19-1129 cv

In the

United States Court of Appeals

for the Second Circuit

Joseph Cracco,

Plaintiff - Appellee,

v.

Cyrus Vance, Jr.,

Defendant – Appellant,

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

Defendants,

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

BRIEF OF AMICUS CURIAE KNIFE RIGHTS FOUNDATION, INC. IN SUPPORT OF PLAINTIFF-APPELLEE AND AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, Amicus Curiae Knife Rights Foundation, Inc. hereby certifies that it has no parent corporation and that there is no publicly held corporation that owns 10% or more of its stock.

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INTRODUCTION AND IDENTITY OF AMICUS CURIAE[1]

Knife Rights Foundation, Inc. ("Knife Rights") is a non-profit organization that serves its supporters and the public, through direct and grassroots advocacy, focused on protecting the rights of knife owners to keep and carry knives and edged tools. The purposes of Knife Rights include the promotion of education regarding state and federal knife laws, and the defense and protection of the civil rights of knife owners nationwide. Knife Rights was a principle sponsor of the prior lawsuit *Copeland v. Vance*, 893 F.3d 101 (2d. Cir. 2017), *cert. denied*, ___ U.S. ___, (2019).

Knife Rights urges this Court to uphold the lower Court's holding that the wrist-flick test renders the statutory definition of a gravity knife void for vagueness. Knife Rights submits this brief in support of Plaintiff-Appellee because the judgment below represents a critically important recognition by a court of law of the harmful impact the subject regulatory approach, and ones like it, have on the constitutional rights of millions of otherwise law-abiding people.

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[1] This brief is filed with the written consent of all parties. No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than amicus or its counsel, make a monetary contribution intended to fund the preparation or submission of this brief.

ARGUMENT

I. Assembly Bill 5944 Did Not Moot the Appeal Because Gravity Knives Remain Illegal on New York City Subways and Buses, and the NYPD has Announced its Intention to Enforce Those Prohibitions

Appellant New York County District Attorney Cyrus A. Vance, Jr. (the "DA") argues that the appeal is moot and that the Court should vacate the judgment below, based on legislation signed into law on May 30, 2019. However, gravity knives remain illegal on public transportation in New York City, and the New York Police Department ("NYPD") intends to continue enforcing these unconstitutionally vague prohibitions.

The DA is correct that Assembly Bill 5944 ("AB 5944") was signed on May 30, 2019 by Governor Andrew Cuomo, repealing the prohibition on gravity knives found in N.Y. PENAL LAW § 265.01(1). However, AB 5944 did not repeal the *definition* of "gravity knife" found in N.Y. PENAL LAW § 265.00(5), which is one of the statutory provisions being challenged in this lawsuit, and which is the very source of the unconstitutionally vague "Wrist Flick Test" -- the main subject of this vagueness challenge.

Further, AB 5944 did not remove all gravity knife prohibitions from the law. Gravity knives remain illegal on New York City subways and buses, and therefore the unconstitutionally vague definition of gravity knife found in § 265.00(5) will continue to place Plaintiff and other New Yorkers in jeopardy,

Rules of the Metropolitan Transportation Authority governing subway and bus operations throughout the City provide as follows:

> **Section 1050.8 - Weapons and other dangerous instruments**
>
> (a) No weapon, dangerous instrument, or any other item intended for use as a weapon may be carried in or on any facility or conveyance. . . . For the purposes hereof, a weapon or dangerous instrument shall include, but not be limited to, a firearm, switchblade knife, boxcutter, straight razor or razor blades that are not wrapped or enclosed in a protective covering, *gravity knife*, sword, shotgun or rifle. [Emphasis added.]

21 NYCRR § 1050.8.

> **Section 1040.9 - Firearms or other weapons**
>
> No weapon, dangerous instrument, or any other item intended for use as a weapon may be carried in or on any facility or train. . . . For the purposes hereof, a weapon or dangerous instrument shall include, but not be limited to, a firearm, switchblade knife, *gravity knife*, boxcutter, straight razor or razorblades that are not wrapped or enclosed in a protective covering, sword, shotgun or rifle. [Emphasis added.]

21 NYCRR § 1040.9.

> **Section 1044.11 - Firearms or other weapons**
>
> No weapon, dangerous instrument, or any other item intended for use as a weapon may be carried in or on any facility or conveyance. . . . For the purposes hereof, a weapon or dangerous instrument shall include, but not be limited to, a firearm, switchblade knife, *gravity knife*, box cutter, straight razor or razorblades that are not wrapped or enclosed in a protective covering, sword, shotgun or rifle. [Emphasis added.]

21 NYCRR § 1044.11.

Penalties for violating these prohibitions include fines or civil penalties up to $100 and up to 30 days in prison. *See* 21 NYCRR § 1040.12; 21 NYCRR § 1044.14; 21 NYCRR § 1050.10.

(The foregoing, collectively, the "MTA Rules.")

Thus, in reality, gravity knives remain illegal to possess in New York City if you happen to be one of the more than 5 million New Yorkers who ride the subway or the nearly 2 million New Yorkers who ride the bus to work every day. *See* http://web.mta.info/nyct/facts/ridership/ (last accessed May 27, 2020).

The NYPD has explicitly declared its intention to continue to enforce this gravity knife prohibition in, at least, the New York City subways. One day after AB 5944 was signed into law, the NYPD issued the following statement from its office of the Deputy Commissioner, Public Information ("DCPI") to Albany Bureau Chief Jesse McKinley of the New York Times:

> The NYPD opposed the legislation because gravity knives are in reality rapidly-deployable combat knives, and there have been more than 1600 stabbings and slashings in New York City so far this year.[2] The public should also be aware that the possession of gravity knives in the New York City subway system remains illegal. The NYPD will continue its work to ensure New York City remains the safest big city in America.

[2] Notably, the City cannot actually connect these crimes to the every-day common folding knives law-abiding folks carry and which the City tries to label "gravity knives." The juxtaposition of this number with the inflammatory phrase "rapidly-deployable combat knives" appears intentionally misleading.

(*See* e-mail from DCPI to New York Times Albany Bureau Chief Jesse McKinley and New York Times story dated May 31, 2019, attached to Exhibit 1 to James M. Maloney's Declaration in Opposition to the District Attorney's Motion to Dismiss, at A729-736.)

The NYPD statement makes it clear that it does not consider AB 5944 the end of the story regarding gravity knife enforcement against ordinary law abiding New Yorkers possessing common folding knives, the most commonly possessed pocket knives in the United States. The use of aggressive and misleading hyperbole such as "rapidly-deployable combat knives" (which common folding knives most certainly are not) and the promise that NYPD will "continue its work" in this regard makes the NYPD's intention to continue its unconstitutionally vague gravity knife enforcement activities unmistakable.

Indeed, the inconsistent messages from the state (via AB 5944) and the NYPD do little more than set a trap for the unwary and compounds the existing vagueness and notice problems – New Yorkers who reasonably believe that the ban has been repealed may be misled into mistakenly believing that they can carry their work tools on their person while on public transportation and find themselves confronted by the police as a result.

This is more than merely theoretical. Plaintiff, himself, was arrested in Grand Central Station by one of the named defendants who was a member of the

NYC Transit Police (Appellant's Brief, p. 7). In fact, the arresting officer, Jonathan Correa, testified that of the 70 gravity knife arrests he has made, the vast majority took place in the subways. A308-309.

Continued gravity knife enforcement action under the MTA Rules would require the NYPD to apply exactly the same unconstitutionally vague Wrist Flick Test from N.Y. PENAL LAW § 265.00(5) as was previously used unconstitutionally to enforce the now repealed N.Y. PENAL LAW § 265.01(1), including against Plaintiff, himself.

It is impossible to take seriously the DA's statements to the contrary when the NYPD takes a very aggressive position publicly even while the DA takes the opposite position with various courts. Most notably, the DA's naked assertion that the NYPD intends to change its tactics is wholly irrelevant to the question of mootness, as even some sort of voluntary announcement by the NYPD (as opposed to the DA who is not the NYPD) that they are renouncing (1) the use of the Wrist Flick Test or (2) future enforcement of the MTA Rules with regards to gravity knives, would be insufficient to render the case moot. Such voluntary cessation represents a clear exception to the doctrine of mootness and cannot divest this Court of Article III jurisdiction. A party voluntarily ceasing the complained of conduct can readily change its mind and resume that very conduct after a dismissal

order is entered. *See Knox v. Serv. Emps. Int'l Union Local 1000*, 567 U.S. 298 (2012).

The DA also errs in claiming that the MTA Rules do not preserve the justiciable nature of this case because Plaintiff did not challenge those MTA Rules. In fact, Plaintiff *did* challenge N.Y. PENAL LAW § 265.00(5), which is where the unconstitutional definition *still* resides. So long as there remains *any* means to punish Plaintiff and those like him using the unconstitutionally vague definition of gravity knife found in N.Y. PENAL LAW § 265.00(5), the injury *still* exists and therefore the case is not moot. In fact, Plaintiff need not have challenged the actual prohibition originally contained in N.Y. PENAL LAW § 265.01(1) at all. The unconstitutional vagueness is found in the definition; that is where the cause of action originated and where it remains to this day.

Thus, in reality, little has changed with the signing of AB 5944. Law-abiding New Yorkers are still at risk of being charged by the NYPD with unlawful gravity knife possession using the unconstitutionally vague Wrist Flick Test that is being challenged in this lawsuit, and millions of New Yorkers remain prospectively in jeopardy. Accordingly, the appeal is not moot.

II. Even if the Court Dismisses the Appeal on the Ground of Mootness, the Judgment Below Should not be Vacated Because the Dismissal on Mootness Will Have Resulted from the DA's Own Action

In the event the Court dismisses the appeal as moot, the DA has also asked the Court to vacate the judgment below. In doing so, the DA ignores the impact of the leading case on the subject, *U.S. Bancorp Mortg. Co. v. Bonner Mall Partnership*, 513 U.S. 18 (1994). In that case, the Supreme Court discussed in detail the history and basis for the principle invoked here by the DA and surveyed the applicable case law.

The Court explained that the vacatur principle is fundamentally a discretionary equitable doctrine and exists to provide fairness to the party against whom the judgment was entered below but who nevertheless lost the opportunity to have the judgment reviewed on appeal. The Court noted:

> The reference to "happenstance" in *Munsingwear* must be understood as an allusion to this equitable tradition of vacatur. A party who seeks review of the merits of an adverse ruling, but is frustrated by the vagaries of circumstance, ought not in fairness be forced to acquiesce in the judgment.

Id. at 25. Because of this, the question is not at all about who caused the mootness. The question is fairness to the relevant appellant who ostensibly has lost the ability to obtain appellate review. In this case, granting vacatur would allow the DA to manipulate this Court's Article III jurisdiction to its advantage.

This case presents unusual facts, and research has no found no similar case for comparison. Here the DA was presented with a strategic choice: (1) litigate the appeal on the merits to try to obtain a reversal, or (2) argue mootness and, if successful, try to obtain vacatur. In effect, the DA concluded that it gets two bites at the apple. It can try to effectively win the appeal right at the outset by arguing mootness and seeking vacatur rather than having to prevail on the heavier lift of winning the appeal on the merits. This motion is a strategic shortcut to prevailing on its appeal.

Notably, the DA is the one raising the mootness argument. If the DA prevails in its mootness position, its *own* position will be the sole reason it cannot obtain appellate review. If the DA actually cared about being deprived of appellate review, it should be arguing *against* mootness, not for mootness. Certainly, the Court could examine mootness on its own motion. But the position taken by the DA on mootness matters for the purpose of the vacatur doctrine, because the vacatur doctrine is all about fairness to the appellant. As the Supreme Court explained in *U.S. Bancorp,* vacatur is highly dependent on the voluntary choices made by an appellant. Here, the *Appellant* chose to support mootness, thereby hoping to usher in its own inability to obtain substantive appellate review yet, in fact, win its appeal employing that jurisdictional shortcut.

The DA is the proverbial child who murders his parents and then throws himself on the mercy of the court because he is an orphan. The DA's strategy is highly manipulative of the Court's Article III jurisdiction, and indulging this approach threatens to encourage similar inappropriate manipulative strategic behavior from other parties in the future.

Having made the very argument in favor of mootness, the DA should be precluded from befitting from its position by also obtaining vacatur if its mootness position prevails. A party in the position of the DA should be required to oppose mootness (at least where, as here, there is a clear good faith argument against mootness) in order to seek vacatur if mootness is found. That way, such a party can at least be said to have tried to defend its ability to appeal on the merits. A party complaining that it has lost the ability to seek appellate review ought to at least have done everything it can to defend the viability of that appeal.

Of course, Amicus believes the argument against mootness should win the day. But even if it does not, the argument against mootness here is not only a good faith argument, but it is in fact quite strong. There is no reason the DA could not and should not have taken the opposition position on mootness. The only explanation for the DA's position is its manipulative strategic behavior on the

jurisdictional issue. The DA should not be rewarded for that manipulative strategic behavior by obtaining vacatur of the judgment below.[3]

III. The Judgment Below Should be Affirmed Because the Definition of Gravity Knife Found in Penal Law § 265.00(5) is Void for Vagueness, as The Wrist Flick Test it Relies on is Inherently Indeterminate when Applied to Folding Knives with a Bias Toward Closure.

In its opinion below, the District Court framed the issue as follows:

> Cracco's requested relief is a declaration that the law is void for vagueness when applied to criminal prosecutions for the possession of any folding knife that has a *bias toward closure*, a lockable blade, and the inability to be readily be opened by gravity or centrifugal force, with a specific finding that a knife is not readily opened unless it opens by means of a wrist flick test on the first or second attempt. [Emphasis supplied.]

SA17.

The District Court correctly zeroed in on the key fundamental aspect of folding knives which makes the Wrist Flick Test inherently indeterminate: bias toward closure. The American Knife and Tool Institute ("AKTI") defines bias toward closure as follows:

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[3] In that regard, this situation shares some of the concerns that apply to the doctrine of judicial estoppel. Judicial estoppel prevents a party from playing fast and loose with the court by taking one position and then when it prevails on that position for one purpose, reversing its position on that issue later for another purpose. *See*, *e.g. New Hampshire v. Maine*, 532 U.S. 742 (2001). Here the DA is the one arguing in favor of mootness in the first instance and then, if it prevails, it is complaining about the impact mootness has on its right to appeal. Playing fast and loose in this manner should not be encouraged.

> The tendency to remain in the closed or folded position, imposed by a spring or mechanical load, unless acted upon by manual force.

See AKTI, Approved Knife Definitions, https://www.akti.org/resources/akti-approved-knife-definitions/#bias-toward-closure, last accessed May 27, 2020.

The purpose of bias toward closure is to keep the blade safely in the handle until the user chooses to rotate the blade out of the handle for use:

> The basic design objective of a folding knife is something that will tend to remain closed unless the user desires or intends to expose the blade and that the blade will remain open until the user desires to fold or close the knife. Another design objective is that the knife will be convenient to employ, meaning that it can be opened easily. Many of the tasks for which a folding knife is employed involve holding some material or holding something in place or steady while the cut is made.
>
> In the typical folding knife, the blade swings or pivots in an arc of approximately 180° from the closed position (within the handle) to the open position. Without some means of providing a bias or lock to the closed position, the knife could swivel open, or at least partially open, unexpectedly or unintended.

See AKTI, Understanding Bias Toward Closure and Knife Mechanisms, https://www.akti.org/resources/additional-definitions/, last accessed May 27, 2020.

Unlike an actual locking mechanism, bias toward closure is a design feature that exerts force in the closed direction and therefore requires the user to exert force to overcome it, much like opening a kickstand on a bicycle:

> In some respects, the bias on the blade is similar to the bias on a typical bicycle kickstand. The leg or strut that supports the bicycle is held in the up or retracted position by spring action. As one starts to

> lower the kickstand, typically by foot pressure, the bias toward the up position is overcome.

Id. Bias toward closure can be implemented using various design features such as springs, detents, and slip joints. *Id*. Because there are various ways of designing bias toward closure into a folding knife, and because there are many hundreds of different folding knives on the market, the amount of force required to be applied by the user overcome the bias toward closure can vary greatly from knife to knife.

Thus, if order for a person to know whether or not he has a knife that meets the definition of "gravity knife" under New York law, he has to successfully apply *the sufficient amount of force* using the Wrist Flick Test to overcome the bias toward closure and open the knife blade.

Naturally the ability to do this will vary from person to person and from knife to knife based on various factors such as strength, dexterity, and skill of the user; design, materials, and construction of the knife; manufacturing variances, and wear and tear over time.

And because applying the Wrist Flick Test will vary from person to person, it will, naturally, vary from the owner to a police officer testing the same knife, and even vary from one police officer to another testing the same knife.

Importantly, for exactly the same reason the Wrist Flick Test can yield different results for different people trying to open the same knife, it also will often require a *different number of attempts* for different people trying to open the knife

– yielding varying and indeterminate results. Some people may never be able to open a given knife using the Wrist Flick Test even though another person (for example a police officer) might be able to do so.

This variability is the inherent problem with the Wrist Flick Test; this is why it is fundamentally indeterminate; and this is why the District Court correctly found the Wrist Flick Test void for vagueness as applied to Plaintiff.

The key question is how does a person like Plaintiff protect himself from the consequences of the Wrist Flick Test? It does not matter if he, himself, tests the knife. What counts is if the NYPD or the DA can open the knife using the Wrist Flick Test. It is no defense for Plaintiff to say "well, officer, *I* was unable to wrist flick the knife open" or even "nobody I know was able to wrist flick the knife open." No matter how often a person tests his knife and fails to open it, whether he will be subject to punishment for possessing a gravity knife depends entirely on Wrist Flick Testing by the NYPD and DA, not his own testing. Thus, there is no way for Plaintiff or others like him to conform their conduct to ensure that they stay within the requirements of the law.

In view of the foregoing, the inherent variability of the Wrist Flick Test makes New York's definition of gravity knife in N.Y. PENAL LAW § 265.00(5) unconstitutionally vague, and the judgment below should be affirmed.

CONCLUSION

For the foregoing reasons, the appeal is not moot, the judgment below should be affirmed, and if the Court finds that the appeal is moot, the judgment below should not be vacated.

Respectfully submitted,

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RULE 32(g)(1) CERTIFICATE

This brief complies with the type-volume limitation of Rules 29(a)(5) and 32(a)(7)(B) of the Federal Rules of Appellate Procedure and Local Rules 29.1(c) and 32.1(a)(4)(A) of the Local Rules and Internal Operating Procedures of the Court of Appeals for the Second Circuit because it contains 3,449 words, excluding the parts of the brief exempted by Rule 32(f).

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

/s/ Daniel L. Schmutter
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