Civil Rights <input type="checkbox"/> Habeas Corpus <input type="checkbox"/> Mandamus <input type="checkbox"/> Parole <input type="checkbox"/> Vacate Sentence <input type="checkbox"/> Other
<b>5. Other</b> <input type="checkbox"/> Hague Int'l Child Custody Conv. <input type="checkbox"/> Forfeiture/Penalty <input type="checkbox"/> Real Property <input type="checkbox"/> Treaty (specify): _____ <input type="checkbox"/> Other (specify): _____	<b>6. General</b> <input type="checkbox"/> Arbitration <input type="checkbox"/> Attorney Disqualification <input type="checkbox"/> Class Action <input checked="" type="checkbox"/> Counsel Fees <input type="checkbox"/> Shareholder Derivative <input type="checkbox"/> Transfer	<b>7. Will appeal raise constitutional issue(s)?</b> <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No  Will appeal raise a matter of first impression? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No	

1. Is any matter relative to this appeal still pending below? <input type="checkbox"/> Yes, specify: _____ <input checked="" type="checkbox"/> No			
2. To your knowledge, is there any case presently pending or about to be brought before this Court or another court or administrative agency which:			
(A) Arises from substantially the same case or controversy as this appeal?		<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No
(B) Involves an issue that is substantially similar or related to an issue in this appeal?		<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No
If yes, state whether <input type="checkbox"/> "A," or <input type="checkbox"/> "B," or <input type="checkbox"/> both are applicable, and provide in the spaces below the following information on the <i>other</i> action(s):			
Case Name:	Docket No.	Citation:	Court or Agency:
Name of Appellant:			
Date: 3/02/2017	Signature of Counsel of Record: /Daniel L. Schmutter		

**NOTICE TO COUNSEL**

Once you have filed your Notice of Appeal with the District Court or the Tax Court, you have only 14 days in which to complete the following important steps:

1. Complete this Civil Appeal Pre-Argument Statement (Form C); serve it upon all parties, and file it with the Clerk of the Second Circuit in accordance with LR 25.1.
2. File the Court of Appeals Transcript Information/Civil Appeal Form (Form D) with the Clerk of the Second Circuit in accordance with LR 25.1.
3. Pay the \$505 docketing fee to the United States District Court or the \$500 docketing fee to the United States Tax Court unless you are authorized to prosecute the appeal without payment.

**PLEASE NOTE: IF YOU DO NOT COMPLY WITH THESE REQUIREMENTS WITHIN 14 DAYS, YOUR APPEAL WILL BE DISMISSED. SEE LOCAL RULE 12.1.**

## **Addendum A**

### *Description of the Nature of the Action*

This 42 U.S.C. § 1983 action challenges the expansive interpretation of the New York State knife law and related enforcement practices. Defendants enforce state knife law based on nothing more than caprice and happenstance, making it impossible for citizens to determine whether common pocket knives are lawful or are deemed prohibited “gravity knives.” Criminal liability for possession of a pocket knife in New York City turns entirely on chance or factors beyond the person’s control or knowledge because the exact same knife can be deemed a perfectly lawful pocket knife one day and an illegal gravity knife the next. The exact same pocket knife can be fully lawful in Brooklyn one week but result in arrest and prosecution in Manhattan the following week. The arbitrary manner in which Defendants enforce New York State’s gravity knife statute renders it impossible to ever know whether or not at any given moment one is in possession of a legal pocket knife.

Defendants interpret the law that prohibits “gravity knives” (N.Y. Penal L. §§ 265.00(5), 265.01(1)) to include not only knives that fall within the customary and traditional definition of “gravity knife,” but also folding locking blade pocket knives, the most common pocket knife in the United States. This expansion of the gravity knife law is void-for-vagueness in violation of the Due Process Clause of the Fourteenth Amendment both because it goes beyond the notice provided by the statute, and also because the “test” used to determine criminal liability – an attempt to open the blade of a folding knife using a wrist-flicking motion – is inherently subjective and lacks an objective standard by which a person can measure the legality of his or her conduct. Even if 100

people are unable to “wrist-flick” a folding knife open, it is always possible that a to-be-encountered police officer will be able to do so, and will accordingly assert that the pocket knife is a prohibited gravity knife. Further, there is no place a person can go to learn this “wrist-flick” test, nor is there any procedure for this “wrist-flick” test to be found in any official document or other resource of the Defendants.

Both Defendants have used the expansive gravity knife interpretation at issue in this case to assert criminal liability on the part of the Plaintiffs. After Defendant District Attorney Vance learned that Plaintiff Native Leather, Ltd. was selling folding knives with locking blades, investigators from his office inspected the knives and asserted that some of them – the particular ones that investigators were able to open using the “wrist-flicking” action described above – were prohibited gravity knives. And, New York City police officers charged Plaintiffs John Copeland and Pedro Perez with violating the gravity knife law after seeing them carrying folding knives in their pockets. As a result, these Plaintiffs have changed their behavior. Native Leather no longer sells any folding knives that its owner is able to open by “wrist-snapping” (although there is no assurance that a future investigator from the DA’s office will not be able to do so). Plaintiffs Copeland and Perez no longer carry folding knives because of the threat that New York City police officers will again stop them, attempt to “wrist-flick” the folding knives open, and assert that the folding knives are prohibited gravity knives.

Defendants moved to dismiss the Complaint pursuant to Fed. R. Civ. P. 12(b)(1) & (6) shortly after Plaintiffs commenced this action in 2011. Plaintiffs thereafter filed a first Amended complaint that added Native Leather, Ltd. and Knife Rights Foundation, Inc. as Plaintiffs, and the District Court then dismissed Defendants’ motions as moot. Defendants then moved to dismiss the

first Amended Complaint pursuant to Fed. R. Civ. P. 12(b)(1) & (6), on substantially the same grounds as raised in their prior motions.

The District Court granted Defendants' motions and dismissed the first Amended Complaint on September 25, 2013. The District Court concluded that the injury that Plaintiffs Copeland and Perez asserted was hypothetical and speculative because they alleged that they wanted to "possess a knife 'similar' to the one they possessed at the time of their arrests," but neither "allege[d] the make and model of knife that he wants to carry or specifically describe it."

Ironically, the Court based its dismissal in part on Plaintiffs' failure to specify legal knives they wished to possess, ignoring that the inability to determine what is lawful and not lawful to possess was at the very heart of their claim.

Similarly, the District Court concluded that Native Leather's fear that someone else would be able to "wrist-flick" a knife open, even though it had passed Native Leather's own application of the "wrist-flick" test, was "mere conjecture," as "[a] plaintiff must allege something more than an abstract, subjective fear that his rights are chilled in order to establish a case or controversy."

Plaintiffs appealed the dismissal order to this Court, which unanimously reversed, holding that the credible threat of future prosecution due to Plaintiff's intention to engage in similar conduct *in the future* gave them standing to maintain the within action. The matter was remanded to the District Court for trial.

### *The Result Below*

The District Court held a trial entirely on paper submissions, with the exception of live testimony from one witness and a knife opening demonstration on June 16, 2016.

The District Court found for Defendants, focusing erroneously on the past conduct of the plaintiffs rather than their intended future conduct, as this Court had recognized was required in the previous appeal.

The District Court also ignored key evidence from several of Plaintiffs' witnesses and a key admission from defense witness Assistant District Attorney Dan Rather that a person could test a knife in a store, fail to make it open with a "wrist-flick test" after multiple attempts, purchase the knife concluding it is legal, walk two steps outside, encounter a police officer, and that police officer could successfully wrist-flick the knife open and place that person under arrest.

*The Notice of Appeal and Lower Court Docket Sheet are Attached.*

*The Decision and Order (January 27, 2017) is Attached.*

**Addendum B**

Issues to be Raised on Appeal

1) Whether the District Court Erred in Finding that the New York Gravity Knife Law is Not Void for Vagueness as Applied to Plaintiffs.

The standard of review is *de novo*, except as to any findings of fact arising solely from the limited live testimony in open court, as to which the standard of review is clearly erroneous.

2) Whether the District Court Erred in Ignoring Certain Evidence of the Plaintiffs.

The standard of review is *de novo*.

3) Whether the District Court Erred in Not Crediting Certain Uncontroverted Evidence of the Plaintiffs.

The standard of review is *de novo*.