17-0474-cv

United States Court of Appeals

for the

Second Circuit

JOHN COPELAND, PEDRO PEREZ, NATIVE LEATHER Ltd,

Plaintiffs-Appellants,

KNIFE RIGHTS, INC., KNIFE RIGHTS FOUNDATION, INC.,

Plaintiffs,

– v. –

CYRUS R. VANCE, JR., in his Official as the New York County District Attorney, CITY OF NEW YORK,

Defendants-Appellees,

ERIC T. SCHNEIDERMAN, in his Official Capacity as Attorney General of the State of New York,

Defendant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF OF PLAINTIFFS-APPELLANTS

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PRELIMINARY STATEMENT

Defendants-Appellees' briefs are notable more for what they do not say than what they do say. Defendants-Appellees ignore the most essential and significant aspect of Plaintiffs-Appellants' evidence, and in doing so they miss the most important aspect of Plaintiffs-Appellants' case: *the variability and indeterminacy of the Wrist Flick Test.* That is what the case is about – whether a person can figure out with a reasonable degree of certainty that he has a legal knife, that is, how to comply with the law.

First, Defendants-Appellees do not deny, and actually *admit*, that the results of the Wrist Flick Test vary with the user, or based on the characteristics of the individual knife, or over time for the same user and the same knife. Thus, a person can hold a folding knife in his hand and have no way to determine if the knife is legal at any point before or after purchase. Suppose he tries to apply the Wrist Flick Test. If the knife fails to open on the first attempt, can he conclude that the knife is not a gravity knife? Of course not. What about if it fails to open on the second, third, or fourth attempt? Of course not.

This is because, as Defendants-Appellees concede, the functional test is not whether the *owner* can flick open the knife. The test is whether *anyone*, but especially an ADA or a police officer, can flick open the knife. Thus, Defendants-Appellees' application of the Gravity Knife Law requires that a person be able to

predict accurately whether some *other person*, likely an ADA or NYPD officer, will at some point be able to open the knife with a wrist flick.

No person can do this. No person can make such a prediction about individuals he has never met. To make such a determination about his knife's legality, he must literally conclude that *no person anywhere* will ever be able to flick the knife open (or at least no ADA or NYPD officer will ever be able to do so). That prediction is impossible to make.

This variability is entirely due to the presence of Bias Toward Closure – a feature present in all folding knives (other than switchblades knives and balisong knives), but not present in a true gravity knife, that is - a knife *designed* to be a gravity knife, such as the German Paratrooper Knife. That is why applying the Gravity Knife Law to a true gravity knife, like the German Paratrooper Knife, is consistent and predicable, while applying the law to a Common Folding Knife, that is, a knife with a Bias Toward Closure, is inconsistent, indeterminate, and unconstitutionally vague.

Second, there is no place a person can go to learn how to perform the Wrist Flick Test. Defendants-Appellees also concede this important point. Every one of Defendants-Appellees' witnesses testified that they learned how to perform the

Wrist Flick Test from someone in the DA's office or someone in the NYPD.[1] However, for an ordinary person there is no class, instruction manual, website, or official publication that provides such instruction (or even informs a person that employing the Wrist Flick Test is the right method to make the determination that a knife is a gravity knife). Thus, there is no way for person to *learn* the Wrist Flick Test.

Defendants-Appellees cannot avoid these basic truths. No amount of cherry-picking case law or parsing the statutory language can change this. A person cannot know how to comply with Defendants-Appellees' application of the Gravity Knife Law, and that makes Defendants-Appellees' application of the Gravity Knife Law unconstitutionally vague.

[1] Even this approach presents a severe risk of variability and inconsistent enforcement. This approach provides no standard whatever for instruction or application.

ARGUMENT

It essential to recall that the essence of the district court's errors below is its failure to properly apply the law of Constitutional Vagueness under the Due Process Clause of the Fourteenth Amendment and the failure to recognize the significance of various facts in the record on that legal issue. Thus, because the district court's errors are largely errors of law and/or mixed law and fact, the standard of review in this case is *de novo*. *See First Nat. Bank of Cincinnati v. Pepper*, 547 F.2d 708 (2d. Cir. 1976).

A. The Statute and the German Paratrooper Knife

Based on Defendants-Appellees' papers, there appears to be little, if any, disagreement on how the Gravity Knife Law *actually* works under New York law, and it is important to clarify Plaintiffs-Appellants' position in this regard, because Defendants-Appellees spend much of their papers arguing issues that are irrelevant.

Plaintiffs-Appellants do not contend that the Gravity Knife Law only applies to the German Paratrooper Knife. Case law is clear that New York courts have on multiple occasions affirmed convictions under the Gravity Knife Law for individuals possessing Common Folding Knives. It is clear that under New York law a Common Folding Knife can be considered a gravity knife. This was

reaffirmed by the New York Court of Appeals as recently as May 3, 2016, in *People v. Parrilla*, 27 N.Y.3d 400 (2016) in which the Court held that the *mens rea* required to prove an offense under the Gravity Knife Law does not include knowledge that the knife meets the definition of gravity knife under the statute.[2]

However, Plaintiffs-Appellants' evidence regarding the German Paratrooper Knife serves several important purposes. First, it is important for the Court to understand what the knife industry and knife users understand a gravity knife to be. This is so that the Court can understand that calling a Common Folding Knife a "gravity knife" is unusual and non-standard in the knife world. As Plaintiffs-Appellants' opening brief demonstrates, other jurisdictions outside New York City understand gravity knives the way Plaintiffs-Appellants do. Defendants-Appellees' attempted citations to the contrary do not contradict this. The City spends much space discussing the Federal Switchblade Act and its definition of "switchblade" knife. Yet, the City entirely ignores the fact that Congress *avoided* the very problem presented in this lawsuit by amending the Act to exclude application of the Act to knives with a Bias Toward Closure. 15 U.S.C. §1244(5). In fact, nearly all of the statutes cited by the City have been similarly repealed or amended.

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[2] The *Parrilla* decision rubs salt into the wounds of innocent knife owners in New York by guaranteeing that they cannot protect themselves from gravity knife prosecutions. *See also* Brief of Amici Curiae Law Professors.

Nor do the City's cases support their position. In *Matter of KES*, 1997 WL 760626 (314th Dist. Ct. Tex. 1997), which predates the *repeal* of the subject Texas statute, the issue of wrist flicking was not even a contested issue in the case. *Id*. at 2. This case does not in any way indicate that a wrist flick test was an established test in Texas prior to repeal or that *any* other gravity knife arrest has ever been made in Texas on that basis.

In *State v. Cattledge*, 2010 WL 3972574 (Ct. App. Ohio 2010), the court noted the State's *contention* that the knife in question was a gravity knife, but indicated that the term "gravity knife" is not defined under Ohio law and did not address that contention, as it was not an issue in the case. *Id*. at 6. Not only does *Cattledge* not stand for the proposition that a wrist flick test is any part of Ohio law relating to gravity knives, but it strongly suggests the opposite -- that wrist flicking is entirely foreign to Ohio law.

People ex rel. Mautner v. Quattrone, 211 Cal.App.3d 1389 (Cal. App. 1989) is particularly irrelevant on this issue, as it has nothing whatever to do with gravity knives. The case involves a balisong knife and something called a "Tekna" sheath-retracting knife. *Id*. at 1393.

Finally, in *State v. Weaver*, 736 P.2d 781 (Ct. App. Alaska 1987), also a case decided before the subject gravity knife law was *entirely repealed*, the court relied

exclusively on a dictionary definition for the concept of the "snap of the wrist."[3] *Weaver* is also a standalone case, suggesting that even before the repeal of the statute, the concept of the wrist flick formed no established part of Alaska law.

Thus, the City's citations actually *support* Plaintiffs-Appellants' contention that applying the concept of "gravity knife" to Common Folding Knives is highly unusual -- even throughout the rest of New York State.

Further, the historical evidence demonstrates that, in banning gravity knives in 1958, the Legislature was concerned with knives like the German Paratrooper Knife, not Common Folding Knives.[4] And, it does not matter that the German Paratrooper Knife does not lock automatically when opened. There is nothing in the language of the Gravity Knife Law that even *suggests* much less *requires* automatic locking. All that is required is that the blade "is locked in place by means of a button, spring, lever or other device." N.Y. Penal L. § 265.00(5). The German Paratrooper Knife, with its lever lock, fits this definition exactly.

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[3] None of the out of state statutes cited in *Weaver* mention anything about wrist flicking.

[4] The fact that the 1958 Bill Jacket refers to opening a gravity knife with a wrist flick does not mean they were thinking about folding knives. A true gravity knife, such as the German Paratrooper Knife, can also be opened by a flick of the wrist – readily and easily by anyone, as demonstrated during the Live Knife Demonstration not only by Douglas Ritter but by Judge Forrest as well.

This is not to argue that, today, the Gravity Knife Law does not cover folding knives. It clearly does, based on the rulings of the New York state courts. However, Common Folding Knives are not what they were concerned with back then when the law was originally enacted.[5]

This is significant, because *true* gravity knives like the German Paratrooper Knife, on the one hand, and Common Folding Knives, on the other, operate in a fundamentally different manner. That is why, although New York Courts do apply the Gravity Knife Law to Common Folding Knives, doing so creates the massive Constitutional vagueness problem Plaintiffs-Appellants have illustrated.

As previously explained, the lynchpin to this difference is Bias Toward Closure. True gravity knives, such as the German Paratrooper Knife, lack Bias Toward Closure and therefore operate the same way for every person, every knife, every time. There is no variability or indeterminacy to give rise to the vagueness problem. Because there is no Bias Toward Closure, the German Paratrooper Knife will always open the same for everyone.

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[5] This is why it does not matter that Plaintiffs-Appellants' expert Paul Tsujimoto did not review any of the case law regarding the definition of gravity knife. He is *not* opining on the meaning of the law. He is an Engineer opining on the mechanics, the physics, and the industry standards regarding knives.

Importantly, Defendants-Appellees do not dispute this critical difference in how the two types of knives operate when force is applied to the blade (Common Folding Knives versus true gravity knives such as the German Paratrooper Knife).

It is also of no moment that Defendants-Appellees' witnesses have testified that all of the gravity knife cases of which they are aware have involved folding knives, not German Paratrooper Knives. Plaintiffs-Appellants acknowledge that Defendants-Appellees have been applying the statute to folding knives. That is precisely the problem. Although the Gravity Knife law was designed to apply to a true gravity knife, for which the functional test works consistently and predictably every time, Defendants-Appellees apply the law to Common Folding Knives with a Bias Toward Closure, for which the functional test operates variably and indeterminately.

B. Variability and the Functional Test

Because Common Folding Knives exhibit the resistance to opening that is exerted on the blade by the Bias Toward Closure, there is substantial variability in when and how they open using the Wrist Flick Test. Defendants-Appellees concede this, acknowledging that the results of applying the Wrist Flick Test to a folding knife can vary based on the design, age, materials, and manufacture of the knife, and also the training, technique, dexterity, and strength of the user.

This is the essence of the problem with the functional test. The parties are in agreement that application of the Gravity Knife Law requires applying a functional test to a knife in question. Thus, Defendants-Appellees acknowledge that one cannot merely read the words of the statute to determine whether a knife is a gravity knife. For this reason, Defendants-Appellees' focus on arguments and cases which relate to the vagueness of the *language* of a statute are not applicable. Significantly, none of Defendants-Appellees' cases relate to the central problem here, which is whether the Wrist Flick Test provides consistent results in a way that allows a person to apply it and draw clear a conclusion about what is legal. Providing notice that the nominal criterion is "centrifugal force" is not the same as providing a reliable, consistent, and predictable means to figure out if your knife, in fact, opens by centrifugal force. There is no such means. Defendants-Appellees do not dispute this. They just do not think it matters.

As previously explained, the statute suffers from three vagueness problems. First, in order to know how to test a knife to see if it is legal, a person must first read the phrase "centrifugal force" in the statute and understand that those words mean "Wrist Flick Test." That a person might not understand that "centrifugal force" translates to "Wrist Flick Test" is clear from the deposition testimony of Police Lieutenant Daniel Albano. When pressed on his understanding of the test for a gravity knife, he repeatedly said simply that one should apply centrifugal

force with one's arm, without any elaboration on how one does that ("I'd tell you to move your arm in such a fashion that centrifugal force or gravity would expose the blade"). (A493; Deposition Read-in of Daniel Albano, Page 71, lines 11-13).

Second, even if one learns that he is supposed to flick his arm and/or wrist to apply the functional test, there is no place a person can go and no document or person one can consult to learn the maneuver. All of Defendants-Appellees' witnesses testified that they learned the Wrist Flick Test either in the DA's office or from other NYPD officers. A regular person has no resource for learning the Wrist Flick Test. Thus, expecting a person to know what the proper test is for making the critical determination and, even more essentially, how to perform it is unreasonable. The fact that Defendants-Appellees' witnesses, a long time ADA and three NYPD officers could not articulate how the Wrist Flick Test is performed in their depositions (and did not do so in their trial declarations) is telling.

Further, as Plaintiffs-Appellants' opening brief demonstrates, the testimony of Carol Walsh reveals enormous uncertainty regarding the proper application of the Wrist Flick Test, and the testimony of Douglas Ritter shows that people he has observed used extremely varying techniques in attempting to apply the Wrist Flicking Test. The record is clear. There is no resource for regular folks to learn the Wrist Flick Test, and as a result there is considerable confusion as to how it is

actually performed. Whether or not the NYPD or the DA's office knows the test, for Constitutional notice purposes, it matters whether the *public* can know the test. They cannot.

Third, and most critical, is that the Wrist Flick Test is variable and indeterminate. As noted above, Defendants-Appellees acknowledge that the results of the Wrist Flick Test vary from knife to knife and from person to person. Thus, a given specimen of knife may flick open, while a different specimen of the same make and model knife may not open under identical circumstances.

Defendants-Appellees further acknowledge that a particular specimen of knife may start out life as not a gravity knife, and then can turn into a gravity knife over time because it naturally loosens up with use. Thus, a person may believe he has a legal knife, and then the knife could suddenly become illegal without him being aware of it, as Defendants-Appellees admitted at oral argument before this Court during the last appeal and still maintain in their submissions herein.

Further, the same specimen of knife can operate differently depending on the strength, skill, technique, and knowledge of the user. Thus, one person may be able to flick open a given knife and another person may not be able to flick open the exact same knife.

Finally, even with the same individual, there can be variability. A person's ability to flick open a knife will vary based on degree of tiredness, injury, etc.

Imagine a retailer like Native Leather or Paragon received a shipment of a hundred or more knives. According to Defendants-Appellees, the retailer must test each individual knife using the Wrist Flick Test. One can be sure that the ability of the tester to flick open a knife will not be the same at the beginning of the flicking session than perhaps an hour later after having applied the Wrist Flick test to perhaps a hundred knives or more.

Even with an individual purchaser this is a problem. Suppose a person has a blister or cut on his strong hand, or has injured his hand or arm. That person will either be entirely unable to perform the Wrist Flick Test, or his ability will be diminished. In that case, is it the Defendants-Appellees' position that such a person is prohibited from purchasing a knife until he has fully healed? The ability of that person to test a knife using the Wrist Flick Test is plainly impacted by the state of his hand and arm. What if the person has been at the gym working out and his arms are tired? Is he prohibited from buying a knife because his ability to employ the Wrist Flick Test is impaired?

Moreover we must invariably return to the fundamental difficulty that any such screening by an individual is not determinative of legality. This same analysis applies equally to police officers. If a person encounters an NYPD officer on a day the officer is rested and strong, he may be arrested for possession of a gravity knife, while another person may encounter the same officer at the end of his shift

when he is tired. Both individuals could be in possession of identical knives, yet one could be arrested and the other not, merely due to the officer's physical state at the time.

These scenarios illustrate just how problematic the Wrist Flick Test is as a screening method for criminal liability even by the ADAs or NYPD officers.

Ultimately, though, the main reason all of the foregoing variability is critical is that the test is, in fact, not whether the user, himself, can open the knife. The test is whether *anyone* at any time can open the knife – particularly an ADA or a member of the NYPD. None of the cases cited by Defendant provide a defense to prosecution under the Gravity Knife Law based on whether the accused could open the knife. In each case, the conviction was obtained based on the police officer's testimony or demonstration that he could open the knife. Whether the defendant was, himself, unable to open the knife with a wrist flick was immaterial.

Thus, Defendants-Appellees' application of the Gravity Knife Law requires that a person be able to predict accurately whether some *other person*, most likely an ADA or NYPD officer, will at some point be able to flick open the knife.

No person can do this. No person can make such a prediction about individuals he does not know and has never met. In order to make such a determination about his knife's legal status, he must literally conclude that *no person anywhere* will ever be able to flick the knife open. That is an impossible

prediction to make, as was demonstrated perfectly on cross-examination by ADA Rather. According to Rather, if a person goes into a store and tries but fails twice to flick a knife open, he may conclude that the knife is not a gravity knife. However, if he then buys that same knife, sets one foot out the door of that store, and encounters a police officer, and if that officer can flick the knife open, the knife suddenly becomes a gravity knife, and that individual is subject to arrest and prosecution.

There is literally no way any person can protect himself from this. Copeland and Perez both wish to buy Common Folding Knives, but there is literally no way that either of them can choose a knife without risking arrest and prosecution, since there is no test that will tell them that a given knife is *legal*.

Similarly, Native Leather wishes to stock and sell Common Folding Knives, but there is literally no way that Carol Walsh can choose to carry any Common Folding Knives without risking arrest and prosecution, since there is no test that will tell her that a given knife is *legal*.

And, because this problem applies not just to Copeland, not just to Perez, not just to Native leather, but to literally anyone who wishes to purchase or sell a Common Folding Knife, the relief required to prevent this problem is necessarily broad.

To be sure, if a person *can* open a knife with the Wrist Flick Test then he or she is able to avoid such a knife. But if a person *cannot* open a given knife with the Wrist Flick Test that tells him or her nothing at all. And that is because if someone *else* can flick the knife open, the knife owner can be arrested and prosecuted. As we learned loudly and clearly from ADA Rather, it makes no difference that the owner could not flick the knife open as long as any police officer or ADA can.

This is why Defendants-Appellees' reference to certain knives with adjustable tension screws is irrelevant (which, in fact, represent only a small percentage of Common Folding Knives in any event). For those types of adjustable knives, a person can certainly tighten the tension screw to prevent himself from flicking the knife open, but he has no way to know how tight he must adjust the screw so that no one with the DA's office or the NYPD could open it. Yet, that is precisely what he must do to avoid arrest and prosecution. He must predict how tight to adjust the tension screw so that *no one anywhere* could open it – an impossible task.

For this same reason, the idea that a knife could start out legal and become illegal by loosening over time is nonsensical. Even assuming a person could determine that a particular folding knife, when new, could not be flicked open (which is impossible as set forth above), because the test is based on what *others*

can do, not on what the *knife owner* can do, the owner would never know when his knife loosened sufficiently to become a gravity knife because he would have no way of knowing at what point the knife became sufficiently loose that a stranger with the DA's office or the NYPD would be able to open it.

Further, Defendants-Appellees concede that a person can be prosecuted even if it takes more than one attempt to flick open the knife (as all of the case law also holds). It is important to recall that ADA Rather refused to state any clear standard for the number of times an attempt may be made to prove that a knife is a gravity knife. The "1 in 10" formula Rather used for evaluating Native Leather's knives was not any sort of standard. It was simply the approach they happened to use that day. In his deposition, ADA Rather specifically refused to commit to that 1 in 10 formula. Thus, a person is always at risk since they can never be satisfied that the knife will never open. As long as there is no limit on attempts to open the knife, a person cannot *ever* conclude that his knife is legal because he can never know when to stop and conclude that he does not have a gravity knife.

All of this variability and uncertainty arises solely due to Bias Toward Closure. True gravity knives, such as the German Paratrooper Knife, operate with none of this variability precisely because they have no Bias Toward Closure. The blade in such a knife glides smoothly in and out without resistance. For this reason, a true gravity knife, such as the German Paratrooper Knife, will operate in

exactly the same way at all times, for everyone *and* it will open solely and completely by the minimal application of centrifugal force. No one need wonder if a police officer will be able to open such a knife with a flick of the wrist because *everyone* can open such a knife with a flick of the wrist *every single time* with complete consistency and predictability. This is in stark contrast to the inherent variability, admitted to by Defendants-Appellees, in the operation of a Common Folding Knife with its Bias Toward Closure.

The record on variability is also clear from the testimony of John Copeland,[6] Carol Walsh, and Douglas Ritter. Each witness illustrated how knives that could not be flicked open by one person could be flicked open by someone else, and the District Court should not have simply ignored that testimony.

Finally, the Live Knife Demonstration, also arbitrarily disregarded by the District Court, showed the inherent variability of the Wrist Flick Test live, in open court. The purpose of the Live Knife Demonstration was to show how two

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[6] Defendants-Appellees have conceded the facts as to Plaintiff John Copeland – that he showed his knife to two NYPD officers who both failed to flick his knife open and as a result declared his knife to be legal. The District Court's finding that the ability of the arresting officer to flick open Copeland's knife a year later was due to usage over time has absolutely no basis in the record. It is pure speculation on the part of the court and is therefore improper. Not only is there no evidence in the record that the passage of that year would have been sufficient to effect such a change, but the undisputed Rebuttal Trial Declaration of John Copeland demonstrates that Copeland made no tension adjustments to the knife at any time. (A926.)

different people could achieve different results applying the Wrist Flick Test to the same knives. Plaintiffs-Appellants presented two knife flickers: Douglas Ritter and attorney Daniel Schmutter. Each person flicked the same set of knives. In several cases, Schmutter was easily able to flick open knives that Ritter either had difficulty opening or could not open at all. It is undisputed that both Ritter and Schmutter are highly skilled at flicking knives open, yet even between two skilled knife flickers, there was substantial variability. Take those same knives and put them in the hands of an ordinary person with little or no practice, knowledge, or skill in knife flicking. The contrast would be even that much more dramatic.

It is irrelevant that the ADA Rather testified, and the District Court found, that Ritter's technique was exaggerated compared with the technique the DA says they use. There was no such testimony and no such finding with respect to Schmutter. Thus, even if Ritter's technique can be considered exaggerated and overly aggressive, that just proves the point even more forcefully. Schmutter, with his mild and deliberate technique, was able to flick open knives that Ritter could not flick open even with his exaggerated and aggressive technique. Even with his allegedly exaggerate motion, Ritter still could not flick open some of the knives that Schmutter could open.

Take, for example, the Buck 110 (P-44). Schmutter had no trouble flicking that knife open with a basic wrist flicking motion. Ritter could not flick open the

Buck 100 at all. So, imagine Copeland or Perez (or any ordinary knife purchaser for that matter) walking into a store and testing the Buck 110 Common Folding Knife. Based on the Live Knife Demonstration, most prospective purchasers would most likely be unable to flick open the Buck 110 using the Wrist Flick Test. They would therefore conclude that the Buck 110 is *not* a gravity knife. The problem, of course, is that if any such person encounters a police officer with the same knife flicking skill as Schmutter, that police officer could flick open the Buck 110 and place such a person under arrest. Since, the City's contention is that the NYPD officers learn the Wrist Flick Test one way or another, it is highly likely that many of them would exhibit such skill. Regardless, since the NYPD is allegedly trained in the Wrist Flick Test and the public is not, the risk that a police officer could flick open a Common Folding Knife (such as, for example, the Buck 110) that a random knife purchaser could not is extremely high, if not in fact certain.

John Copeland could be such a purchaser. Pedro Perez could be such a purchaser. Native Leather could choose to carry the Buck 110 in inventory. In truth, anyone could be such a purchaser or seller. Yet, they might have no way of knowing that someone can flick open the Buck 110, because most likely none of them could do it.

Defendants-Appellees also erroneously cite to *United States v. Powell*, 423 U.S. 87 (1975) for support. However, in *Powell* the Court merely held that the phrase "could be concealed on the person" requires a person to estimate whether a firearm is small enough to be concealable. *Id*. at 92-93. Here, there is no estimating that can be done. If a person cannot flick open his knife, there is literally no way to predict if another person (mainly an ADA or NYPD officer) will nevertheless be able to do so.

For these reasons, the Gravity Knife Law is inherently vague and unpredictable when applied to Common Folding Knives.

C. As Applied Challenge

Defendants-Appellees erroneously argue that to maintain an as applied challenge, the Plaintiffs-Appellants must show vagueness as to the specific knives for which they were arrested and/or for which prosecution was threatened. That is incorrect. The cases replied upon by Defendants-Appellees, such as *Dickerson v. Napolitano*, 604 F.3d 732 (2d Cir. 2010), relate to appeals of the prosecutions themselves. Thus, in order to show vagueness as to *those* prosecutions, the party needed to show vagueness as to *those* past facts.

Here, Plaintiffs-Appellants are not attacking their previous arrests and threatened prosecutions. Rather, the claim is that the statute is vague as to their

conduct going forward. They are unable to determine which knives are legal so they can carry/sell folding knives and avoid arrest and prosecution in the future. Thus, Plaintiffs-Appellants need only show vagueness going forward, not as to the past facts.

In fact, this Court explicitly recognized that the case is forward looking as to future conduct (credible threat of future prosecution), not backwards looking as to the prior arrests, when it reversed the District Court's prior erroneous dismissal on standing. *Knife Rights v. Vance*, 802 F.3d 377, 383-88 (2d Cir. 2015).

It also makes no difference whether this case is characterized an as applied challenge to the Gravity Knife Law or a facial challenge to the application of the Gravity Knife Law to Common Folding Knives. The case is technically an as applied challenge, since it does not go to the face of the law (that is it does not go to every possible application of the law) but rather to how the law is applied with respect to Common Folding Knives only. Thus, the lawsuit meets the definition of an "as applied" challenge

The reason Defendants-Appellees mistakenly seem to refer to it as a facial challenge is that the scope of the claim and the relief sought is broad. This is because the case is not only about Copeland, Perez, and Native Leather. It is about Copeland, Perez, Native Leather, and everyone who shares the same facts that give rise to Plaintiffs-Appellants' cause of action. But in this case, that turns out to be

literally everyone. That is, *every* purchaser of a Common Folding Knife faces the same vagueness problem as Copeland and Perez. *Every* seller of Common Folding Knives faces the same problem as Native Leather. *No one* can apply the Wrist Flick Test and identify and identify with any reasonable degree of certainty what is a legal knife. Thus, it is the breadth of the claim that perhaps leads Defendants-Appellees to try to call this claim a facial challenge or perhaps a "facial challenge only as to Common Folding Knives" to the extent that has any legal meaning under the law. Either way, all Plaintiffs-Appellants need prove to establish their vagueness claim is that they cannot know how to conform their future conduct to the requirements of the Defendants-Appellees' application of the Gravity Knife Law in order to avoid arrest and prosecution.

D. Manner of Enforcement

Defendants-Appellees offer testimony from several DA and NYPD witnesses regarding the manner in which they say they enforce the gravity knife law. For example, Officers Gutierrez and Kyrkos testified that they would never charge someone for possession of a gravity knife unless a knife could be flicked open in one or two attempts. This, of course, is irrelevant, since the testimony of two NYPD officers about what *they* would or would not do is not binding on and tells us nothing about the thousands of other NYPD officers. Furthermore, because

there is no written standard to be referenced in this regard, each officer is, in fact, compelled to decide for himself what is acceptable or not, and it is unlikely that 35,000 officers do so in exactly the same way.

Further, Rather's testimony that when a knife cannot be flicked open every time or when it takes multiple attempts to flick a knife open, he uses his discretion to decide whether he can prove his case to a jury beyond a reasonable doubt is no help to a person trying to decide if he is subject to arrest and prosecution. If that person is unable to flick his knife open, the fact that a jury might have to decide if, nevertheless, it is a gravity knife because an ADA or NYPD officer *was* able to flick it open provides that person with no due process at all. That a critical fact presents a jury question does not relieve the government from providing a person proper notice as to what is and is not a crime.

E. Centrifugal Force/Tsujimoto Testimony/Video Demonstration

Defendants-Appellees also attempt to contradict Mr. Tsujimoto's explanation of how centrifugal force and inertia operate on a folding knife, suggesting that video/photographic evidence show a knife starting to open before inertia is applied and the end of the arm thrust.

First, however, the testimony on centrifugal force is offered for context and to provide a background of knife mechanics. Whether or not a folding knife

actually opens by centrifugal force (as engineers and physicists understand the term) or opens by inertia or by a combination of the two has no impact on the legal vagueness argument. Regardless of which force is actually at work, it is still the case that the Wrist Flick Test is variable and indeterminate when applied to any knife with a Bias Toward Closure.

Second, it is difficult to evaluate the behavior and characteristics of these knives from still photographs or videos, and one cannot be sure about the precise technique being employed. (A929; Tsujimoto Rebuttal Dec ¶2.)

Nevertheless, Defendants-Appellees' assertion in this regard is certainly possible with a blade that has a very light bias toward closure or which is defective. However, generally, folding knives with a bias toward closure will not behave in this manner. The amount of centrifugal force applied during a wrist flick is normally insufficient to overcome the bias and, thus, the blade does not move until the inertia stage of the wrist flick is reached. The whole point of bias is to resist the blade opening as a safety measure. (A929; Tsujimoto Rebuttal Dec ¶3.)

Based on the photographs and videos, those blades are likely particularly loose -- that is, the Bias Toward Closure is very light, if it even exists at all.

Further, even if those blades started moving out of the handle prior to the inertia stage of the wrist flick maneuver, the blades would not have fully extended

and locked into place until the hand and handle stopped moving and the effect of inertia took over. (A929; Tsujimoto Rebuttal Dec ¶5.)

Additionally, Defendant incorrectly claim that Mr. Tsujimoto stated that knives that can be flicked open are particularly dangerous. That was not his testimony. In the testimony cited to by Defendants-Appellees, Mr. Tsujimoto says only that opening a knife with a wrist flick is a dangerous technique, not that such knives themselves are more dangerous as knives – a key distinction.

Moreover, the fact that the ADA in the videos can easily open certain specific knives is irrelevant. That some knives open easily for one specific person says nothing about other knives that do not open easily and/or which open differently for different people. In fact, as discussed above, the knives in the DA's video appear to have been selected as particularly loose knives. Their specific behavior during the Wrist Flick Test tells us nothing about the millions of other knives carried by ordinary folks in New York. In fact, Defendants-Appellees have conceded that different knives behave differently under the Wrist Flick Test (even two examples of the same model knife). Thus, these videos tell the Court nothing about the vagueness claim, especially since the vagueness claim is not about the previous knives and the related arrests and threatened prosecutions but about the inability to engage in future conduct without risking arrest and prosecution.

Finally, the video of the Leatherman not opening with a wrist flick (A890; D-23) is also meaningless. First, it is clear from the video Mr. Rather is not making a determined attempt to open the knife. The attempt is perfunctory and weak and therefore shows nothing on which the Court could draw any conclusion about whether the knife is capable of being opened using the Wrist Flick Test. More importantly, the test of a gravity knife is not whether *Rather* can flick it open. It is whether *anyone* can flick it open. Therefore, the mere fact that Rather appears unable to flick it open says nothing about whether it could be considered a gravity knife under Defendants-Appellees' approach to the law. And, in fact, Plaintiffs-Appellants demonstrated quite clearly during the Live Knife Demonstration that a Leatherman can, in fact, be opened using the Wrist Flick Test. This further underscores Plaintiffs-Appellants' proof of variability using the Wrist Flick Test on Common Folding Knives.

F. Recent Enforcement Efforts and Historical Context

Further, Defendants-Appellees seek to contradict Plaintiffs-Appellants' historical recitation both as to when the Wrist Flick Test started to be used by the DA and the City and as to the history of the Gravity Knife Law and gravity knives generally. However, these recitations also only provide context and a background understanding for the Court. None of those historical facts change the variability

and indeterminacy of the Wrist Flick Test. Therefore, the accuracy or inaccuracy of such historical facts does not change the fact that applying the Gravity Knife Law to Common Folding Knives (with a Bias Toward Closure) is unconstitutionally vague. [7]

G. Other Significant Court Decisions

It is significant that the first major reported gravity knife decision to address this issue in any detail was *United States v. Irizarry*, 509 F. Supp. 2d 198 (E.D.N.Y. 2007). Judge Weinstein understood that there is something fundamentally wrong with applying the Gravity Knife Law to knives with a Bias Toward Closure. However, Judge Weinstein phrased it not in terms of vagueness (as that was not the issue before the court) but instead concluded that the Gravity Knife Law was intended to apply to knives *designed* to open by gravity or centrifugal force, not simply knives that *could* be opened that way. Thus, he concluded that Bias Toward Closure negated such a showing. Although no New York state courts followed that reasoning, neither did they have the kind of record that Judge Weinstein had, a record explaining Bias Toward Closure and its impact on the operation of Wrist Flick Test. Clearly Judge Weinstein was onto something.

[7] Significantly, even the DA's own case citations do not predate 2006. Moving the start date back by a mere four years is completely irrelevant.

People v. Trowells, Ind. No. 3015/2013 (NY Sup Ct Bx Cty, July 11, 2014), *available at* http://nylawyer.nylj.com/adgifs/decisions14/072414webber.pdf, represents the first time a New York state court has wrestled with the same sense of fundamental unfairness that Judge Weinstein understood is inherent is these arrests and prosecutions. In *Trowells,* the court granted a motion to dismiss the indictment in the furtherance of justice pursuant to N.Y. Crim. Proc. Law § 210.40. Although the court did not have the type of record before it as in the within matter and was not asked to find the statute void for vagueness, the court clearly understood that there was an inherent problem with such prosecutions.

CONCLUSION

For the foregoing reasons, the Court should reverse the judgment below and direct the entry of judgment in favor of Plaintiffs-Appellants: (1) declaring that the application of New York's Gravity Knife Law, N.Y. Penal L. § 265.00(5) and N.Y. Penal L. § 265.01(1), to folding knives is void for vagueness in violation of the Due Process Clause of the Fourteenth Amendment and (2) permanently enjoining such enforcement.

Respectfully submitted,

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September 14, 2017

CERTIFICATE OF COMPLIANCE

I, Daniel L. Schmutter, attorney for Plaintiffs-Appellants hereby certify that the foregoing brief complies with the type-volume limitations set forth in Second Circuit Local Rule 32.1(a)(4)(A) because it contains 6,985 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5)(A) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally-spaced typeface using Microsoft Word in Times New Roman, 14-point font.

Dated: September 14, 2017

/s/ Daniel L. Schmutter