19-1129-cv

United States Court of Appeals
for the
Second Circuit

Joseph Cracco,

Plaintiff-Appellee,

– v. –

Cyrus R. Vance, Jr.,

Defendant-Appellant,

City of New York, Police Officer Jonathan Correa, Shield 7869, Transit Division District 4, Police Officers John Doe,

Defendants.

On Appeal from the United States District Court
for the Southern District of New York

BRIEF FOR THE DISTRICT ATTORNEY

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JURISDICTIONAL STATEMENT

This case was filed in the U.S. District Court for the Southern District of New York on October 15, 2014. A2.[1] Because the case involved claims arising under 42 U.S.C. §1983, the district court (Crotty, J.) had subject matter jurisdiction under 28 U.S.C. §1331. On March 28, 2019, the district court entered final judgment on its order granting summary judgment in favor of plaintiff-appellee Joseph Cracco and denying the cross-motion of defendant-appellant Cyrus R. Vance, Jr., the District Attorney of New York County. SA24; Cracco v. Vance, 376 F. Supp. 3d 304 (S.D.N.Y. 2019). The District Attorney filed a timely notice of appeal on April 24, 2019, and this Court has appellate jurisdiction under 28 U.S.C. §§1291, 1294. A667-68.

STATEMENT OF THE ISSUES PRESENTED

This lawsuit involves an as-applied vagueness challenge to New York's former-gravity knife statute. While it remained law, the statute prohibited knives with blades that opened via centrifugal force and was enforced by means of a wrist-flick test. In October 2013, Cracco was charged with violating the statute based the determination of the arresting officer that a folding knife clipped to Cracco's clothing opened in response to the wrist-flick test. As reflected in the record of the prosecution, a factual dispute existed between Cracco and the officer as to what happened when the officer applied the test. The officer maintained that he applied the test and the knife opened,

[1] "A__" indicates the appendix; "SA__" indicates the special appendix.

whereas Cracco claimed that the knife remained closed until the fourth or fifth attempt. Cracco moved to dismiss the charge on this ground, arguing that the statute was vague as-applied to knives that did not open on the first attempt of the wrist-flick test. Before that motion or the factual dispute could be resolved, Cracco pled guilty. This federal lawsuit against the officer and District Attorney Vance followed.

The subject of this appeal is the sole claim that survived Rule 12 motion practice: Cracco's claim for prospective relief against the District Attorney. In the ninth cause of action of the operative complaint, Cracco sought a declaration that the gravity knife statute was void for vagueness as-applied to knives that did not open on the first attempt of the wrist-flick test. The district court resolved the parties' cross-motions for summary judgment on this cause of action by entering judgment in favor of Cracco and against the District Attorney. While our challenge to the district court's decision raises several issues, all are overshadowed by one fact: the record lacked any proof that the District Attorney applied the statute in the manner alleged by Cracco. This is true with respect to Cracco's past prosecution, and it is true with respect to any knife that he may have wished to carry in the future, while the statute remained law. Although the case had advanced to summary judgment, the district court relied on the disputed events of Cracco's past prosecution to enter a declaration in his favor.

The District Attorney respectfully asks this Court for two forms of relief, in the alternative. First, the District Attorney seeks a finding that this appeal is moot due to the intervening repeal of the gravity knife statute, and the usual remedy of vacatur that

applies when a case becomes moot on appeal. Second, in the event the Court disagrees with our mootness analysis, the District Attorney seeks reversal of the district court's decision and the entry of summary judgment in favor of this office. As grounds for the foregoing relief, the District Attorney asks that the following issues be resolved in the affirmative:

1. Whether the repeal of the gravity knife statute rendered moot Cracco's claim for prospective declaratory relief?
2. Whether the district court erred in sua sponte granting summary judgment in favor of Cracco on grounds not raised in his motion, without giving the District Attorney notice and the opportunity to respond?
3. Whether the district court erred in granting Cracco's motion for summary judgment and denying the District Attorney's cross-motion by:
    a. relying on factual assertions that lacked record support; and
    b. crediting Cracco's version of events with respect to a fact that was material to Cracco's ability to prove his claim and, at the same time, disputed by the District Attorney?
4. Whether the district court erred by finding that Cracco had established that the former-gravity knife statute did not provide reasonable notice of the conduct it prohibited and encouraged arbitrary enforcement?

STATEMENT OF THE CASE

I. The former-gravity knife statute and the wrist-flick test

Over sixty years ago, the former-gravity knife statute was added to the Penal Law in response to the increasing use of such knives in violent felonies. A267. The statute had two components: one operative, the other definitional. The first component, Penal Law §256.01(1), rendered simple possession of a gravity knife a misdemeanor criminal offense. This section of the Penal Law was repealed in May 2019. The second component, Penal Law §265.00(5), defined a gravity knife as "any knife which has a blade which is released from the handle or sheath thereof by the force of gravity or the application of centrifugal force which, when released, is locked in place by means of a button, spring, lever or other device." While this section remains part of the Penal Law, no operative section exists through which it could be invoked to charge a criminal offense.

When the gravity knife statute remained law, the wrist-flick test was the standard by which it was enforced. A265-66, 268, 308, 322. This test was exactly what its name suggested: using the force of a one-handed flick-of-the-wrist to determine whether a knife would open from the closed position. A308, 322. The wrist-flick test was used to identify gravity knives since the statute's effective date: The bill jacket includes a New York Times article from December 1957 that describes a sponsor of the law opening a gravity knife by "flick[ing] his wrist sharply downward." A291. The legislative history makes clear that knives which functioned in such a manner were considered particularly

dangerous. A288. Since its inception, the former-statute was enforced "mainly, and perhaps exclusively," against folding knives. Copeland v. Vance, 893 F.3d 101, 115 (2d Cir. 2018);[2] A267, 309.

State courts consistently upheld application of the gravity knife statute to folding knives via the wrist-flick test. Copeland, 893 F.3d at 115-16; A428-29 (collecting decisions). The New York Court of Appeals and the state's intermediate appellate courts endorsed the use of the wrist-flick test to identify a folding knife as a gravity knife. A430 (collecting decisions). State courts also considered and rejected the notion that a knife must open on every attempt of the wrist-flick test to be considered a gravity knife. A431 (collecting decisions). This premise was "plainly correct" as the former-statute did not, on its face, limit the number of applications of gravity or centrifugal force. Copeland, 230 F. Supp. 3d at 238 n.8.

As the statutory text and interpretive decisions illustrate, the former-gravity knife statute was enforced by reference to function, not design; indeed the design or intended use of a knife was not an element of a charge under the statute and was irrelevant to the knife's classification. A431.[3] This was so because the operability of a knife could change depending on several variables. A265-66. For example, a knife with a tension screw connecting the knife blade and the handle could open in response to the wrist-

[2] The full citation is: Copeland v. Vance, 230 F. Supp. 3d 232 (S.D.N.Y. 2017), aff'd, 893 F.3d 101 (2d Cir. 2018), cert. denied, 139 S.Ct. 2714 (2019).
[3] By contrast, other Penal Law provisions that define weapons incorporate the design of the weapon into its definition. A429.

flick test if the screw had loosened, either through intentional modification or normal wear-and-tear. Id.[4] A mindful owner, intending to use his knife lawfully as a tool, could correct looseness in the blade by periodically checking the knife to ensure that the screw remained tight. Id. Because the operability of a knife was subject to manipulation, a functional definition was needed to accomplish statute's goal. As observed by one state court judge, the fact that knives which met the statutory definition of a gravity knife were "sold in local stores as 'folding knives'" and marketed as "tools" did not alter gravity knives' "obvious and inherently dangerous nature." People v. Fana, 23 Misc. 3d 1114(A) (N.Y. County Crim. Ct. 2009); A431.[5]

The concerns animating the former-statute remained relevant during the events underlying this litigation. In 2009 and early 2010, the presence of gravity knives on the streets of our city was an exacerbating factor in relation to knife violence. A267. A substantial portion of the homicides, assaults, and violent felonies were committed with knives—including folding knives—prompting an investigation by this office that led to enforcement actions against several retail stores that were selling a high volume of illegal

[4] Conversely, a knife that once opened via the wrist-flick test may have ceased to do so if, for example, the blade had been taped shut during evidence collection. Id.

[5] Enforcement of the former-statute with respect to folding knives that the industry elected to market as tools was not, at the time of Cracco's arrest, a new issue. In June 2006, the Wall Street Journal published an article describing how retailers built a $1 billion dollar business, nationwide, by selling "deadly" folding knives that "flick[ ] open" to "just about anyone in the market" for a pocketknife. Mark Fritz, How New, Deadly Pocketknives Became a $1 Billion Business, Wall Street Journal, (July 25, 2006), available at: https://www.wsj.com/articles/SB115379426517016179.

gravity knives. Id. Then, in 2016, the city was confronted with a rise in seemingly-random assaults involving folding knives and other cutting instruments, creating fear in the community and among subway riders. A267, 469. In December of that year, the Governor vetoed an amendment to the former-statute out of concern that it would "potentially legalize all folding knives." A254-55. In his veto message, the Governor cited grave public safety issues in the form of "a staggering 4,000 stabbings and slashings" in the city in 2015 and the use of knives in "half the homicides" committed in Manhattan in the first half of 2016. Id.

II. The arrest and prosecution of Cracco

On October 18, 2013, while inside Grand Central subway station, Cracco was arrested for possession of a folding knife that, in the estimation of the arresting officer, functioned as a gravity knife. A309-10.

At the time, Cracco worked as a sous chef at a restaurant that was preparing to open in the city. A365-66. While at work, Cracco used the knife to cut packing tape on boxes of kitchen equipment and inventory. A368-69, 370-71. He kept the knife clipped to his pants pocket so that it was readily accessible to him. A374-75. To open the knife from a closed position, Cracco placed his thumb in the circular hole in the blade and used his thumb to pivot the blade into an open position. A357-58. Cracco had owned the knife for several years and used it outside of work, as well, for various purposes. A385-87. He never attempted to open the knife by application of the wrist-flick test. A378-81.

At approximately 4:00 p.m., Cracco and Jared Sipple—his co-worker and roommate—left the restaurant to commute home. A360, 372, 391-92. Although Cracco was carrying a messenger bag in which he could have stored the knife, and although he had no need to use the knife during his commute, he continued to wear the knife clipped to his pants pocket as he traveled through the subway. A373-75, 389. The City Administrative Code makes it unlawful for a person to wear a knife outside his clothing in a public place such as the subway. A309.

A police officer saw Cracco on the subway platform within Grand Central, with the knife visibly clipped to his pants pocket. Id. In the officer's experience, gravity knives were typically clipped to the owner's clothing so as to make the knife readily accessible. Id. The officer knew gravity knives to be a common problem in the subway. A307.

The officer stopped Cracco, recovered the knife, and applied the wrist-flick test. A309-10. The officer maintained that he applied the wrist-flick test to the knife and the blade opened—as shown in a video exhibit submitted by the District Attorney in support of his summary judgment motion that depicts the officer applying the test to Cracco's knife in the exact manner that he did on the day of the arrest. A310, 312-13, 320. Cracco and Sipple, on the other hand, claimed that the officer unsuccessfully attempted the wrist-flick test several times, with increasing force, until the knife finally opened on the fourth or fifth attempt. A378-80, 401-02, 411-12, 422-23.

Even when a knife opened on the first application of the wrist-flick test, it was this officer's practice to repeat the test several times to ensure that the knife functioned consistently as a gravity knife. A308. The officer maintained that Cracco's knife unambiguously functioned as a gravity knife every time he applied the test—as shown in a second video exhibit submitted by the District Attorney that depicts the officer applying the wrist-flick test to Cracco's knife five times, in succession, with a 100% success rate. A312-13, 321. If, as Cracco alleged, the officer had been unable to open the knife until the fourth or fifth attempt of the test, it would not be consistent with his personal practice to charge Cracco with possession of a gravity knife. A310. In fact, the officer would not charge someone if more than two attempts were required to open a knife. A308.

Having identified Cracco's knife to be a gravity knife, the officer arrested him. A310. At the police precinct, the officer completed a desk appearance ticket directing Cracco to appear in Criminal Court on December 9, 2013. A310, 314. After signing the desk appearance ticket, Cracco was free to leave. A310.

On November 13, 2013, the officer met with a representative of the DA's Office to draft a criminal complaint, which is the document that sets out the basis for the charge against a defendant. Id. The officer did not state that five attempts of the wrist-flick test were required to open the knife because that is not what happened. A311. The officer signed a criminal complaint charging Cracco with possession of a gravity knife that read as follows:

> I know that the knife was a gravity knife because I opened the knife with centrifugal force by flicking my wrist while holding the knife, thereby releasing the blade which locked in place by means of an automatic device that did not require manual locking.

A315. At his deposition, Cracco agreed that the criminal complaint conveys that the knife opened on the first flick of the officer's wrist. A391, 395-96.

After Cracco's arraignment, an Assistant D.A. was assigned to the case. A323. The file that the Assistant D.A. received included a copy of the criminal complaint signed by the officer, which she reviewed. A323-24.

On April 30, 2013, Cracco served a motion to dismiss based on the following theories of relief: (1) Cracco submitted an affidavit from Sipple claiming that the officer required five attempts of the wrist-flick test to open the knife; (2) Cracco argued that the Court of Appeals' decision in People v. Dreyden, 15 N.Y.3d 100 (2010) required that a complaint include an observation that the knife could be "readily" opened by centrifugal force; and (3) Cracco argued that, without this requirement supposedly flowing from Dreyden, the former-gravity knife statute was void for vagueness. A323, 328-38.

On May 14, 2014, the parties appeared in Criminal Court and the People served their opposition papers. A324. Based on a comparison of the officer's sworn statement in the criminal complaint and the Sipple affidavit, the Assistant D.A. understood there to be a factual dispute between the defense and the officer as to whether multiple attempts were required to open the knife. A323-24. In opposition, the Assistant D.A.

argued that the version of events in the Sipple affidavit did not render the criminal complaint insufficient—which is standard that applies in the context of a motion to dismiss a charge—but merely created a factual dispute as to the functionality of the knife to be resolved at trial. A325, 342.

If the Assistant D.A. in this case were assigned to draft a criminal complaint and learned from the officer that he required five attempts of the wrist-flick test to open a knife, she would speak to a supervisor about declining to prosecute the charge. A324. If she learned, after a prosecution was underway, that it was undisputed that the officer required five attempts to open a knife, she would speak to a supervisor about moving to dismiss the charge. Id. In this case, after Cracco raised the allegation that five attempts were required, the officer appeared at this office at the request of the Assistant D.A. and tested the knife in her presence. A311-12.

It was not the People's position that the prosecution of Cracco for possession of a gravity knife should, or even could, continue were it undisputed that the officer required five attempts of the wrist-flick test to open the knife. A325. Rather, the People did not credit the claim of Cracco and Sipple that the officer—who can be seen handling Cracco's knife in the video exhibits submitted by the District Attorney, and who maintains that it has never functioned other than as depicted therein—required five attempts to open the knife. A320-21, 325.

On July 8, 2014, the parties appeared in court for a decision on Cracco's motion to dismiss. A325. At that time, rather than having his vagueness challenge resolved by

a state court tasked with interpreting state statutes, Cracco pled guilty to disorderly conduct in exchange for a sentence of time served and a $120 fine in full satisfaction of the gravity knife charge. A325-26, 374-51.

III. The enforcement practices of the District Attorney's Office

Prosecutions charging a violation of the former-gravity knife statute constituted a "very small fraction" of the total number of misdemeanor prosecutions filed in New York County each year. Copeland, 230 F. Supp. 3d at 242. Where, as here, a street arrest was made for possession of a gravity knife, the Assistant D.A. would file a charge in reliance upon the statement of the officer—who signed the charging document—as to the functionality of the knife. A310-11. In evaluating whether a charge was appropriate, an Assistant would consider, first, whether the knife met the statutory definition—i.e., did the knife open to a locked position by application of the wrist-flick test—and, second, whether the People would be able to meet their burden of proof beyond a reasonable doubt at trial. A322-23.

Assistants were instructed on the former-statute and its enforcement via the wrist-flick test. A268, 322. The Counsel to the Trial Division regularly advised and provided training to our prosecutors on this subject. A267-68. During his 30 years with the office, the Counsel to the Trial Division personally prosecuted or supervised hundreds of cases involving a gravity knife charge, ranging from misdemeanor criminal possession to homicide prosecutions. A267. He is not aware of any prosecution going forward where, at the time of trial, the officer could not open the defendant's knife to

a locked position by application of the wrist flick test in fewer than three attempts. A269.

IV. The federal court litigation

Three months after his guilty plea, on October 15, 2014, Cracco filed this lawsuit. A16-17. In the original complaint, Cracco sought damages against the City of New York and the arresting officer. A29. On January 12, 2015, the City defendants stated their intention to move to dismiss on several grounds, including the fact that Cracco's guilty plea barred his damages claim. A52-55. Cracco then filed an amended complaint that added the District Attorney as a defendant for the purpose of seeking declaratory relief with respect to his possession of a folding knife "similar or identical" to the one that was the subject of his arrest. A63 at ¶5. To this end, in the ninth cause of action, Cracco sought a declaration that the former-statute was vague as-applied to folding knives that did not "readily" open by gravity or centrifugal force, along with a "specific finding" that a knife must open on the "first attempt" of the wrist-flick test to meet this requirement. A78-79.

On May 22, 2015, the District Attorney and City defendants moved to dismiss in separate filings. A110-11, 122-23. Throughout his motion, the District Attorney emphasized that Cracco's claim did not present a situation where the officer required five attempts of the wrist-flick test to open the knife, but rather, a situation where the allegations of the parties conflicted and the defendant pled guilty before the conflict could be resolved. While the operability of Cracco's knife would have presented issues

of fact for the criminal jury to resolve in holding the People to their burden of proof, the District Attorney argued, these issues could not support a finding in federal court that this office had applied, or would apply, the statute to Cracco in an unconstitutional manner. Cracco v. Vance, ECF 24 at 2, 8, 12, 14-15, 22 (S.D.N.Y., 14-8235).

On November 4, 2015, the district court dismissed the City and the officer from the case, finding that Cracco's guilty plea barred his damages claim. A224-32. On December 9, 2015, the district court denied the District Attorney's motion, finding that Cracco's vagueness claim raised "factual questions not ripe for adjudication on a motion to dismiss." A238. The District Attorney filed a motion for reconsideration, which the district court denied on January 28, 2016. A240-43.

From February 23 through June 22, 2016, the parties engaged in discovery. A7-8. During this period, there were two external events relevant to Cracco's claim. First, on June 15, 2016, the state legislature passed an amendment to the former-gravity knife statute to exclude knives with a "resistance to opening" and "a bias towards closure" from the definition of a gravity knife. SA1. Second, on June 16, 2016, the District Attorney and the City concluded a bench trial before a different district judge (Forrest, J.) in Copeland v. Vance, wherein the plaintiffs sought a declaration that the statute was vague as-applied to folding knives with a "bias towards closure." Copeland v. Vance, ECF 128 at 2, 9-10, 55 (S.D.N.Y., 11-3918).

On June 22, 2016, the district court imposed a stay in this case pending action by the Governor on the amendment and a decision by the district judge in Copeland.

SA11-12. On December 31, 2016, the Governor vetoed the amendment. A254-55; p. 7, supra. On January 27, 2017, Judge Forrest entered judgment in Copeland in favor of the District Attorney and the City, finding that the former-gravity knife statute provided clear notice of the prohibited conduct and clear standards to those tasked with enforcing it. Copeland, 230 F. Supp. 3d at 236.

On February 21, 2017, the parties in this case appeared before the district court and agreed to proceed by cross-motions for summary judgment. A9-10. In his notice of motion, Cracco asked the district court to enter judgment in his favor on the ninth cause of action in the amended complaint by entering:

> [A] declaration that §§265.00(5) and §265.091(1) of the Penal Law of the State of New York, which define the simple possession of a gravity knife as a crime, are void for vagueness as-applied to criminal prosecutions for the simple possession of any folding knife that [cannot] readily be opened by gravity or centrifugal force, with a specific finding [ ] that any knife that does not open by means of a 'wrist-flick' test on the first attempt to do so cannot be readily opened by gravity or centrifugal force and therefore cannot be the basis for a criminal prosecution for mere possession under [Penal Law] §§265.00(5) and 265.01(1).

A473. In his memorandum of law, Cracco emphasized that the "crux" of the proposed declaration was the finding that a knife must open on the "first attempt" of the wrist-flick test. A505.

Although Cracco sought summary judgment as a plaintiff, he relied exclusively on the disputed facts of October 18, 2013. A507, 512. In his Local Rule 56.1 statement, Cracco alleged that the officer required five attempts of the wrist-flick test to open his

knife; that this fact was brought to the People's attention; and that we nonetheless proceeded with the prosecution. A501-02. Because Cracco had not taken depositions, he could not elevate these allegations to facts. His motion lacked any support for the theory that the District Attorney had or would, in this case or any other, pursue or continue a charge where the officer admittedly required five attempts to open a knife.

In his motion, Cracco advanced two legal theories. First, he argued that the former-statute was void-for-vagueness because a knife could be considered a gravity knife even if it did not always respond positively to the wrist-flick test. A508-09. Second, Cracco argued that a one-attempt limitation would bring enforcement of the statute in "better conformity" with what Cracco referred to as the "standard" articulated in Dreyden. A505-06, 509. Regarding the nature of his challenge, Cracco argued only that the former-statute was vague for lack of notice. He did not argue that the statute encouraged arbitrary enforcement, or that his own prosecution fell outside the core of its prohibition. See generally A504-13.

In his cross-motion, the District Attorney raised several grounds for a judgment in his favor. Declarations by the officer and Assistant D.A. confirmed the existence of a factual dispute between Cracco and the officer as to the operability of the knife. A460-63. Such disputes are not unique to the former-gravity knife statute and cannot form the basis of a ruling that the District Attorney had enforced a law unreasonably—especially where, as here, the defendant pled guilty. A447. The summary judgment record also confirmed that the District Attorney did not enforce the statute with respect

to knives that functioned as inconsistently as alleged by Cracco. A460. Any relief resting on the premise that this office would have charged Cracco had the officer in fact required five attempts of the wrist-flick test to open the knife (or even three or four) would be based on speculation. A462.

The District Attorney further argued that the relief Cracco sought was divorced from the facts. Cracco claimed that the officer required five attempts to open the knife, yet he sought a declaration enjoining prosecutions where the knife did not open on the first attempt. A470. Cracco thus sought a constitutional ruling that was broader than his own allegation and in conflict with state court decisions finding that a knife need not open on every attempt to be deemed a gravity knife. A470-71. Alternatively, even were it undisputed that the officer required five attempts, the number of attempts did not implicate vagueness doctrine, and, second, the former-statute and state court decisions nonetheless provided notice and guidance with respect to all aspects of the law that Cracco claimed rendered it vague. A463-70.

In the interim, the Copeland plaintiffs filed an appeal. On March 2, 2018, the district court stayed this case sua sponte pending the resolution of that appeal. A608-09. In imposing the stay, the district court reasoned that the allegation of inherent vagueness in the wrist-flick test raised by the Copeland plaintiffs "directly b[ore]" on whether the former-statute was constitutional as-applied to a knife that did not open on the first attempt of the wrist-flick test. A609.

On June 22, 2018, this Court affirmed the judgment in Copeland. The decision did not suggest that the wrist-flick test suffered from inherent vagueness. On the contrary, this Court highlighted the lack of evidence to that effect. Id. at 107, 113, 118-119. Approaching the former-statute from a bird's eye view, the panel identified a class of folding knives to which application of the test would be clear—including a collection of approximately 300 knives confiscated from one of the plaintiffs. Id. at 121. "Even if" the statute had been unfairly applied to all three of the plaintiffs—which it was not—the existence of this class of knives precluded a finding that the wrist-flick test was a vague standard. Id. Regarding a scenario where multiple attempts were hypothetically required to open a knife,[6] the panel suggested that enforcement against a knife that opened "once in twenty attempts" could have implicated the notice requirement of vagueness doctrine. Id. at 117.

This Court further rejected both legal theories relied on by Cracco, p. 16, supra. Like Cracco, the Copeland plaintiffs argued that the former-statute was vague because the wrist-flick test only measured illegality, such that "a negative test [was] inconclusive." 893 F.3d at 116. In rejecting the notion that there must be a threshold not simply for function, but for malfunction, too, this Court held that legislatures may functionally define crimes without simultaneously creating a "safe harbor" from prosecution. Id. Also like Cracco, the Copeland plaintiffs argued that Dreyden created

[6] No plaintiff in Copeland alleged this to be the case.

a class of folding knives that did not "readily" open to which the former-statute could not constitutionally apply. Id. at 112 n.7. In rejecting this misinterpretation, this Court held that Dreyden spoke only to the sufficiency of the facts in criminal complaint, and its "readily" open language "more resembles dicta than statutory construction." Id. "In any event," this Court further found, "[a] reading of Dreyden that the gravity knife law only reaches those knives [readily open] would enhance the public's notice of which knives were proscribed and would do much to answer [the] complaint that the wrist-flick test is indeterminate," and thus "undercut [a] vagueness claim." Id. (emphasis in original).

Because the Copeland plaintiffs had disavowed any reliance on their own arrests and prosecutions, a portion of this Court's decision discussed the difference between facial and as-applied challenges. 893 F.3d at 111-112. The panel that heard the case agreed "in principle" that someone "previously convicted for carrying what is indisputably a gravity knife" could raise a "prospective as-applied" challenge based on "a different set of facts." Id. at 112. Assuming the viability of such a claim, the panel found that the plaintiffs had offered no evidence to support it:

> If this were a true prospective as-applied challenge, we would therefore expect plaintiffs to have offered proof that specific knives they wished to possess responded inconsistently, if all, to the wrist-flick test. They did not.

Id. at 112-13. Because the plaintiffs relied instead on "hypothetical examples of unfair prosecutions," the panel deemed their challenge to be facial and held that it failed due to the statute's clear application to a significant class of knives. Id.

On September 17 and 18, 2018, the parties filed letters presenting their respective positions on the import of Copeland. In his letter, Cracco did not mention the "prospective as-applied" language from Copeland—let alone attach any significance to it or assert that his complaint should be viewed to have raised such a claim. A611-14. In his letter, the District Attorney noted that Cracco did not profess to have raised such a claim or otherwise allege an intention to engage in conduct that differed from the conduct underlying his past arrest. A661. The parties then filed a joint letter agreeing to rely on their prior motion papers. A666.

On March 27, 2019, the district court granted Cracco's summary judgment motion and denied this office's cross-motion. SA2. Relying on the "prospective as-applied" language from Copeland, the district court held that Cracco was "entitled" to declaratory judgment based on the potential for future unfairness in the application of the wrist-flick test. SA16-17. The district court found that Cracco, unlike the Copeland plaintiffs, had tailored his "manner of proof" to "specific conduct that he wants to pursue." SA16. Cracco did not offer proof that application of the wrist-flick test would be unclear with respect to any knife. He never attempted to apply the test to his own knife, nor did he offer evidence to suggest that application of the test to a knife he

wished to carry in the future would be unclear. A378-81.[7] The district court further distinguished Copeland by finding that Cracco, unlike the Copeland plaintiffs, sought a declaration based on the "facts of his actual criminal prosecution." SA17. Those events amounted to an allegation by a convicted defendant that was disputed by the officer and reasonably discredited by the Assistant D.A. The former-statute would not have been vague as-applied to a knife that opened on every application of the wrist-flick test. The district court did not give notice to the District Attorney of its intention to enter summary judgment on a prospective as-applied claim that was not advocated for, in any filings, by the plaintiff himself.

The district court further made a host of unfounded findings that exceeded the evidence—or even the allegations—in this case. Without record support, the district court found that there had "long been disagreement in the state of New York" as to what constituted a gravity knife. SA2. Without record support, the district court found that because the wrist-flick test was "functional" in nature, it was "difficult if not impossible" to determine whether a knife was illegal. Id. Also without record support, the district court theorized that someone could apply the wrist-flick test to a knife in a store with negative results, immediately encounter an officer who is "more adept" at applying the test, and be subject to arrest. SA2-3. These findings contradicted

[7] The only evidence of the wrist-flick test was offered by this office, i.e., the videos depicting the officer who arrested Cracco applying the test to his knife with consistent success.

undisputed evidence submitted by the District Attorney and findings by this Court in Copeland based upon a similar, if not identical, record.

Finally, the district court held that the former-statute invited arbitrary enforcement. SA21. Cracco did not move for summary judgment on this ground; he argued this point only in opposition to the District Attorney's cross-motion and, even then, he did not claim that his own conduct fell outside the core of the former-statute. A503-13, 566, 572-73. In nonetheless granting judgment to Cracco, the district court found, without record support, that this office would pursue a charge even if it was "undisputed" that an officer required "four or five tries to effectively apply the wrist-flick test." SA22. The district court further held, although not argued or proven by Cracco, that enforcement of the former-statute with respect to Cracco's knife fell outside the "core" of its prohibition. Id. To this end, the district court concluded, again without record support, that Cracco was charged with possession of "an ordinary folding knife offered for sale at stores in New York" and that the former-statute was not meant to apply to possession of a knife without "criminal purpose[ ]." Id. The district court did not afford notice to the District Attorney of its intent to grant summary judgment for Cracco on these points.

On March 28, 2019, the district court entered judgment in favor of Cracco on the ninth cause of action in the amended complaint, which sought a declaration that the former-statute was void for vagueness as-applied to folding knives that did not open

on the first attempt of the wrist-flick test. A78-79; SPA24.[8] On April 24, 2019, the District Attorney filed a notice of appeal. A667-68.

V. The repeal of the gravity knife statute

On May 30, 2019, while this appeal was pending, the Governor signed into law Assembly Bill 5944, entitled "An Act to amend the penal law, in relation to gravity knives," following unanimous passage of the bill by both houses of the state Legislature. A67-71, 674-75. Assembly Bill 5944 removed the term "gravity knife" from the list of weapons that can support a charge of misdemeanor possession under Penal Law §265.01(1), thereby decriminalizing simple possession of a gravity knife. The legislation further removed the term "gravity knife" from all sections of the Penal Law that define a criminal offense.

On June 28, 2019, this office moved to dismiss this appeal as moot. A693. Because Cracco sought solely prospective relief against enforcement of a repealed statute, the District Attorney argued, no live case or controversy remained. A693-94. On November 12, 2019, a panel of this Court denied that motion without prejudice to the parties raising the mootness issue in their merits briefs. A743-44.

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[8] This paragraph is our response to this Court's order directing the parties to address "the scope of declaratory relief granted by the district court." A743. While the decision equivocates as to the relief granted (i.e., one or two attempts of the wrist-flick test), the district court entered judgment on the ninth cause of action in the amended complaint, which sought a declaration that a knife must open on the first attempt (as did Cracco's notice of motion). If anything, the equivocation in the district court's decision draws attention to the fact that the issue raised by Cracco's claim is best characterized as a policy preference, not a matter of constitutional law, p. 50-51, infra.

STANDARD OF REVIEW

This Court reviews de novo the grant of Cracco's motion for summary judgment and the denial of the District Attorney's cross-motion. Scholastic, Inc. v. Harris, 259 F.3d 73, 82 (2d Cir. 2001). Where summary judgment is appropriate, this Court is empowered to grant either party's motion. Joyner v. Dumpson, 712 F.2d 770, 776 (2d Cir. 1983); see also Noel v. New York City Taxi & Limousine Comm'n, 687 F.3d 63, 74 (2d Cir. 2012).

"The principles governing a district court's consideration of a motion for summary judgment—which also govern appellate review of a summary judgment decision—are well established." Davis-Garett v. Urban Outfitters, Inc., 921 F.3d 30, 45 (2d Cir. 2019) (citation omitted). Summary judgment may be granted where "there is no genuine issue as to any material fact and…the moving party is entitled to a judgment as a matter of law," Fed. R. Civ. P. 56(c), i.e., "where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party." Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). In reviewing the evidence, "the district court may not make credibility determinations or weigh the evidence, and it must draw all reasonable inferences in favor of the non-moving party." Davis-Garett, at 45.

Where one party would bear "the burden of persuasion at trial," the other party can defeat summary judgment in either of two ways: "(1) by submitting evidence that negates an essential element of the [former] party's claim, or (2) by demonstrating that

the [former] party's evidence is insufficient to establish an essential element of [his] claim." Farid v. Smith, 850 F.2d 917, 924 (2d Cir. 1988).

SUMMARY OF ARGUMENT

The sole claim pled against the District Attorney is moot given the repeal of the former-criminal statute on which it is based. Because that mootness came to pass by no fault of either party, this Court should follow its usual course under such circumstances by vacating the decision of the district court and remanding the case for dismissal.

If, however, this Court finds that a controversy remains between the parties, the district court's decision is unsound on several legal and factual grounds. The district court, acting sua sponte, entered judgment against the District Attorney on a claim and a theory of relief upon which Cracco did not move for summary judgment, without affording this office notice and opportunity to present responsive argument. Had such notice been given, the District Attorney would have raised the points outlined in Point II, infra, which preclude the result reached below. The district court also misapplied summary judgment principles by relying on unsupported factual assertions to find inherent vagueness in the wrist-flick test and by crediting Cracco's version of events in relation to a disputed issue of fact that was material to the success of his claim—i.e., whether the officer indeed required five attempts of the wrist-flick test to open the knife. Finally, on a broader level, the district court's rulings on the issues of notice and arbitrary enforcement cannot be squared with the record or with this Court's findings

in Copeland. Any one of these categories of error warrants reversal of the decision below and the entry of summary judgment in favor of the District Attorney.

ARGUMENT

I. This appeal is moot due to the repeal of the challenged statute, and the decision of the district court should be vacated

Because new legislation has mooted the District Attorney's appeal by repealing the criminal statute that is the subject of Cracco's claim for prospective relief, this Court should vacate the order and judgment of the district court and remand this case for dismissal.

A. No controversy is presented by a challenge to a repealed law

Article III of the Constitution requires "a live case or controversy at the time that a federal court decides [a] case; it is not enough that there may have been [one] when the case was decided by the court whose judgment [is under review]." Burke v. Barnes, 479 U.S. 361, 363 (1987). A challenge to the validity of a repealed law does not satisfy this requirement where the plaintiff seeks only prospective relief. Id.; see also Diffenderfer v. Central Baptist Church of Miami, Florida, Inc., 404 U.S. 412, 414-415 (1972); Hall v. Beals, 396 U.S. 45, 48 (1969) (finding a claim for prospective relief moot where voters who had been disenfranchised would not suffer the same fate under an amended law); Catanzano v. Wing, 277 F.3d 99, 102, 107 (2d Cir. 2001) (finding a claim for prospective relief moot where the challenged law "expired" and there was no reason

to expect that it would be reenacted); Associated Gen. Contractors v. City of New Haven, 41 F.3d 62, 63-64, 67 (2d Cir. 1994) (same).

When the District Attorney was added as a defendant, Cracco raised a vagueness challenge to the then-existing gravity knife statute. The relief he sought was prospective in nature: a declaration as to the applicability of the former-criminal statute to "his future possession of a folding knife similar or identical to the folding knife that was in [his] possession" on the date of his arrest. A63. Given the repeal of the statute, no controversy remains between the parties. The judgment entered by the district court—namely, a declaration that the former-statute is vague as-applied to knives that do not open on the first attempt of the wrist-flick test—will not benefit Cracco because the statute no longer exists and cannot be enforced against him by this office. Assembly Bill 5944 passed both houses of the legislature unanimously; there is no colorable possibility that the statute will be reenacted. By removing from the Penal Law the precise conduct that Cracco wished to engage in—simple possession of a gravity knife—Assembly Bill 5944 rendered moot his claim for prospective relief.

B. No other law creates a continued controversy between the parties[9]

An otherwise moot claim will remain live only if "the same parties" are "reasonably likely" to find themselves again in dispute over "the same issue" raised on

[9] This section is our response to the Court's order directing the parties to address "the current and potential use of the definition of 'gravity knife' in [ ] Penal Law §265.00(5) in prosecutions and other proceedings under other provisions of law." A743.

appeal. Dennin v. Connecticut Interscholastic Ath. Conf., 94 F.3d 96, 101 (2d Cir. 1996) (quotation omitted); Van Wie v. Pataki, 267 F.3d 109, 114 (2d Cir. 2001) (requiring "a reasonable likelihood that the same complaining party [will] be subjected to the same action again") (quotation omitted). "This requirement flows naturally from Article III, because [the Court has] no power to adjudicate a case that no longer presents an actual ongoing dispute between the named parties." Video Tutorial Servs. v. MCI Telcoms. Corp., 79 F.3d 3, 6 (2d Cir. 1996) (quotation omitted). "Mere speculation" that the same issue will again arise between the parties does not amount to an actual ongoing dispute. Dennin, at 101.

There is no law that presents the same issue, in relation to the same parties, as Cracco's challenge to the former-criminal statute. In opposition to our motion to dismiss, Cracco raised the "potential" for "alternative enforcement contexts" involving laws that "reference[ ]" the Penal Law definition of a gravity knife. A739-40. Because that definition remains, Cracco argued, the wrist-flick test that was used to enforce the repealed criminal statute "could be used" to enforce laws in other "jurisdiction[s] or administrative settings." A739. The allegation that such laws "may exist now" or "may exist in the future" does not form a case or controversy,[10] nor would a law outside the jurisdiction of this office to enforce be relevant. More importantly, as shown below,

[10] See, e.g., Lillbask ex rel. Mauclaire v. Conn. Dep't of Educ., 397 F.3d 77, 88 (2d Cir. 2005) (a plaintiff must "point to something more" than "the possibility" of future reoccurrence to "lift [his claim] beyond the speculative") (emphasis in original).

there is no law that operates as Cracco envisioned. Nor can the two components of the former-criminal statute—one operative, the other definitional—be spliced from one another without altering the nature of Cracco's vagueness challenge.

The sole example raised by Cracco in opposition to our motion to dismiss—administrative regulations promulgated by the Metropolitan Transportation Authority ("MTA")—are different in scope than the former-criminal statute and do not reference Penal Law definitions. It is speculative to suggest that the MTA regulations will be enforced in the same manner as the repealed criminal statute, for several reasons. First, the Police Department "abandon[ed]" the wrist-flick test after the repeal of the gravity knife statute, which is consistent with the legislature's decision to decriminalize conduct that was identified solely by means of the same. A668-69. Second, the MTA regulations are broadly worded, barring the possession of a "weapon" or "dangerous instrument" in the public-transit system, and they cite gravity knives only as one of a nonexclusive list of examples. 21 N.Y.C.R.R. §§1044.11, 1050.8. That list is not coextensive with Penal Law definitions.[11] Similar to the Administrative Code section upon which Cracco's stop was predicated, p. 8, supra, a folding knife may be subject to the regulations regardless of whether it opens in response to the wrist-flick test that was once used to enforce the criminal statute. Third, as one district judge has noted, the

[11] For example, the Penal Law does not criminalize the possession of boxcutters or swords, or define those terms, but the regulations include boxcutters and swords as weapons or dangerous instruments that cannot be possessed on public transportation.

Penal Law formerly defined a "deadly weapon" to include gravity knives, whereas the MTA regulations apply simply to a "weapon"—suggesting that the regulations encompass a range of knives beyond those enumerated in the Penal Law.[12] The state courts have rarely addressed the regulations, Corso, n.12, supra, and have had no opportunity to do so since the new legislation.

Further, to properly challenge the MTA regulations and to even have standing to make the claim, Cracco would have needed to include them in his complaint and allege a fear of future enforcement. He did neither. Cracco has consistently raised the former-criminal statute as the sole source of his injury. He did not claim a fear being cited under the regulations for carrying a knife on public transportation—gravity knife or otherwise—or name the transit adjudication bureau or officers that share authority to enforce them. 21 N.Y.C.R.R. §§1044.14(b), 1050.10(b), 1050.12. Although the term "gravity knife" appeared or was incorporated by reference in other Penal Law sections that define a criminal offense, Cracco did not challenge those sections, either.[13] Instead, this lawsuit has always been based on the asserted unfairness of charging someone who acted without criminal intent with a criminal offense. See, e.g., A72 (identifying as his constitutional injury the fact that "Plaintiff was charged with a Class A Misdemeanor

[12] Corso v. City of New York, 2018 U.S. Dist. LEXIS 161113, *19-20 (S.D.N.Y. Sept. 20, 2018); see also Penal Law §10.00(12).

[13] E.g., Penal Law §265.01(2) (rendering it an offense to possess a "deadly" weapon—which formerly included a gravity knife—with intent to use that weapon unlawfully).

for the simple possession of an ordinary folding knife that could not be readily opened").

A related point follows: Even if the MTA regulations or some other law were enforced by reference to the Penal Law definition of a gravity knife and the wrist-flick test, it is speculative to suggest that such a law would present an identical vagueness issue. Cracco's claim was based on the former-criminalization of simple possession of a gravity knife. A hypothetical law that imposed civil or non-criminal penalties for such conduct—even by reference to the Penal Law definition and the wrist-flick test—would not be subject to the same "scrutiny" as the former-statute. See, e.g., Monserrate v. N.Y. State Senate, 599 F.3d 148, 158 (2d Cir. 2010) ("Laws with civil consequences receive less exacting vagueness scrutiny") (quotation omitted). Nor would a hypothetical law that imposed criminal penalties for possession of a gravity knife with criminal intent—even by reference to the Penal Law definition and the wrist-flick test—be subject to the same scrutiny as the former-statute. See, e.g., Copeland, 893 F.3d at 121 ("To be sure, a scienter requirement may mitigate a law's vagueness, especially where the defendant alleges inadequate notice") (quotation omitted).

In sum, it is speculative to suggest that the MTA regulations, which are different in scope than the repealed criminal statute, will be enforced in the same manner as that statute. And even if there existed a law enforceable by this office with the language imagined by Cracco, it is speculative to suggest that such a law would be subject to the same vagueness analysis. Because there is no reasonable expectation that Cracco will

again be subject to prosecution under the repealed criminal statute by the District Attorney, this case is moot.

C. The equities weigh in favor of vacatur

"When a civil case becomes moot while an appeal is pending, it is the general practice of the appellate court to vacate the unreviewed judgment granted in the court below and remand the case to that court with directions to dismiss it." Bragger v. Trinity Capital Enter. Corp., 30 F.3d 14, 17 (2d Cir. 1994); see also Camreta v. Greene, 563 U.S. 692, 712 (2011) (the "established practice" when mootness frustrates a party's right to appeal is to vacate the challenged rulings) (quotation omitted). The decision to vacate "depends on the equities of the case," with the "primary concern" being the "fault of the parties in causing the appeal to become moot." E.I. Dupont De Nemours & Co. v. Invista B.V. & Invista S.A.R.L., 473 F.3d 44, 48 (2d Cir. 2006) (quotation omitted). Where an appeal has become moot through "no fault or machination" of the appellant, "it would be unfair to require that [party to] acquiesce in the judgment of the district court." Id. (quotation omitted); see also FDIC v. Regency Sav. Bank, F.S.B., 271 F.3d 75, 77-78 (2d Cir. 2001) (declining to dismiss an appeal outright, as requested by the appellees, where the appellant was not at fault for the case becoming moot; instead, vacating the decision below).

Now that this case is moot, the District Attorney cannot challenge the district court's decision entering summary judgment against him in a case with no evidence of unconstitutional enforcement activity by this office. That order raises a host of issues

with respect to which the District Attorney is frustrated in his intention to seek review. The district court's rulings on these issues have potential application to the enforcement by this office of the hundreds of other criminal statutes that remain law, and are problematic for the many reasons identified in the remaining sections of our brief. Meanwhile, as a local law enforcement official, the District Attorney played no role in bringing about the state legislation that ended the controversy between the parties. This office therefore asks this Court to follow the "general duty to vacate and dismiss" that applies in such circumstances. Bragger, 30 F.3d at 17.

II. The district court erred in sua sponte granting summary judgment on grounds not raised by Cracco without providing notice to the District Attorney

Alternatively, the District Attorney seeks reversal of the district court's decision on several grounds—starting with entry of judgment, sua sponte, on a prospective as-applied challenge and a theory of vagueness on which Cracco did not seek summary judgment, without affording this office notice and a chance to respond.

"[A] grant of summary judgment must comport with the Federal Rules of Civil Procedure." Willey v. Kirkpatrick, 801 F.3d 51, 62 (2d Cir. 2015). Rule 56 permits a sua sponte grant of summary judgment "only under certain conditions." Id. Before granting summary judgment on "grounds not raised by a party," the district court must give "notice and a reasonable time to respond." Fed. R. Civ. P. 56(f). This Court has found reversible error where a district court enters summary judgment on grounds that "appear[ ] nowhere in the [party's] moving papers" without affording the other party

the requite notice. Willey, at 62; see also Nick's Garage v. Nationwide Mut. Ins. Co., 715 Fed. Appx. 31, 34 (2d Cir. 2017) ("[T]he court failed to give Garage prior notice of the ground on which it intended to rely, coupled with citation to record evidence demonstrating Insurer's entitlement to judgment on that ground"); Lawson v. Homenuk, 710 Fed. Appx. 460, 466 (2d Cir. 2017) ("[W]hile defendants moved for summary judgment on all of Plaintiff's claims, they urged neither of the evidentiary defects noted by the district court") (quotation and citation omitted); Markman v. City of New York, 629 Fed. Appx. 119, 122 (2d Cir. 2015).

In this case, Cracco's motion for summary judgment was "threadbare," at best. Willey, 62. The motion made no reference to a prospective as-applied challenge and, instead, was based exclusively on the events of Cracco's past prosecution. A504-13; see also A501-02. Further, while a vagueness claim may proceed on one of two theories—lack of notice or arbitrary enforcement, Copeland, 893 F.3d at 119—Cracco did not seek summary judgment on a theory that the former-statute afforded inadequate guidance to law enforcement, or that his own prosecution fell outside the law's core. In opposition to Cracco's motion and in our post-briefing letter, see p. 20, supra, the District Attorney pointed out that Cracco's motion could not be read to raise the former claim or the latter theory of relief. A556, 661. The district court nonetheless entered summary judgment against the District Attorney, sua sponte, on both. SA15-22. Had the district court afforded notice to this office of its intent to do so, and the "facts"

upon which the court intended to rely, we would have identified the portions of the record that preclude a judgment in Cracco's favor.

A. Cracco was not entitled to summary judgment on a prospective as-applied challenge

Assuming, arguendo, that a prospective as-applied challenge is viable where, as here, a law does not implicate a fundamental right, Cracco did not offer, and otherwise lacked, the evidence needed to prove such a claim.[14] In Copeland, this Court "agree[d] in principle" that "someone previously convicted for carrying what is indisputably a gravity knife should be permitted to claim that the gravity knife law cannot lawfully be applied to a different knife that [he] intends to carry and that responds differently to the wrist-flick test." 893 F.3d at 112. The panel labeled such a claim a "prospective as-applied challenge," and explained that a plaintiff seeking relief on this ground "must tailor the proof to specific conduct that [he] would pursue but for fear of future enforcement." Id. at 112-13. In the context of the former-statute, such evidence

[14] In Copeland, this Court assumed the existence of such a claim but did not need to decide the matter because the plaintiffs' claim was properly viewed as a facial challenge. To suggest the existence of a prospective as-applied challenge, the panel relied solely on Expressions Hair Design v. Schneiderman, 137 S.Ct. 1144 (2017). See Copeland, 893 F.3d at 112. That decision involved a law that implicated a constitutional right (there, the First Amendment). Expressions Hair Design, at 1150-51. No claim is made that the former-gravity knife statute implicated a constitutional right, as the panel acknowledged elsewhere in its decision. Copeland, at 111. At the same time, this Court has previously recognized that a "pre-enforcement" challenge to the application of a law to a prospective set of facts constitutes a "facial, rather than as-applied challenge." N.Y. State Rifle & Pistol Ass'n v. Cuomo, 804 F.3d 242, 265 (2d Cir. 2015) (quotation omitted).

includes "proof that specific knives [the plaintiff] wished possess responded inconsistently, if at all, to the wrist-flick test." Id. at 113. Because Cracco offered no such proof and instead relied only on the disputed events of his past arrest and prosecution, he was not "entitled" to summary judgment on a prospective as-applied challenge. SA16.

If this office been given notice, we would have further responded that Cracco lacked the proof described in Copeland, warranting judgment in our favor. A defendant can meet his burden on summary judgment by "mak[ing] a discovery demand requiring the plaintiff to reveal the evidence that supports an essential element of his claim." Nick's Garage, 875 F.3d at 116. If the plaintiff "fails to show evidence capable of sustaining [his] burden of proof on that element, then the defendant can prevail on its motion [under Rule 56]." Id. Had Cracco in fact raised a prospective as-applied challenge, he would have borne the burden of establishing at trial that "specific knives" he wished to possess in the future responded inconsistently to the wrist-flick test. Copeland, at 113. Had the district court given notice to the District Attorney, this office would have explained that Cracco "failed to identify, in answering interrogatories" any such knife. Celotex Corp. v. Catrett, 477 U.S. 317, 320 (1986). By interrogatory, this office asked Cracco to identify all knives to which he contended application of the former-statute would be vague. A249-50. In response, Cracco identified only "the specific folding knife" that he had on the date of his arrest. Id. Cracco was thus obligated by a discovery demand to produce evidence of an essential element of a

prospective as-applied challenge, and failed to do so.[15] Assuming such a challenge could be properly interjected into the case at this late hour, summary judgment should have been entered for this office.[16]

B. Cracco was not entitled to summary judgment under a theory of arbitrary enforcement

In his moving papers, Cracco did not argue or offer any evidence to suggest that the former-statute invited arbitrary enforcement. In nonetheless entering summary judgment on this theory, the district court relied on a host of factual statements that lacked record support. At the outset, the district court asserted that Cracco sought to carry an "ordinary folding knife offered for sale at stores in New York," and that the wrist-flick test, when applied to such a knife, "could have different outcomes depending on who performed [the test] or when." SA22-23.[17] Had the district court given notice of its intent to rely on these assertions, the District Attorney would have raised Cracco's testimony that he did not buy his knife in New York and never tested it himself, as well as Cracco's interrogatory response that his claim was not based on any other knife. A402-03.[18] The only individual who tested the sole knife underlying this lawsuit was

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[15] Cracco further objected to the interrogatory as "beyond the scope [of] this vagueness challenge to the gravity knife statute as it was applied to the specific folding knife possessed by plaintiff on October 18, 2013." A249-50.

[16] Cracco did not alter the nature of his claim; the district court did, sua sponte. The unfairness nonetheless remains apparent: this office requested that Cracco identify the universe of knives on which his claim was based so that, in advance of summary judgment or a trial, we would have an opportunity to demand inspection of such knives.

[17] The district court did not cite to a portion of the record to support these claims.

[18] Cracco purchased the knife either in Iowa, California, Minnesota, or Illinois.

the officer who arrested Cracco. Even the events of Cracco's arrest—which are disputed and cannot form the basis of summary judgment in his favor—do not involve "different outcomes depending on who performed [the test] or when," as described by the district court. As a general matter, Cracco did not submit proof of different outcomes under the wrist-flick test as-applied by any individual(s) to any knife.

The district court further asserted that this office "claimed" an "authority" to prosecute cases where it was "undisputed that it took an officer four or five tries" to open a knife. SA22. The paragraph of the declaration of the assigned Assistant cited by the district court leaves room only for the opposite conclusion:

> It was not the People's position in Cracco's case that the prosecution could or should continue were it undisputed that Officer Correa required five attempts to open Cracco's knife; it was the People's position that there was a factual dispute between the Officer and the defendant on this point and that the appropriate remedy was not dismissal of the charge but resolution of the dispute at trial.

A325; see also A342. It is clear to any defendant, charged with any offense, that a disputed fact presents an issue for trial and does not compel dismissal of a charge, or render application of the Penal Law vague.

Finally, in finding that a prosecution for the possession of "an ordinary folding knife" would fall outside the "core" of the former-statute's prohibition, the district court distinguished an "ordinary folding knife" from one "use to advance criminal purposes." SA22. But the law itself was clear: no such distinction was available. This lawsuit is not about felony possession of a knife with criminal intent; it is about the

former-misdemeanor offense of strict-liability possession. Cracco's conduct fell squarely within the "core" of that prohibition: he was charged with possessing a knife that functioned in an "inherently dangerous" manner, regardless of whether he had criminal intent—exactly as contemplated by the language of the law and its legislative history.[19] Perhaps Cracco could have argued that the absence of a scienter requirement detracted from the notice afforded by the law (a point which this Court rejected in Copeland, see 893 F.3d at 121), but a prosecution that follows the letter of the law does not fall outside its core. When it came to the "core" of the former-statute, the critical inquiry was whether Cracco's knife responded consistently to the wrist-flick test. Copeland, at 120 ("Native Leather did not show that the seized knives responded inconsistently to the wrist-flick test. Native Leather's misconduct therefore fell 'within the core of the statute's prohibition'"). The District Attorney maintains that it did.

In sum, the district court entered judgment on a claim and a theory of relief on which the plaintiff did not move, without giving the defendant notice and an opportunity to respond. This was error, and it infects the entire decision. Most significantly, had the district court afforded notice to the District Attorney of its intent to enter summary judgment on a prospective as-applied challenge, this office would

[19] Specifically, the Bill Jacket states: "The gravity knife is inherently dangerous. To children and adults not versed in the use of such weapons, this knife can cause very serious injuries." A288. The district court is correct that gravity knifes were used to "perpetrate crimes." SA20. But the rationale for criminalizing simple possession remains the fact that the knife itself was inherently dangerous, regardless of whether the person using the knife was a "criminal" or acted with criminal intent.

have raised the portions of the record that compel the opposite result. Because Cracco has explicitly limited his claim to the events of his past prosecution, no trial can proceed on a prospective as-applied challenge and summary judgment should be entered for the District Attorney.

III. The district court in erred resolving the parties' cross-motions by misapplying well-settled summary judgment principles

In resolving the parties' cross-motions for summary judgment, the district court relied on factual assertions that lacked record support and credited Cracco's account in relation to a fact that was material to his ability to prove his claim and, at the same time, disputed by the District Attorney. These two faults in the decision, independent of one another and the other arguments raised in this brief, merit reversal.

First, the premise of the district court's finding that the wrist-flick test was an inherently vague or unfair standard is factually unsound. Without exception, the district court relied on unsupported assertions that cannot form the basis of a summary judgment ruling. See, e.g., Salahuddin v. Goord, 467 F.3d 263, 273 (2d Cir. 2006) (a party moving for summary judgment "cannot rest on allegations…and must point to specific evidence in the record to carry its burden").[20] These assertions were further contradicted by evidence offered by the District Attorney and this Court's findings in Copeland.

[20] These are not allegations that were raised by Cracco; they are assertions that the district court raised on its own.

The district court opened its decision in reliance on the precise hypothetical that this Court found, in Copeland, "simply [was] not cognizable in an as-applied challenge" and lacked evidentiary support. SA2-3; Copeland, at 113, 118-119. Specifically, the district court imagined the prosecution of a customer who, after attempting to flick open a knife several times, concluded that it was legal and purchased it, only to be immediately stopped by a police officer who succeeded in flicking it open. SA2-3. No evidence was offered in this case, and no evidence was offered in Copeland, to suggest that the wrist-flick test produced such indeterminate results from tester-to-tester that this sequence of events could reasonably occur. Based simply on the fact that the wrist-flick test was a functional standard, the district court further imagined that it would have been "difficult if not impossible" for a knife-owner to determine whether his knife was legal, and that two police officers applying the test to the same knife, one day apart, could have had different results. SA2. Cracco never applied the wrist-flick test to his own knife, and offered no proof of different results under the test. A393. In Copeland, this Court found an identical fact pattern—i.e., a plaintiff who did not test her own knives or offer proof that results varied depending on the "skill" of the tester—fatal to the allegation that the wrist-flick test produced inconsistent results. 893 F.3d at 117-19. No evidence in the summary judgment record proved that the wrist-flick test was unpredictable, or that its results depended on the attributes of the tester.

Second, the premise of the district court's finding that the former-statute was unfairly applied to Cracco is factually unsound. To this end, the district court relied on

Cracco's version of events on an issue that was material to his motion: whether the officer in fact required five attempts of the wrist-flick test to open Cracco's knife. See, e.g., SA15, 17. In reviewing the summary judgment record, however, a district court "may not make credibility determinations or weigh the evidence." Davis-Garett, 921 F.3d at 45 (emphasis in original). "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge." Id. (quotation omitted).

This office opposed Cracco's claim that the officer required five attempts to open the knife. We did not simply rely on conclusory allegations to do so, but filed a detailed declaration by the officer and video exhibits in support of our position that the officer successfully opened Cracco's knife on every application of the wrist-flick test. In entering summary judgment for Cracco, the district court observed that the officer's declaration did not "explicitly state that [the officer] required only one attempt of the wrist-flick test to open Cracco's knife." SA9. As the District Attorney argued below, it was Cracco who interjected the notion of "attempts" into this case. The officer's declaration and the video exhibits make clear that Cracco's knife unambiguously functioned as a gravity knife on every application of the test. Moreover, in evaluating Cracco's motion, the district court was required "to draw all reasonable inferences in favor of the nonmoving party," Davis-Garett, 45 (emphasis in original)—i.e., the District Attorney. That did not happen here. The officer's declaration compels the conclusion that the parties submitted conflicting evidence. A310-11, 313. But it

certainly cannot be said that the district court, in reviewing that declaration, drew all reasonable inferences in favor of the District Attorney.

The events of Cracco's arrest were material to his motion, for the former-statute would not have been vague as-applied to a knife that opened on every application of the wrist-flick test. Only by ignoring the sworn statements of the officer was the district court able to reach the challenged result. At the same time, resolution of this dispute was not material to the District Attorney's cross-motion. On the contrary, the existence of this dispute—which created a factual issue for a jury to resolve at a criminal trial—is precisely what rendered the application of the former-statute to Cracco's knife a reasonable enforcement of the law. Cracco may claim that the officer required five attempts to open the knife, but he cannot dispute that an objectively reasonable individual, having reviewed the Criminal Court complaint and seen the officer handle the knife, could elect to credit the officer and conclude that the knife opened on every application of the test. The District Attorney must be able to exercise this type of discretion without triggering a collateral challenge in federal court to the way this office enforces the Penal Law.[21]

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[21] In its decision, the district court wrote that "both [parties] agree that [the number of attempts] does not matter for purposes of this challenge." SA13. The District Attorney did not agree to this point. This office repeatedly argued that resolution of the dispute was material to Cracco's ability to prove his claim, whereas the existence of the dispute, itself, rendered our application of the law reasonable. A460-63, 551-53, 565-66, 600.

In sum, the district court did not follow well-settled summary judgment principles in finding that the wrist-flick test suffered from inherent vagueness, or that its application to the knife that is the subject of this case was unfair. Had the district court adhered to the record and followed those principles, the opposite disposition would have been reached on the parties' cross-motions for summary judgment. The District Attorney respectfully asks this Court to enter that disposition.

VI. The district court erred in resolving the parties' cross-motions by finding that the former-statute did not afford reasonable notice and authorized arbitrary enforcement

The district court's resolution of the issues of notice and arbitrary enforcement cannot be squared with this Court's resolution of the same issues in Copeland, or the record at summary judgment. As noted above, there are two grounds upon which a law can be declared vague: the statute may either fail to provide reasonable notice of the prohibited conduct or authorize arbitrary enforcement. Copeland, 893 F.3d at 114 (quotation omitted). Even where a law does not provide sufficiently clear standards to law enforcement, a vagueness challenge will fail if the plaintiff's conduct nonetheless fell within the "core" of the law's prohibition. Id. at 119 (quotation omitted). Given that the former-gravity knife statute "is not claimed to [have] inhibit[ed] the exercise of constitutional rights, only a moderately stringent vagueness test is required." Id. at 114 (quotation omitted).

On the issue of notice, the district court held that Cracco "had no way of knowing" whether his conduct was criminal under the former-statute. SA20. To

support this holding, the district court made three related findings. First, the district court found that "case law in New York [was] not clear on what [could] be considered a gravity knife." Id. In furtherance of this point, the district court suggested that the wrist-flick test was a procedure unique to this office. SA5. Second, the district court found that "the type of knives" that were prosecuted as gravity knives—which the district court referred to as "common folding knives"—were "sold openly" in stores in New York. SA21. Third, the district court found that the former-statute was intended to apply only to "knives used by criminals in New York," not to "the type of ordinary folding knife" possessed by Cracco. Id.

In Copeland, this court reached the inverse holding on the issue of notice on a nearly identical record, and made a series of findings contrary to those outlined above. Specifically, this Court held that the former-statute provided adequate notice to a plaintiff who, like Cracco, offered no proof that her own knives had responded inconsistently to the wrist-flick test. 893 F.3d at 119. In support of this holding, this Court found, first, that "the courts of New York [ ] long upheld the application of the gravity knife law to common folding knives via the wrist-flick test," and this judicial authority gave notice that a knife that opened in such a manner was illegal. Id. at 115-16. As this Court observed, the wrist-flick test was not an invention of this office—it was "consistently used [by law enforcement] to identify illegal folding knives since the ban was enacted." Id. at 115. Second, this Court rejected the notion that folding knives should have been exempt from prosecution simply because they were sold in stores

within New York. Indeed, the primary focus of Copeland was a storeowner who sold illegal gravity knives under the guise of "common folding knives." Id. at 114-19. Third, this Court rejected the related notion that the statute was intended to apply only to knives that were designed to be used as weapons. To this end, the panel distinguished the sole decision relied on by the district court to inject some form of ambiguity into the law—United States v. Irizarry, 509 F. Supp. 2d 198 (E.D.N.Y. 2007)—as having applied a "design-based interpretation of the [former-statute] that [was] not adopted by the state courts." Compare 893 F.3d at 119 with SA20-21.

The second "notice" finding by the district court, p. 45, supra, is faulty for the additional reason that, as noted above, Cracco did not purchase his knife in New York. No evidence in the record established that "the types of knives" that were prosecuted under the former-law were "sold openly in stores in New York." SA21. The district court's reliance on Dickerson v. Napolitano, 604 F.3d 732 (2d Cir. 2010), to attribute legal significance to this unsupported finding is further problematic. In Dickerson, this Court held that the "widespread availability" of products similar to those possessed by the plaintiffs had no bearing on their challenge to the law as-applied to the particular products they possessed. Id. at 746-47. This holding directly undermines the general proposition for which the district court invoked the decision. But, more specifically, the language from Dickerson quoted by the district court—that the sale of similar products "lends credence" to a notice argument, SA21—has no application here. The products at issue in Dickerson were NYPD collectables: the NYPD was "itself

involved" in selling products similar to the ones it was policing. Dickerson, at 746. Conversely, in this case, the District Attorney's Office made significant efforts to curb the sale of illegal knives at retail stores within our jurisdiction in the years leading up to Cracco's arrest. A267. Nor can private companies inject vagueness into a state statute by flooding the market with illegal products and marketing them as lawful "tools." See n.5, supra.

On the issue of arbitrary enforcement, the district court's holding is factually unsupported as argued in Part II(B), supra. From a purely legal standpoint, however, this aspect of the district court's decision sits in direct tension with this Court's explanation in Copeland that the "test" for arbitrary enforcement in the vagueness context is whether enforcement depends on an "officer's unguided and subjective judgment." 893 F.3d at 119. To be vague on this ground, a law must be "so devoid of objective content" that enforcement "necessarily devolves" upon the "whim" of an officer. Id. (citing, for example, a law that prohibited "acting in an annoying manner"). Applying this principle to the former-statute, this Court held:

> Whatever flaws infect the gravity knife law, a totally subjective element is not among them. The gravity knife law has an objective 'incriminating fact': either the knife flicks open to a locked position or it does not. In the ordinary case, a law enforcement officer is simply not called upon to make a subjective judgment about whether a criterion of guilt is present. The gravity knife law therefore does not authorize or even encourage discriminatory enforcement.

Id. at 120 (citations omitted). This holding all but precluded the result reached by the district court, especially given the absence of any proof capable of distinguishing this plaintiff's claim from the claim raised in that case.

This Court's decision in Copeland is clear: By the time of Cracco's arrest, there had long been consensus in New York—not "disagreement," as the district court found—over "how to define and when to prosecute an individual for possession of a gravity knife." SA2. A folding knife that opened in response to centrifugal force, as measured by the wrist-flick, was illegal under the law, no matter the marketed design of the knife or whether its user possessed the knife with criminal intent. Moving on from the problematic factual and legal underpinning of the district court's general pronouncements on the issues of notice and arbitrary enforcement, what remains is the district court's determination that the alleged number of attempts of the wrist-flick test was, in fact, a matter of constitutional law in this case. It was not.

As the Supreme Court explained in United States v. Williams, "[w]hat renders a statute vague is not the possibility that it will sometimes be difficult to determine whether the incriminating fact it establishes has been proved; but rather the indeterminacy of precisely what that fact is." 553 U.S. 285, 306 (2008) (emphasis added). "[T]he mere fact that close cases can be envisioned" does not render a statute vague, for close cases "can be imagined under virtually any statute." Id. An alleged uncertainty that relates to the "whether" language of Williams, rather than the "what,"

is properly addressed by the requirement of proof beyond a reasonable doubt—not vagueness doctrine. Id.

In the context of this case, the number of attempts of the wrist-flick test was an alleged uncertainty that related to the "whether," not the "what." The former-statute provided clear notice of the "incriminating fact" to be proven: the blade of a knife must have opened and locked into place in response to gravity or centrifugal force. In Copeland, this Court found as much. 893 F.3d at 120. The former-statute did not run afoul of the Fourteenth Amendment simply because Cracco claimed "difficult[y]" determining whether that fact had been proven. Williams, at 306. The issue of whether the officer required four or five attempts of the wrist-flick test to open Cracco's knife was precisely type of issue properly addressed by the protections of the Criminal Procedure Law—protections which Cracco had invoked before he elected to plead guilty—and the People's burden of proof at trial.

This Court's decision in Copeland further makes clear that the former-statute was not vague simply because it lacked a numeric rule. As this Court recognized in Copeland, "just because it is possible to replace a standard with a numeric rule, the Constitution does not render the standard a forbidden choice." 893 F.3d at 116 (quotation omitted). Yet the district court found the former-statute vague precisely because it employed a functional standard without "codify[ing]" the "prescribed number of wrist-flick attempts." SA5. As this Court further recognized in Copeland, "legislatures may functionally define crimes" and "need not simultaneously create a safe

harbor from prosecution." 893 F.3d at 116. The district court, meanwhile, found the former-statute vague for precisely because it lacked a safe harbor:

> [A] knife must open upon application of the wrist-flick test to warrant prosecution, even though there is no specific number of attempts of the wrist-flick test that is too many. Under this enforcement regime, Cracco has no way of knowing that his past conduct was, or that his intended future conduct will be, criminal under the gravity knife statute.

SA20. Indeed, in parts of its decision, the district court acknowledged that its ruling was not so much a matter of constitutional law but an "[im]perfect solution" to what the court perceived as a failure on the part of New York's elected branches of government to reach an agreement to amend the law. SA2, 16.

In sum, there is no principled, constitutional basis for drawing the line where the district court drew it. The limit of one attempt cannot be reconciled with Williams or Copeland, and it far exceeds the alleged facts of Cracco's arrest—calling to mind the principle that sweeping vagueness claims should be viewed with skepticism because they "run contrary to fundamental principles of judicial restraint" and "threaten to short circuit the democratic process." Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442, 451 (2008). To this end, the District Attorney offered evidence that the concerns animating the former-statute remained relevant when the parties' motions were filed. Although Cracco may have been unable to perfectly predict whether his knife—and not just any knife, but one that he elected to needlessly wear in plain view on the subway—would be classified as a gravity knife, he was not the only person with

something at stake. Gravity knives were regularly used to commit crimes and were often carried through public places, creating real danger to unsuspecting civilians. While it is true that the continued wisdom of the statute, as a policy matter, was the subject of important political debate, vagueness doctrine operates on a different level. When it comes to vagueness doctrine, it cannot be said that the former-statute, absent the numerical rule imposed by the district court, "proscribe[d] no comprehensible course of conduct at all." Copeland, 893 F.3d at 114 (quotation omitted). The narrow criteria on which a statute can be found vague in a constitutional sense simply were not established in this case.

CONCLUSION

The district court erred by granting Cracco's motion for summary judgment and denying the District Attorney's cross-motion for the same relief. This office, however, believes Cracco's claim to be moot given the repeal of the statute on which it is based, and we therefore ask this Court to vacate the decision that is the subject of our appeal and remand this case to the district court for dismissal. In the alternative, if the Court disagrees and identifies a continued controversy between the parties, we ask the Court to reverse that decision based on the myriad of errors identified in this brief, and to enter summary judgment in favor of the District Attorney, as is warranted by the record.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief was prepared using Microsoft Word 2013, and according to that software, it contains 13,926 words, not including the cover, the table of contents, table of authorities, the signature block, and this certificate.

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ELIZABETH N. KRASNOW