IN THE SUPREME COURT OF CALIFORNIA

Case No. S218861

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,

vs.

EMMANUEL CASTILLOLOPEZ,
Defendant and Appellant.

On Review From the Fourth Appellate District, Case No. D063394
San Diego County Superior Court, Case No. SCD242311
Hon. Albert T. Harutunian, III, Judge

BRIEF OF AMICI CURIAE KNIFE RIGHTS FOUNDATION, INC. AND SECOND AMENDMENT FOUNDATION, INC. IN SUPPORT OF DEFENDANT AND APPELLANT EMMANUEL CASTILLOLOPEZ

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INTEREST OF AMICI CURIAE

Knife Rights Foundation, Inc. is a non-profit organization that serves its members and the public, through direct and grassroots advocacy, focused on protecting the rights of knife owners to keep and carry knives and edged tools, including their utilization as a means of self-defense in extremis. See, e.g., *State v. DeCiccio* (Conn. 2014) 105 A.3d 165. The purposes of the Knife Rights Foundation include the promotion of education regarding state and federal knife laws, and the defense and protection of the civil rights of knife owners nationwide.

Second Amendment Foundation, Inc. ("SAF") is a non-profit educational foundation that seeks to preserve the effectiveness of the Second Amendment's guarantee of the right to keep and bear arms, through educational and legal action programs. The SAF has over 650,000 members and supporters residing in every State of the Union, including thousands in California.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case presents the question of whether defendant Emmanuel Castillolopez's conviction, for carrying a non-locking Swiss Army knife in the "open" position, concealed, should be reversed. Petition for review was granted after the Court of Appeal, Fourth Appellate District, reversed Mr. Castillolopez's conviction. The specific issue on review as stated is: whether the defendant's possession of a concealed and opened pocketknife with the blade in its fully extended position was sufficient to sustain his conviction for carrying a concealed dirk or dagger in violation of Penal Code § 21310.

Amici Curiae herein believe the Court of Appeal correctly decided the issue of whether the evidence was sufficient to support the reversal of Mr. Castillolopez's conviction. It was undisputed that the Swiss Army knife at issue did not contain any overt locking mechanism, and therefore, it did not meet the definition of "dirk or dagger," under both the historical understanding

of what a dirk or dagger is, nor under the plain words of the statute because it did not have a fixed blade or a folding blade that "locked into place."

The interest of Amici Curiae herein is simple and straightforward. Their combined members and constituency have a substantial interest, first, in upholding the Court of Appeal's decision, to the extent that it correctly found that the evidence was insufficient to support a conviction for Pen. Code § 21310. The constituents and members of Amici Curiae herein are specifically concerned about over-criminalization of the possession or carrying of innocent, innocuous, and trivial items highly unlikely actually to be used as weapons, even if they were theoretically so capable. As asserted below, Respondent's overinclusive view of what constitutes a "dirk or dagger," within the meaning of Pen. Code § 16470, as applied to an ordinary, open, non-locking Swiss Army knife (an item that has been carried by tens of millions nationwide) loses sight of both the historical prohibition on dirks and daggers, and does not comport with the statute.

Amici Curiae would further urge, in the alternative, that the conviction should be overturned on the grounds that the statute, purporting to define "dirk or dagger" as amended, is unconstitutionally vague, because it invites arbitrary enforcement of the law. In 2000, in *People v. Rubalcava* (2000) 23 Cal.4th 322, this Court found "troubling" the potential for criminalization of otherwise innocent or innocuous conduct under the auspices of the prohibition on carrying concealed so-called dirks or daggers. Amici Curiae therefore believe, in light of Mr. Castillolopez's conviction for possession of a Swiss Army knife that happened to be in the open position – where no other criminal conduct was alleged – that this Court's concerns were warranted and it is time to reexamine this statute.

ARGUMENT OF AMICI CURIAE

I. THE COURT OF APPEAL PROPERLY CONCLUDED THAT DEFENDANT'S SWISS ARMY KNIFE WAS NOT A DIRK OR DAGGER, NEITHER HISTORICALLY NOR WITHIN THE PLAIN MEANING OF THE STATUTE .

We view the problem before this court as such: When does an ordinary, unaltered Swiss Army knife cease to become that iconic tool of ingenious Swiss design and improvisational utility, and become categorized as a weapon historically called a "dirk or dagger"? According to Respondent, the moment that Swiss Army knife is hidden on the person, if left open, it transmutes from a common knife to a dirk or dagger within the meaning of Pen. Code § 16470. Such a conclusion defies common sense, and is supported neither by the historical view of a dirk or dagger, nor by the language of the statute itself.

In the view of Amici Curiae herein, Respondent unfairly re-characterizes the Swiss Army knife into the category of weapon, something for which it was neither designed nor is it particularly effective. A Swiss Army knife is neither historically a stabbing weapon, nor does it fit the definition as one because it lacked an overt locking mechanism that would allow it to be used as such. For these reasons, the Court of Appeal correctly found that the evidence was insufficient to support Mr. Castillolopez's conviction under the concealed weapons statute.

A. HISTORICALLY, AN ORDINARY POCKETKNIFE WAS NEVER CONSIDERED TO BE A DIRK OR DAGGER.

Historically, pocket knives on the one hand, and dirks and daggers on the other, have been considered separate, mutually exclusive items. "Dirks or daggers were originally used in dueling and required blades locked into place to be effective. They are weapons designed primarily for stabbing." *People v. Forrest* (1967) 67 Cal.2d 478, 480-481 (citing Webster's Third New Internat. Dict. (1961) pp. 570, 642 and 6 Encyclopaedia Brittanica (1954) p. 972;

Peterson, American Knives (1958) p. 2.) A dagger itself has historically been regarded as a stabbing weapon bearing a double-edged blade. See, *People v. Mowatt* (1997) 56 Cal.App.4th 713, 719 ("[i]n pure usage," the dagger was considered to be "always a weapon," and typically consisted of having a symmetrical tapering blade with at least two edges.) What comes to mind in consideration of a "dagger" is the classic Fairbairn-Sykes fighting knife, used by British commandos during World War II. (See, Wolfgang, The Fairbairn-Sykes Fighting Knife: Collecting Britain's Most Iconic Dagger (2011 ed.)) A "dirk" has historically been either synonymous with, or a type of dagger. See, *State v. Walthour* (Fla. App. 2004) 876 So.2d 594, 597 ("'dirk' and 'dagger' are used synonymously, and consist of any straight stabbing weapon"); *Knight v. State* (Nev. 2000) 116 Nev. 140, 145-147 ("a dirk appears to be simply a type of dagger[.]")

In *People v. Bain* (1971) 5 Cal.3d 839, a case decided before our Legislature's attempts to define dirk or dagger, this Court held that the question of whether the defendant's knife constituted a "dirk or dagger" was a close one, which could not be determined as a matter of law, but which warranted reversal in conjunction with prosecutorial misconduct. *Bain* was, in fact, primarily a case about prosecutorial misconduct. But this Court also considered whether the evidence supported the defendant's conviction for possession of a dirk or dagger under the then-existing statute, Pen. Code § 12020.[1] At the time of his arrest, the defendant was carrying, concealed on his person, a knife 11 inches long, the blade of which was nearly 5 inches long. 5 Cal.3d at 853 (conc. opn. of Burke J.) Although the blade's sides were dull, and not useable for cutting, its tip was "particularly appropriate" for stabbing," and "the blade could easily be locked into place." Id. It was disputed at trial whether the defendant, at the

[1] As the parties note, the statutes regulating deadly weapons was reorganized, and its sections reassigned, without substantive change, in 2010. Pen. Code § 16005.

time of his arrest, was carrying the knife in the open, "locked position" or whether it was closed when the officer found it. 5 Cal.3d at 844. At that time, of course, whether the knife was open or closed was not dispositive of the issue of the essential character of the knife itself as a dirk or dagger.

At the outset, the Court reiterated that "[a]s is the usual practice in interpreting criminal statutes, the term 'dirk or dagger' is to be strictly construed." Id. at 850. The Court further noted that it had been held that "[a] dagger has been defined as any straight knife to be worn on the person which is capable of inflicting death except what is commonly known as a 'pocket knife.'" Id. at 851 (citing *People v. Ruiz* (1928) 88 Cal.App. 502, 504.) In examining the facts at issue, this Court ultimately concluded that "it is a question of fact for the jury to determine whether the instant knife [was] a 'dirk or dagger[,]'" and rejected the defendant's claim that the jury could not find the knife to be a dirk or dagger under the then-existing definition. However, the Court further added that "the knife in the instant case cannot be held as a matter of law to be a 'dirk or dagger.'" Id. at 852. The Court concluded that all of the cases "which have discussed the term 'dirk or dagger,' agree that the term does not include what is commonly known as a pocketknife. Like the ordinary pocketknife, the instant knife folds, and although it might be viewed by some as too large to qualify as a pocketknife, the knife is not so large that when folded it will not lie flat on the bottom of the pocket of men's pants. It is for the jury to determine whether the instant knife should be categorized as what is commonly known as a pocketknife." Id.

The import of this is clear. Even before the Legislature first attempted, imprecisely, to define "dirk or dagger" starting in 1993, the *Bain* Court observed the well-understood proposition that a pocketknife, whether open or closed, was not a dirk or dagger, nor a subset thereof. In fact, the very concepts of the nature and intended purpose of these types of knives appeared to make them mutually exclusive to each other. See also, *People v. Forrest, supra*, 67

Cal.2d at 481 (reversing defendant's conviction for possession of a closed, oversized pocket knife, finding the Legislature did not included folding pocketknives within the meaning of "dirk or dagger"); *People v. La Grande* (1979) 98 Cal.App.3d 871, 873 (an awl is not a dirk or dagger within the meaning of Pen. Code § 12020, and observing that that section did "not encompass every sharp-pointed tool which can stab within the definition of dirk or dagger.")

We would submit that legislative attempts to change the inherent character of a pocketknife as a dirk or dagger cannot override history and common sense. And therefore, simply calling a pocketknife a "dirk or dagger," while it certainly facilitated the California District Attorneys Association's stated desire to make the prosecution of knife possession easier (see *In re George W.* (1998) 68 Cal.App.4th 1208, at 1213), it did not fundamentally alter the meaning of what a dirk or dagger is, even 20 years later. If prosecutors one day convince the Legislature to facilitate their jobs by recasting all BB guns as firearms, it would still not make it so, even with the long passage of time. In fact, we note that California stands alone as the only state in the Union which attempts to conflate the formerly mutually exclusive concepts of folding knives

and "dirks or daggers" by making the former a subset of the other by virtue of its being open and concealed.[2]

B. THE FACT THAT THE KNIFE WAS CONCEALED DID NOT TRANSMUTE THE KNIFE INTO A DIRK OR DAGGER, OR ANY OTHER DANGEROUS STABBING INSTRUMENT.

Respondent's position in this case, if reduced to a syllogistic exercise, may be stated as follows: All pocketknives may be used as stabbing weapons.[3] All knives that can be used as stabbing weapons are dirks or daggers. Therefore, all pocketknives are dirks or daggers, and may not be concealed. The one saving exception from this syllogism is that pocketknives appear to be expressly excepted, and therefore would fit within the syllogism "only if the blade of the knife is exposed and locked into position." Pen. Code § 16470.

Therefore, in the Respondent's view, virtually any open knife is now considered to be a dirk or dagger. And Respondent does not shy away from this concept of over-inclusiveness. Indeed, it welcomes it. First, it notes that this Court has recognized that "some instruments may be designed for innocent

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[2] A 50-state survey of deadly weapons laws in the U.S. reveals that, while 29 states prohibit the concealed carry of "dirks" or "daggers" (or "Bowie knives"), only two other states, Delaware and North Carolina, make any distinction between the folded or opened state of the knife whatsoever. Both states prohibit the concealment of "any deadly weapon" (11 Del. Code §§ 222, 1442 (2012); N.C. Gen. Stat. § 14-269 (2013)), and exempt an "ordinary pocketknife carried in a closed position" (though North Carolina provides a defense if the weapon was possessed for a legitimate purpose and not used for an illegal purpose.) However, except for California, no other state in the Union considers an ordinary folding pocketknife such as the one at issue in the instant case to be a "dirk" or "dagger," or considers the act of opening a folding knife a transformative event that metamorphoses a legal pocketknife into an illegally-concealed "dirk" or "dagger" as California does.

[3] In this case, the knife blade was "two to three inches long" (2RT 138). California is among the majority of states that do not prohibit the concealed carrying of knives by the measurement of their blades.

or harmless purposes but may nonetheless become criminal under certain circumstances." (Resp. Op. Brief at p. 13.) Citing *People v. Grubb* (1965) 63 Cal.2d 614, 621, Respondent then asserts that the Legislature legitimately criminalizes the possession of "ordinarily harmless objects when the circumstances of possession demonstrate an immediate atmosphere of danger." (Resp. Op. Brief at p. 13.) Therefore, let us be candid about the sweep of Respondent's claims: In the sixty years since the predecessor to Pen. Code § 16470 was enacted (that is, since the original enactment of Pen. Code § 12020), we will have gone from the criminalization of carrying traditional stabbing weapons, criminalized because of their perceived dangerousness, e.g., *People v. Mowatt* (1997) 56 Cal.App.4th 713, 718 ("[i]t has long been recognized that section 12020, subdivision (a) proscribes some weapons that are inherently dangerous"), to the criminalization of virtually any edged tool or sharpened instrument, criminalized not because they are necessarily dangerous in and of themselves, but merely by the act of concealment itself.

Are we inexorably grinding toward a worldview that outlaws the carrying of any knives, innocent or otherwise? Perhaps. In *In re Rosalio S.* (1995) 35 Cal.App.4th 775, the Fourth District Court of Appeal considered whether a juvenile's possession of a Leatherman multi-tool on school grounds was properly found to be a knife prohibited as such by Pen. Code § 626.10, subdiv. (a), as being a knife with a blade longer than 2½ inches. The court reversed the finding on the ground that the blade length was measured incorrectly. In support of its decision, the court rejected the Attorney General's argument that the purpose of banning blades of a certain length was to eliminate or curtail the presence of "stabbing weapons" on school campuses. 35 Cal.App.4th at 780. The court rejected this argument, in part, on the grounds that the Legislature had already outlawed stabbing knife-like weapons elsewhere by enacting the 1993 amendment to the definition of dirk or dagger as a knife "primarily designed, constructed, or altered to be a stabbing

instrument designed to inflict great bodily injury or death." 35 Cal.App.4th at 780. But in his dissent, Justice Froehlich believed that the knife itself had the potential for inflicting a stab wound to a certain degree, and therefore, met the legislative prohibition, irrespective of the length of the sharpened portion. Justice Froehlich further found troubling the majority's reliance upon the dirk and dagger definition, stating that "[i]f we logically follow the majority's lead and assume, as does the majority, that the Legislature had a clear view of its objective, *then any instrument which otherwise could be classified as a 'knife' becomes a dirk or dagger*, regardless of its length, when it is capable of being used as a 'stabbing instrument.'" Id. at 783 (Froehlich, J., dissenting, emphasis added.)

Twenty years later, at least in those states which tend to distrust the idea of knives carried concealed in the pockets of ordinary citizens, Justice Froehlich's view on the matter has apparently been realized. Today, in the view of Respondent as expressed in the briefs, virtually any instrument that could be classified as a knife, when open, indeed becomes a dirk or dagger – irrespective of the length – thereby prohibiting its concealment. Respondent emphasizes that the Legislature does not consider ordinary pocketknives to be inherently dangerous instrumentalities of death of great bodily injury or death (per Pen. Code § 16470), "unless and until they are concealed in a dangerous manner." (Respondent's Opening Brief on the Merits ("Op. Brief") at p. 13.) Yet, Respondent overstates the proof required for a conviction, while understating the legislative sweep. Concealment "in a dangerous manner" is not required for a conviction under the statute. Rather, under Respondent's view, the statute roundly prohibits *all* concealment of a pocketknife left open, whether concealed "dangerously" or otherwise.

Amici Curiae would contend this would be a tragic denouement to our story regarding the prohibition on dirks or daggers. In *People v. Rubalcava*, *supra*, 23 Cal.4th 322, which we discuss, *infra* at pp. 17-19, this Court found

"troubling" the potentially innocent uses which may be criminalized by overzealous use of the dirk and dagger statute. In the present case, the nature of a Swiss Army knife, or "multitool," should be well known to most, and to the Justices of this Court. Indeed, as is well-understood, and conceded by the prosecution's expert witness, a "Swiss Army knife [is] more of a tool than a stabbing instrument," and "it wouldn't […] be considered a fighting knife like a stabbing tool." (Slip Op. at p. 24.) Again, the blade length is "between two to three inches" (2RT 138), which makes it a legal folding knife for one to carry in any state in the Union.

Respondent's conclusion that "carrying a concealed and open pocketknife should be punishable as a dirk or dagger" (Resp. Op. Brief at 13) is therefore an unreasonable generalization, where not all knives lock open, nor would they be effectively capable stabbing instruments.

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Let us then address what the party briefs seem to regard as the heart of the matter: whether the Swiss Army knife is a "dirk or dagger" merely by virtue of its being open, or whether the statutory requirement of being "locked into position" necessarily means something more. On this issue, the Court of Appeal correctly found that the phrase "locked into position," a requisite of Pen. Code § 16470, means "firmly fixed in place or securely attached so as to be immovable." (Slip Opn. at 23, 27.) Respondent claims simply that "a pocketknife can be a dirk or dagger when it is carried as one – that is, with the blade secured in the open position." (Resp. Op. Brief at 1.) We believe that the cases, and common sense, dictate otherwise, and that the Court of Appeal's focus on the relative immobility of the blade was correct.

In re T.B. (2009) 172 Cal.App.4th 125, upon which Respondent relies in its reply brief, illustrates two things: (1) a folding knife that is "locked into place" has a meaning separate and apart from merely being "fully open," and (2) the Legislature could have written the statute to reflect the meaning

Respondent ascribes to it, had it desired to do so. At issue in the *T.B.* case was a juvenile's adjudication under Pen. Code § 626.10, subdiv. (a), which, then and at present, essentially prohibits the carrying of most knives, of any size, on school grounds. First, we note that Pen. Code § 626.10, subdiv. (h) defines "dirk or dagger" using the non-qualified definition as: "a knife or other instrument with or without a handguard that is capable of ready use as a stabbing weapon that may inflict great bodily injury or death." But the appellant in *T.B.* was not adjudicated a ward of the state based upon the prohibition on carrying dirk or dagger, but rather, upon the court's finding that he had carried "a folding knife with a blade that locks into place," in violation of section 626.10, subdiv. (a). It was undisputed that the blade contained within the multi-tool at issue was "approximately one inch" long. 172 Cal.App.4th at 128.

Clearly, had the Legislature wanted to prohibit the concealed carrying of a knife with a blade in the "open position," it could have said so. As illustrated by *In re T.B.*, the Legislature knew how to identify a "folding knife that locks into place," which is not simply synonymous with "open." The court specifically took time to point out that the blade in question "can be deployed by pulling it out of the interior of the tool and locking it into place. The blade can then be 'folded' back into the tool once the locking mechanism is released." 172 Cal.App.4th at 130. Although the court's use of the passive voice is unfortunate, it implies that there must be some conscious effort to unlock the blade before it can be closed – and not simply pushed out of place.

Likewise, in *In re George W.*, *supra*, 68 Cal.App.4th 1208 (a case again involving possession of a dirk or dagger under then-Pen. Code § 12020), the knife in question could be closed only by pushing a release lever that allowed the blade to retract into the handle. 68 Cal.App.4th at 1211. On review, the appellate court observed that "there [was] no evidence in the record demonstrating or tending to suggest the blade of the folding knife in

[defendant's] pocket was exposed and locked into position – as opposed to being closed and retracted into its handle." Id. at 1215. Thus, the court concluded that the evidence was insufficient to establish that the defendant "carried the concealed folding knife in such a way as to satisfy the controlling statutory definition of 'dirk or dagger'— namely that the folding knife have its blade exposed and locked into position." Id.

In the present case, Respondent asserts that the *T.B.* case demonstrates that "locked into place" does not mean a knife must necessarily be able to be *locked* into place. Respondent further asserts on the one hand that the Court of Appeal's decision "did not rest on how secure the locking mechanism held the blade in the open position or how the mechanism released the blade from the open position." (Resp. Reply Brief at p. 10.) At the same time, however, Respondent quotes language from that case, reciting the trial court's findings, that "on this device, when the blade is open, certainly it is in a locked position, and one cannot move the blade. […]" 172 Cal.App.4th at 128. It necessarily follows that if one cannot move a blade, without some mechanical manipulation, it is necessarily "locked into place," and not simply "open." See also, *People v. Forrest*, *supra*, 67 Cal.2d at 479 ("[w]hen opened like an ordinary pocketknife, the blades do not lock into place.")

Here, it was undisputed that the Swiss Army knife in Mr. Castillolopez's possession did not have any type of locking mechanism that required it to be released, prior to closure, other than by overcoming the tension holding it in place by moving the blade towards the closed position. (Slip Op. at p. 5.) The arresting officer demonstrated to the jury that to close the blade, he needed to push on nothing but the blade itself. (Id.) The prosecution's expert witness, Cameron Gary, could not remember the name of the type of mechanism the

knife had,[4] but described it as having spring tension which created some resistance, which could be overcome with pressure, and where the blade would then "lock" or "click" into place. (2 RT 138-139, 148.) However, it appears to be undisputed, and common knowledge, that some knives do indeed have a locking mechanism which prevents the knife from closing unless the mechanism is manipulated. (2 RT 148.)

Thus, the Court of Appeal here reached the appropriate conclusion, similar and consistent with the implied finding in *In re T.B.*, *supra*, that if a knife is to be considered in a "locked" position, under the statute, one cannot move the blade.

Respondent takes the position, however, that "'locked into position,' in the context of folding knives, means the blade is secured in the open position." (Resp. Reply Brief at p. 5.) "That," according to Respondent, "is because 'locked into position' describes 'the final spot of opening' rather than a 'locking blade knife.'" (Id., at p. 6.) In other words, when the Legislature said "locked into position," it did not mean *locked* into position, it merely meant "open." Respondent further asserts: "Nothing in the statutory language supports Castillolopez's argument that section 16470 requires a certain kind of locking mechanism, and that pocketknives with friction or spring locks are excluded from the broad purview of the statute." (Resp. Reply Brief at p. 7.) Essentially, Respondent is asserting that "nonlocking" and "locked," as used, has two different meanings – not only in the same statute, but in the very same sentence. But that type of equivocation is not permitted. "It is a well-established principle of statutory construction that 'the same words or phrases are presumed to have the same meaning when used in different parts of the statute.'" *Catholic Social Services, Inc. v. Meese* (E.D. Cal. 1988) 685 F.Supp.

[4] But to fully inform the Court of this point, we would offer that a Swiss Army knife of this type utilizes a simple slipjoint, used in most Swiss Army brand knives.

1149, 1153 (citing *United States v. Various Slot Machines on Guam* (9th Cir. 1981) 658 F.2d 697, 703 n. 11.) In this case, Respondent's interpretation would reduce the term "locked into position" within section 16470 to a meaningless phrase, for then *every* folding knife – even "nonlocking" ones – would be capable of being "locked" open.[5]

And ultimately, Respondent's argument, taken to its logical conclusion, would mean that a folding Swiss Army knife, commonly understood to have no overt locking mechanism, which may be 99% open, and concealed, enjoys the status as being every good citizen's pocketknife, but that the moment it "clicks" into the open position, even if the barest amount of human force is necessary to push the blade back from its open position to start its path toward closure, it becomes a instrument "capable of ready use as a stabbing weapon that may inflict great bodily injury or death" within the meaning of Pen. Code § 16470, even if it is completely impractical, and frankly, calls for only the most desperate of circumstances, for one actually to use it as a fighting weapon.[6]

This is an untenable conclusion, and the Court of Appeal correctly decided the issue.

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[5] It would be a curious and unusable folding knife, indeed, if it were capable of closing without the use of any pressure or physical manipulation whatsoever.

[6] Respondent argues that "Nowhere in the plain language of the section 16470 does the Legislature suggest that a dirk or dagger must be a risk-free weapon or the best stabbing weapon." (Resp. Op. Brief at 16.) Yet, Respondent is also arguing, that by definition alone, a dirk or dagger no longer has to be any sort of *actually* useable stabbing weapon at all in order to be classified as such, by statutory definition alone. Respondent's position is essentially: if it is a pocketknife, and it is in the open position, it has become transmuted into a dirk or dagger, the concealment of which is a crime. That again, would be a surprise to the millions of ordinary citizens who use folding knives as tools on a daily basis, and who do not consider themselves to be holding stabbing weapons, or any sort of derivatives from traditional dueling weapons.

II. MR. CASTILLOLOPEZ'S PRIMARY ARGUMENT BEFORE THE COURT OF APPEAL WAS CORRECT – PENAL CODE § 16470 IS UNCONSTITUTIONALLY VAGUE.

Alternatively, Amici Curiae urge reversal of Mr. Castillolopez's conviction on the grounds that the statute defining dirks and daggers, Pen. Code § 16470, under which he was convicted, is void on its face for vagueness, because it is unclear as to what "nonlocking folding knife […] into locked position" means, and it therefore invites arbitrary enforcement. Amici Curiae further assert the statute is unconstitutionally overbroad because it criminalizes innocent conduct.

A. STANDARD

It is well established that a criminal statute that is so indefinite in its statement of the standard of guilt that it does not give adequate notice of the conduct prohibited violates due process under the "void for vagueness" doctrine. *Connally v. General Const. Co.* (1926) 269 U.S. 385, 391, 46 S.Ct. 126, 127. In *People v. Heitzman* (1994) 9 Cal.4th 189, this court summarized that "in order for a criminal statute to satisfy the dictates of due process, two requirements must be met. First, the provision must be definite enough to provide a standard of conduct for those whose activities are proscribed. […] Because we assume that individuals are free to choose between lawful and unlawful conduct, 'we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he [or she] may act accordingly. Vague laws trap the innocent by not providing fair warning.' […] Second, the statute must provide definite guidelines for the police in order to prevent arbitrary and discriminatory enforcement. […] When the Legislature fails to provide such guidelines, the mere existence of a criminal statute may permit 'a standardless sweep' that allows police officers, prosecutors and juries

'to pursue their personal predilections.'" 9 Cal.4th at 199-200 (citations omitted.)

The constitutionality of a statute is a question of law that appellate courts review de novo. *People v. Health Laboratories of North America, Inc.* (2001) 87 Cal.App.4th 442, 445.

B. THE STATUTE INVITES ARBITRARY ENFORCEMENT, AND CRIMINALIZES INNOCENT AND PROTECTED CONDUCT.

Although the void-for vagueness doctrine focuses both on actual notice to citizens and arbitrary enforcement, the U.S. Supreme Court has recognized that the more important aspect of the vagueness doctrine is not actual notice, "'but the other principal element of the doctrine – the requirement that a legislature establish minimal guidelines to govern law enforcement.' […] Where the legislature fails to provide such minimal guidelines, a criminal statute may permit 'a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections.'" *Kolender v. Lawson* (1983) 461 U.S. 352, 357-58, 103 S.Ct. 1855 (citing *Smith v. Goguen* (1974) 415 U.S. 566, 574, 94 S.Ct. 1242, 1247-1248.)

Penal Code § 16470 is unconstitutionally vague, first because it fails to define what it means to have a "nonlocking folding knife […] locked into position." This is something that the Respondent, in the court below, conceded was an "apparent paradox." The statute is therefore vague because it does not provide fair notice of what kind of knife is prohibited if opened and carried concealed.

But the primary point of Amici Curiae here is that the statute also invites arbitrary enforcement, as to the interpretation of the terms "nonlocking folding knife" is, or what it means "if the blade of the knife is exposed and locked into position." Although we would like to think that most law enforcement officers would not consider an ordinary Swiss Army knife, even in the open position, to

be a dirk or dagger, the instant case demonstrates there is a minority view, held by Respondent, that matters. The unpredictability and the arbitrary application of whether a Swiss Army knife may be "locked into position," is unsettling for the constituents and membership of Amicus Curiae. Mr. Castillolopez was sentenced to a three-year term for the offense of carrying a Swiss Army knife, concealed, in the open position. Freedom or confinement, good citizen or convict, should not depend upon whether a knife has "clicked" or whether it has "locked," or a police officer's arbitrary insistence that "clicked" means "locked."

And in the context of the demonstrated potential for arbitrary enforcement this case presents, we believe it provides the opportunity for this Court to revisit the strong concern it expressed in *People v. Rubacalva*, *supra*, 23 Cal.4th 322. In *Rubacalva*, this Court held that the offense of carrying a concealed dirk or dagger did not have a specific intent requirement. In that case, the defendant was arrested on an outstanding drug warrant; during the arrest, the officer discovered a knife which was blunt on one side, and dull on the other; the tip of the blade was chipped. 23 Cal.4th at 325. The defendant claimed at trial that he was taking tools, including the knife, to a friend, and further disputed that he had been carrying it in a concealed manner. The arresting officer testified that he could not see the knife when he approached the defendant, because he was wearing a long shirt which covered his pockets, and the handle protruding from his pocket. Id. at 325-326. The defendant was convicted of carrying a concealed dirk or dagger, and the Court of Appeal affirmed. On review to this Court, the defendant asserted that the trial court erred by failing to give a jury instruction, sua sponte, that would have allowed the jury to consider other potential uses of the knife in determining whether it was intended to be used as a dirk or dagger.[7]

[7] Currently, this is set forth in CALCRIM 2501.

This Court affirmed the lower courts, finding no error, in part, on the grounds that the statute prohibiting concealed carrying of a dirk or dagger (then Pen. Code § 12020) did not require an intent to use the concealed instrument as a stabbing weapon. 23 Cal.4th at 328. The *Rubalcava* Court detailed the legislative history of the dirk and dagger definition — much as been done by the parties in the instant case — and came to the clear and unequivocal conclusion that the use of the concealed instrument as a stabbing weapon was not an element of the crime of carrying a concealed dirk or dagger, and that nothing in the history of that statute required it to be a specific intent crime. Id. at 331.

However, this Court did not do so without expressing reservations. Noting the lack of a specific intent requirement, this Court duly considered the defendant's argument that the Legislature "could not have intended to make a felon out of '[t]he tailor who places a pair of scissors in his jacket[,] ... the carpenter who puts an awl in his pocket' […] 'the auto mechanic who absentmindedly slips a utility knife in his back pocket before going out to lunch[,] ... the shopper who walks out of a kitchen-supply store with a recently purchased steak knife 'concealed' in his or her pocket, ... the parent who wraps a sharp pointed knife in a paper towel and places it in his coat to carry into a PTA potluck dinner, or ... the recreational user who tucks his 'throwing knives' into a pocket as he heads home after target practice or a game of mumblety-peg.'" 23 Cal.4th at 331 (citing *People v. Oskins* (1999) 69 Cal.App.4th 126, 138, and *People v. Aubrey* (1999) 70 Cal.App.4th 1088, 1102.) In fact, this Court acknowledged that the potentially broad reach of section 12020 in the absence of a specific intent element was "troubling," but nevertheless found such concerns did not necessarily render the statute unconstitutional. Id.

Furthermore, while upholding the constitutionality of the statute, this Court went one step further, and raised specific concerns about the potential overbreadth raised by the defendant, acknowledging that as written, it "may

criminalize seemingly innocent conduct." This Court elaborated:

> Consequently, the statute may invite arbitrary and discriminatory enforcement not due to any vagueness in the statutory language but due to the wide range of otherwise innocent conduct it proscribes. Indeed, the Legislature suggested this very possibility. (See Sen. Com. on Criminal Procedure, Analysis of Assem. Bill No. 1222 (1995–1996 Reg. Sess.) as amended May 31, 1995, p. 6 ["Proponents of this bill would possibly suggest that everyone—peace officers, prosecutors, judges, and juries—knows what is considered 'bad' carrying of a concealed dirk or dagger, cite *Grubb* (*supra*), and argue that is the protection against possibly overzealous use of the Penal Code proscriptions on such conduct"].) While the wisdom of this solution to the gang problem may certainly be questioned […], "[t]he role of the judiciary is not to rewrite legislation to satisfy the court's, rather than the Legislature's, sense of balance and order." […] We must therefore leave it to the Legislature to reconsider the wisdom of its statutory enactments.

23 Cal.4th at 333 (citing *In re Jasper* (1973) 30 Cal.App.3d 985, 989, and *People v. Carter* (1997) 58 Cal.App.4th 128, 134.)

Perhaps this Court placed the utmost faith in the Legislature's will to curb overzealous prosecutions, or possibly believed in the reasoned discretion to be exercised in the police and prosecutors in making prudent charging decisions. Or perhaps this Court properly deferred the issue until such prosecutions ultimately made their way before this Court. In any case, we believe the present case presents an opportunity for this Court to revisit *Rubacalva*, and the concerns expressed there, in the context of seemingly arbitrary enforcement.

Therefore, and in the alternative to reversal of Mr. Castillolopez's conviction on the grounds stated above, we ask this Court to hold that this case demonstrates that Pen. Code § 16470, as applied, and taken in conjunction with Pen. Code § 21310, is unconstitutionally vague, because it fails to give fair notice of the type of knife prohibited, and it results in arbitrary enforcement of the law because of its overbreadth.

In furtherance of this argument, we would be remiss in the expression of our true vision here, if we did not argue this: that a Swiss Army knife *may* be used as a stabbing weapon does not, per se, qualify it as a dirk or dagger as the Respondent insists. The fact of the matter is, any knife may be carried for any number of reasons, in places urban and rural, and everywhere in between, e.g., to open envelopes or packages, to cut wire, rope or twine, to remove stitching, labels or to trim excess material, to create wood shavings for tinder, to cut plastic model pieces from their sprues, to cut meat or other food into pieces, to cut away clothing in applying first aid, to whittle sticks, to carve soap, to cut away seatbelts at the scene of an accident, to skin animal hides, gut fish, and other purposes while hunting or fishing, to shave machined fittings to the precise size needed, to carve a loved one's initials into a tree, and yes, even to defend oneself from attack from animals or other people if absolutely necessary. A knife does not have to have a singular purpose, and may legitimately be carried for one, any or all of these reasons. The fact that it *may* be used as a weapon, alone, does not qualify it as a dirk or dagger, historically or by statute, and the statute is therefore vague because it relies upon arbitrary enforcement as to a *potential* use unrealized.

In *People v. Mitchell* (2012) 209 Cal.App.4th 1364, the Fourth Appellate District rejected the defendant's claims that the statute prohibiting the concealed carrying of a dirk or dagger violated his constitutional right to bear arms under the Second Amendment, among other claims. Citing California appellate cases which have upheld laws restricting the carrying of concealed firearms generally, the *Mitchell* court expressed deep hostility to the idea of allowing ordinary citizens the means to defend themselves by carrying weapons in public, even borrowing language from a case outside of California to do so. 209 Cal.App.4th at 1375 (citing *Mack v. United States* (D.C. App. Ct. 2010) 6 A.3d 1224, 1232 ("Even when they start out with good intentions, persons who

carry items capable of inflicting death and great bodily injury may use them in ways and in situations that are not justified – with grave results.”))

Yet, as is said often in the law, one does not need to be a weatherman to know which way the wind is blowing. Attitudes are changing, nationwide, as to whether a person has a right to carry a weapon to defend oneself, outside the home. The Ninth Circuit is currently considering its affirmation of that principle, on review of the matter *en banc*, and other Circuits, applying varying levels of scrutiny, have either held or assumed a right to bear arms outside of the home. See, e.g., *Moore v. Madigan* (7th Cir. 2012) 702 F.3d 933, 936 (“A right to bear arms thus implies a right to carry a loaded gun outside the home”); *Drake v. Filko* (3d Cir. 2013) 724 F.3d 426, 431 (recognizing that the Second Amendment right “may have some application beyond the home”); *Woollard v. Gallagher* (4th Cir. 2013) 712 F.3d 865, 876 (“We [...] assume that the *Heller* right exists outside the home [...]”); *Kachalsky v. County of Westchester* (2d Cir. 2012) 701 F.3d 81, 89 (assuming that the Second Amendment must have *some* application in the very different context of the public possession of firearms.) Some of these cases have outright held there is a right to carry a firearm outside of the home for the lawful purpose of self-defense.

For now, it is enough to say that if an object has many so-called innocent uses, those might legitimately include the right to defend oneself, but that the mere capability of the knife to be used as a stabbing weapon, should not, without more, determine the issue entirely.

In general, when other ordinary objects possessed as weapons are objects with so-called “innocent uses,” then there must be some evidence that the object was actually possessed as a weapon, even if there was no intention to use it as such. See, e.g., *People v. Grubb*, *supra*, 63 Cal.2d at 620-622, fn. 9 (broken baseball bat possessed as a “billy”); *People v. Gaitan* (2001 92 Cal.App.4th 540, 547 (metal knuckles); *People v. Taylor* (2001) 93 Cal.App.4th 933, 941 (cane sword); *People v. Fannin* (2001) 91 Cal.App.4th

1399, 1404 (slungshot.) This principle is reflected in the current version of CALCRIM 2500, concerning the illegal possession of other weapons, and which reflects the prosecutor's burden to show that the object was possessed as a weapon. If the object has innocent uses, the instruction to be given states: "When deciding whether the defendant [possessed] the object *as a weapon*, consider all the surrounding circumstances relating to that question, including when and where the object was [possessed][,] [and] [where the defendant was going][,] [and] [whether the object was changed from its standard form][,] and any other evidence that indicates whether the object would be used for a dangerous, rather than a harmless, purpose.[.]" CALCRIM 2500 (emphasis original.)

But no such rule currently exists as to knives, as this Court explained in *Rubalcava, supra*. As this Court pointed out, the Legislature specifically broadened the definition of dirk or dagger "by replacing the phrase, 'that is *primarily designed, constructed, or altered* to be a stabbing instrument,' with the phrase 'that is *capable of ready use* as a stabbing weapon.'" 23 Cal.4th at 330 (emphasis original.) "In doing so, the Legislature recognized that the new definition may criminalize the "innocent" carrying of legal instruments such as steak knives, scissors and metal knitting needles, but concluded "there is no need to carry such items concealed in public.'" Id. (citing Sen. Com. on Criminal Procedure, Analysis of Assem. Bill. No. 1222 (1995–1996 Reg. Sess.) as amended May 31, 1995, pp. 3, 5–6.)) And thus, the carrying of a dirk or dagger in a concealed manner is not only a general intent crime, i.e., it does not require specific intent to use it as a weapon, but all that is required to prove guilt is that "the defendant must knowingly and intentionally carry concealed upon his or her person an instrument "that is capable of ready use as a stabbing weapon." 23 Cal.4th at 332; see also CALCRIM 2501 (containing no innocent use limitation.)

In line with our belief that carrying a knife for defensive purposes among many others is legitimate, we wish to dispense with the legal pretext that a knife, while it may have many uses, can *never* be thought of as a weapon, else it become a dirk or dagger. In light of the overreach represented by this case, we would respectfully submit that this Court should hold that an open, non-locking folding knife with a blade measuring less than three inches, not locked into position – even if it is known that it *can* be used as a weapon – should not be held to be a dirk or dagger, the concealment of which is criminal, without anything further. This law as it has been applied, threatens now to include possessors of Swiss Army knives – hardly a criminal's weapon – if they happen to leave the blade open, leaving those with *actual* criminal intent with far better options to carry out their aims. And we then succumb to the classic prohibitionist's conundrum: that only the law abiding citizen will be debarred from the use of arms, or other instruments of self-defense, based upon his or her respect for the law. The criminally-intended knows no such limitation, and honors no such law. And the innocent offender, who knows he or she is carrying something which *may* theoretically be used as a weapon, but has no intention to use it that way, is then assumed to be that very criminal.

We do not know what Mr. Castillolopez was intending to do on the day he was arrested. We do know that he was not charged with anything other than possession of the Swiss Army knife as a "dirk or dagger" in question. Thus, whether he knew the blade of the knife *could* be used as a stabbing weapon should fall by the wayside. Under the facts of this case, to prove that the defendant actually possessed a dirk or dagger, the prosecutor should not be able to rely upon the mere fact of possession, in a concealed manner, of this particular Swiss Army knife alone. To the extent that this Court previously held or suggested otherwise in *Rubacalva, supra*, that language should now be disapproved.

Amici Curiae make no secret that they envision a day when knives are held and widely acknowledged to be arms, subject to the guarantees guaranteed in the Second Amendment. See, e.g., *State v. DeCiccio*, *supra*, 105 A.3d 165; *State v. Delgado* (Or. 1984) 298 Or. 395, P.2d 610; Kopel, Cramer & Olson, *Knives and the Second Amendment* (2013) 47 Univ. Mich. J.L. Reform 167. And we appreciate that this is not the issue before this Court today. However, until that day, and in the context of whether so-called innocent uses may include the prospective use of the knife as a last-ditch, and extremely desperate defensive weapon, we must be content to urge this Court to find that the mere theoretical use of that knife as a defensive stabbing weapon did not elevate it into its more sinister cousin under California's "dirk and dagger" statute, nor should Mr. Castillolopez suffer the ignominy of a conviction for concealing a "dirk or dagger" merely by virtue of that theory alone.

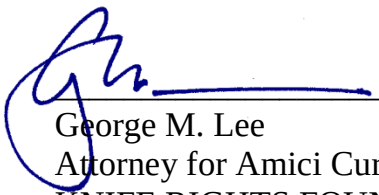
CONCLUSION

For the foregoing reasons, Amici Curiae respectfully urge that the judgment of the Court of Appeal should be affirmed with respect to the issue raised on appeal. In the alternative, Mr. Castillolopez's conviction should be reversed, on the grounds that the statute at issue is impermissibly vague.

Respectfully submitted,

Dated: April 13, 2015

SEILER EPSTEIN ZIEGLER & APPLEGATE LLP



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WORD COUNT CERTIFICATION

The undersigned counsel for Amici Curiae herein certifies, pursuant to the requirements of California Rule of Court 8.204(c)(1), that according to the word processing program used to create this brief, the foregoing brief, not including the cover, table of contents, table of authorities, the signature block, and this certificate, contains 7,982 words.

Dated: April 13, 2015

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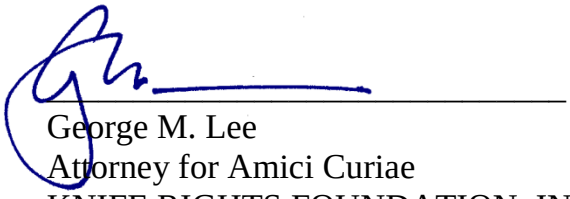

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