COURT OF APPEALS
STATE OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK,

Plaintiff-Respondent,

-against-

STEVEN BERREZUETA,

Defendant-Appellant.

APL-2017-00224

NOTICE OF MOTION OF LAW PROFESSORS FOR LEAVE TO FILE A BRIEF AMICI CURIAE IN SUPPORT OF DEFENDANT-APPELLANT STEVEN BERREZUETA

PLEASE TAKE NOTICE that upon the annexed affirmation of Erica T. Dubno, dated July 27, 2018, the proposed *Amici Curiae* Law Professors (Gideon Yaffe, Brett Dignam, Jeffrey Fagan, Issa Kohler-Hausmann, Martha Rayner, Kenneth Simons, and Steven Zeidman), will move before this Court at 20 Eagle Street, Albany, New York, on Monday, August 13, 2018, or as soon thereafter as counsel may be heard, for an order, pursuant to NYCRR Rule 500.23, for leave to file the proposed *Amici Curiae* brief in Support of Defendant-Appellant Steven Berrezueta, filed herewith, and for such other and further relief as this Court deems just and proper.

July 27, 2018

Respectfully submitted,

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COURT OF APPEALS
STATE OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK, *Plaintiff-Respondent,* -against- STEVEN BERREZUETA, *Defendant-Appellant.*	APL-2017-00224 **AFFIRMATION OF ERICA T. DUBNO, ESQ., IN SUPPORT OF MOTION OF LAW PROFESSORS FOR LEAVE TO FILE A BRIEF AMICI CURIAE IN SUPPORT OF DEFENDANT-APPELLANT STEVEN BERREZUETA**

Erica T. Dubno, an attorney admitted to practice in the Courts of New York State, hereby affirms under penalty of perjury:

1. I am a member of the firm of Herald Price Fahringer PLLC d/b/a Fahringer & Dubno, with offices at 767 Third Avenue, Suite 3600, New York, New York, 10017. I make this affirmation in support of the motion by seven distinguished law professors to file an amici curiae brief in support of the Defendant-Appellant's pending motion for reargument.

2. Daniel L. Schmutter, counsel for the Defendant-Appellant, consents to the participation of the law professors as amici curiae in this matter.

3. We most respectfully submit that the parties are not capable of a full and adequate presentation of the issues identified and developed by this collection of experienced law professors. The proposed amici curiae bring with them unique

knowledge regarding, among other things, federal constitutional issues implicated by this case and the law relating to folding knives.

4. The distinguished array of law professors, who seek permission to appear as amici curiae in this case, can remedy the deficiency in the parties' ability to present a full and adequate presentation of critical issues.

5. The law professors have identified law and arguments that may well have escaped the Court's decision in this case. We also have a good faith basis to believe that these law professors, with diverse experience from Yale, Columbia, Fordham, the University of California, and CUNY, have presented, in the attached brief, a perspective that would be of assistance to this Court. This brief represents only the views of amici, not the institutions with which they are affiliated.

6. Gideon Yaffe is a Professor of Law, Professor of Philosophy, and Professor of Psychology at Yale University. His research interests include the philosophy of law, particularly criminal law, and the study of intention and the theory of action. He has written extensively about mens rea and the extent to which criminal possession statutes can be compatible with the criminal law's general restriction of liability to acts and omissions. See, e.g., Gideon Yaffe, In Defense of Criminal Possession, 10 Crim. L. & Phil. 441 (2016).

7. Brett Dignam is a Clinical Professor at Columbia Law School. Professor Dignam teaches a prison clinic in which she supervises students in state and federal prison litigation on issues ranging from habeas corpus challenges to conviction, parole, and the constitutionality of prison conditions.

8. Jeffrey Fagan is the Isidor and Seville Sulzbacher Professor of Law and Professor of Epidemiology at Columbia University. His research and scholarship examine legal and social regulation of police. He teaches courses on criminal law, policing, and empirical analysis in law. He is Fellow of the American Society of Criminology, and served on the Committee on Law and Justice of the National Research Council.

9. Issa Kohler-Hausmann is an Associate Professor of Law and Sociology at Yale University. Her research and scholarship focuses on misdemeanor arrests and lower court adjudication. Her forthcoming book documents the extensive collateral consequences stemming from arrest and prosecution for minor crimes, including folding knife possession.

10. Martha Rayner is a Clinical Associate Professor of Law at Fordham University School of Law. She co-directs Fordham's Criminal Defense clinic, in which her students represent many clients charged with possession of knives deemed to be illegal when opened in a particular manner by New York Police Department officers.

11. Kenneth W. Simons is the Chancellor's Professor of Law and Professor of Philosophy by courtesy at the University of California, Irvine School of Law. Professor Simons specializes in criminal law and torts, and has published widely on the nature and role of mental states in criminal law, torts, and constitutional law, and on the justifiability of strict criminal liability.

12. Steven Zeidman is a Professor of Law at CUNY School of Law. His research interests include criminal procedure, evidence, and criminal justice generally. His teaching responsibilities include supervising students representing indigent clients in the New York City Criminal Court.

13. To the best of my knowledge, no party's counsel contributed content to the brief or participated in the preparation of the brief in any other manner.

14. No party or party's counsel contributed money that was intended to fund preparation or submission of the brief. No person or entity, other than movants or movants' counsel, contributed money intended to fund preparation and submission of the brief.

15. I am acting pro bono and personally funding the printing and filing of this application because, in an unrelated proceeding, one of my family members, who was walking down a street in Manhattan, was stopped and charged with criminal possession of a weapon because he had a folding knife, purchased from Paragon Sporting Goods, in his pocket.

16. For all these reasons, as well as those developed in the attached proposed brief, we most respectfully seek leave to submit a brief as amici curiae.

Dated: New York, New York
July 27, 2018

Erica T. Dubno, Esq.

APL-2017-00224

Court of Appeals
of the
State of New York

THE PEOPLE OF THE STATE OF NEW YORK,

Plaintiff-Respondent,

-against-

STEVEN BERREZUETA,

Defendant-Appellant.

BRIEF OF AMICI CURIAE LAW PROFESSORS GIDEON YAFFE, BRETT DIGNAM, JEFFREY FAGAN, ISSA KOHLER-HAUSMANN, MARTHA RAYNER, KENNETH SIMONS, AND STEVEN ZEIDMAN IN SUPPORT OF MOTION FOR REARGUMENT

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Dated: July 27, 2018

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Table of Authorities

I. INTEREST AND IDENTITY OF AMICI CURIAE

Gideon Yaffe is a Professor of Law, Professor of Philosophy, and Professor of Psychology at Yale University. His research interests include the philosophy of law, particularly criminal law, and the study of intention and the theory of action. He has written extensively about mens rea and the extent to which criminal possession statutes can be compatible with the criminal law's general restriction of liability to acts and omissions.[1]

Brett Dignam is a Clinical Professor at Columbia Law School. Professor Dignam teaches a prison clinic in which she supervises students in state and federal prison litigation on issues ranging from habeas corpus challenges to conviction, parole, and the constitutionality of prison conditions.

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Steven Zeidman is a Professor of Law at CUNY School of Law. His research interests include criminal procedure, evidence, and criminal justice generally. His teaching responsibilities include supervising students representing indigent clients in the New York City Criminal Court.

This brief was not authored, in whole or in part, by counsel to any party. No party or party's counsel contributed money that was intended to fund preparing or submitting this brief. No person, other than amici or their counsel, contributed money intended to fund preparing or submitting this brief. This brief represents only the views of amici, not the institutions with which they are affiliated.

II. INTRODUCTION AND SUMMARY OF ARGUMENT

In a one-paragraph memorandum decision, this Court, perhaps inadvertently, recently tread deep into the churning waters regarding the prosecution of individuals for possession of common folding knives. The Court affirmed Steven Berrezueta's conviction for attempted possession of a switchblade, in violation of sections 110 and 265.01(1) of the Penal Law, even though the defense urges that Mr. Berrezueta had an assisted opening folding knife, instead of a switchblade.

We urge, most respectfully, that in affirming this conviction the Court overlooked another constitutional lens through which New York's Folding Knife Law can and should be inspected. A knife owner may be subject to prosecution and conviction — perhaps for a felony — even though he or she plainly lacks mens rea with respect to the knife's characteristics or illegality. A long line of federal cases demonstrates that the Folding Knife Law offends core notions of due process.

III. ARGUMENT

1. Mens Rea and Due Process

The idea that the stigma of a criminal conviction should be imposed only on culpable actors has long been at the very core of our system of justice. As the Supreme Court noted in Morissette v. United States,

> [t]he contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil.[2]

Exceptions to this approach have commonly been limited to "minor violations," crimes often characterized as "public-welfare offenses."[3]

Although the due process dimension of the mens rea requirement is a "clear message" of the case law,[4] the precise circumstances in which a court can wield the Due Process Clause to invalidate a strict-liability criminal statute remain frustratingly underdeveloped.[5] The primary problem is that courts addressing the due process dimensions of mens rea generally do so in cases involving the construction and

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[2] 342 U.S. 246, 250 (1952).

[3] United States v. Cordoba-Hincapie, 825 F. Supp. 485, 496 (E.D.N.Y. 1993).

[4] Id. at 515.

[5] Id. at 505 ("Mens rea is an important requirement, but it is not a constitutional requirement, except sometimes" [quoting Herbert L. Packer, Mens Rea and the Supreme Court, 1962 Sup. Ct. Rev. 107, 107]); id. at 508 ("The [Supreme] Court's treatment of strict liability in the criminal law continues to provide little guidance with respect to the constitutional status of the mens rea principle").

interpretation of criminal statutes, and fail to separate the constitutional issues from the statutory ones.[6] For example, relying on core concerns of due process, the Supreme Court has noted that it takes "particular care" to avoid "construing a statute to dispense with mens rea where doing so would 'criminalize a broad range of apparently innocent conduct.'"[7]

These cases' signposts regarding due process and mens rea are, nevertheless, highly relevant here. This is so because analysis of a statute's vagueness is informed by whether the statute has a mens rea requirement that comports with due process, i.e., that would prevent convictions for innocent conduct.[8] As noted by Judge Jack Weinstein, in the end "[t]here is much similarity between saying that a law is unconstitutional because it punishes the person who lacks criminal intent and saying it is unconstitutional because it captures the person who cannot know whether that law applies to his or her conduct."[9]

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[6] Id. at 505.

[7] Staples v. United States, 511 U.S. 600, 610 (1994) (quoting Liparota v. United States, 471 U.S. 419, 426 [1985]).

[8] Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 499 (1982), abrogated on other grounds by Johnson v. United States, 135 S. Ct. 2551, 2561 (2015) ("[T]he Court has recognized that a scienter requirement may mitigate a law's vagueness, especially with respect to the adequacy of notice to the complainant that his conduct is proscribed").

[9] Cordoba-Hincapie, 825 F. Supp. at 513.

Amici contend that the Folding Knife Law's strict liability is well outside the due process perimeter drawn by the Supreme Court.

2. The Folding Knife Law Imposes Strict Liability with Respect to the Unlawful Characteristics of the Knife

To begin the analysis, there can be no doubt that the Folding Knife Law (e.g., N.Y. P.L. § 265.01[1]) is, in its material respects, a strict liability criminal possession statute — the only mens rea required is knowledge of possession.

In People v. Parrilla, for example, the defendant was in possession of a folding utility knife at the time of his arrest.[10] After the knife was able to be opened in a Wrist-Flick Test, Parrilla was charged with possession of an illegal gravity knife. Id. Parrilla argued that the State was required to prove not only that he was knowingly in possession of "a" knife (a fact he admitted), but also that he knew the knife met the statutory definition of a gravity knife.[11] In short, Parrilla argued that there was a mens rea requirement of knowledge with respect to the knife's illegality or its illegal characteristics.

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[10] People v. Parrilla, 27 N.Y.3d 400, 402 (2016).

[11] Id.

The Parrilla court, citing gravity knife precedent dating to 1996, disagreed, in the clearest possible terms.[12] The Court observed that

> [t]he plain language of the [Folding Knife Law] demonstrates that the legislature intended to impose strict liability to the extent that defendants need only be aware of their physical possession of the knife . . . . [I]t is not necessary that defendants know that the knife meets the technical definition of a gravity knife under the [Folding Knife Law].[13]

3. In Criminal Possession Statutes, Mens Rea is Generally Required with Respect to Both Possession and Characteristics Generating Illegality

New York's interpretation of the intent required under the Folding Knife Law is at war with the due process principles routinely applied by federal courts. In general, constitutionally permissible criminal possession statutes (and particularly felony possession statutes) require knowledge with respect to both possession of the item or substance in question and knowledge with respect to its illegality or illegal characteristics.

In Staples, for example, the defendant was in possession of a rifle that had the external appearance of an entirely lawful semi-automatic weapon, the AR-15. But the rifle had been internally modified so that it was capable of firing fully automatically (i.e., as a machine gun), an illegal characteristic.[14] The government, echoing

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[12] Id. at 404.

[13] Id.

[14] Staples, 511 U.S. at 603.

the Parrilla court, contended it need only prove that Staples was knowingly in possession of the firearm, regardless of his knowledge of its illegal full-auto capability.[15]

The Supreme Court, however, required the government to prove both that the defendant knowingly possessed the firearm, and that the defendant was aware of the weapon's unlawful characteristic.[16] To do otherwise, the Staples court noted, would mean that

> any person who has purchased what he believes to be a semiautomatic rifle or handgun, or who simply has inherited a gun from a relative and left it untouched in an attic or basement, can be subject to imprisonment, despite absolute ignorance of the gun's firing capabilities, if the gun turns out to be an automatic.[17]

This same constitutional reasoning with respect to mens rea applies to statutes criminalizing the possession of unlawful "analogue" drugs. To avoid imposing the stigma of criminal punishment upon innocent conduct, the Supreme Court has required not only that a defendant knowingly possessed the substance in question, but also that the defendant "knew he was dealing with 'a controlled substance.'"[18] The latter knowledge can be shown in two ways — "either by knowledge that a substance

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[15] Id. at 608.

[16] Id. at 619.

[17] Id. at 615.

[18] McFadden v. United States, 135 S. Ct. 2298, 2302 (2015).

is listed or treated as listed by operation of the Analogue Act, or by knowledge of the physical characteristics that give rise to that treatment."[19]

The analyses in Staples and McFadden echo the Court's earlier observation, in United States v. International Minerals & Chemical Corp., that prohibiting possession of apparently ordinary items can run afoul of the Due Process Clause. As that Court noted:

> Pencils, dental floss, paper clips may also be regulated. But they may be the type of products which might raise substantial due process questions if Congress did not require, as in [United States v. Murdock, 290 U.S. 389 (1933)], "mens rea" as to each ingredient of the offense.[20]

The exceptions to the rule of Staples and McFadden are equally instructive regarding the due process dimensions of mens rea. For example, where a person is knowingly in possession of a hand grenade, it is permissible to impose strict liability with respect to whether the grenade is also unregistered (and thus illegal).[21] As the

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[19] Id. at 2306 (citation omitted). There is some variability here among the states. For example, for purposes of a prima facie drug-possession case, the State of Washington does not require, as part of the State's prima facie case, proof that the defendant knowingly possessed the substance. Washington does, however, permit an "affirmative defense of unwitting possession." See, e.g., State v. Bradshaw, 98 P.3d 1190, 1195 (Wash. 2004). That defense may be supported by a showing that the defendant (a) did not know he was in possession of the controlled substance, or (b) did not know the nature of the substance he possessed. See State v. Staley, 872 P.2d 502, 505 (Wash. 1994). Whatever might be said about the constitutionality of this regime, it is clearly not equivalent to the strict liability of the Folding Knife Law.

[20] 402 U.S. 558, 564-65 (1971).

[21] United States v. Freed, 401 U.S. 601, 609 (1971).

Staples Court noted, the reason is that a hand grenade is so unusually hazardous that it puts knowing possessors "on notice that they stand 'in responsible relation to a public danger.'"[22] Put another way, there is little risk that imposing strict liability with respect to the registration status of hand grenades might "criminalize a broad range of apparently innocent conduct."[23]

4. Criminal Possession Statutes Require Knowledge, Rather than Recklessness, with Respect to Illegal Characteristics

It is worth focusing on the fact that in general, criminal possession statutes require not merely some level of mens rea — they require actual knowledge. On this point, the Model Penal Code ("MPC") agrees with the holdings of Staples, McFadden, and related cases.

It is true that the MPC uses recklessness as a default minimum mens rea for establishing criminality.[24] Under the MPC's "one-for-all" rule, however, a stated mens rea for the initial element of a crime "travels" through the remaining elements, applying to all of them (assuming no other intent is identified for those elements).[25]

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[22] Staples, 511 U.S. at 611 (quoting United States v. Dotterweich, 320 U.S. 277, 281 [1943]).

[23] Id. at 610.

[24] Model Penal Code § 2.02(3) (Am. Law Inst. 1985).

[25] Id. § 2.02(4); Kenneth W. Simons, Should the Model Penal Code's Mens Rea Provisions Be Amended?, 1 Ohio St. J. Crim. L. 179, 181 n.6 (2003).

Because the MPC applies an intent requirement of knowledge to the act of possession,[26] that intent therefore applies to the other elements of a possession crime.

The revised New York Penal Law of 1965 "drew heavily upon the Institute's proposals [in the MPC] both in general provisions and in treatment of specific crimes."[27] The Parrilla court, however, in determining that the Folding Knife Law imposed strict liability, apparently did not consider the MPC's approach on this point.

5. The Folding Knife Law's Strict Liability Plainly Contradicts Principles of Due Process Identified in Supreme Court Precedents

Certainly, there is room for argument at the edges of Staples and McFadden. There is, for example, space to accommodate potentially divergent views of state and federal legislators with respect to what is "apparently innocent conduct." Thus, within the confines of New York City, where firearms are widely understood to be strictly regulated, perhaps an AR-15 is constitutionally equivalent to a hand grenade: Perhaps a New Yorker's knowing possession of an AR-15 would itself be sufficient to put her on notice that she was "in responsible relation to a public danger," such that further proof of her knowledge of the weapon's fully automatic capability would be unnecessary.

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[26] Model Penal Code § 2.01(4).

[27] Herbert Wechsler, Codification of Criminal Law in the United States: The Model Penal Code, 68 Colum. L. Rev. 1425, 1428 (1968).

But the Folding Knife Law does not exist anywhere close to any conceivable mens rea gray area. Instead, the Law's strict liability with respect to the illegality or illegal characteristics of the knife plainly exceeds the "outer limits of what is permissible" under the Due Process Clause,[28] failing to protect innocent conduct.

A key point is that folding knives are employed in the City and elsewhere in the State as entirely ordinary hand tools. In fact, they are simply the folding version of a common tool that dates to the Stone Age, and can be found today in essentially every household and workplace — where they are used routinely, often daily, for entirely peaceful purposes. As one New York court has noted, the knives that are potentially prohibited by the Folding Knife Law are

> widely manufactured and sold across the country in hardware and outdoor stores under brand names such as Clip-it, Husky Utility Folding Knives and other brands. They are sold for and are used for purely legitimate purposes. Despite "locking" safety features, many can be "flicked" open with the appropriate amount of force. Thus, these knives are routinely carried by many New Yorkers for legitimate purposes ignorant of the fact that they may be in violation of the law and face a potential automatic one-year jail sentence.[29]

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[28] Cordoba-Hincapie, 825 F. Supp. at 515.

[29] People v. Trowells, Ind. No. 3015/2013, at *4 (N.Y. Sup. Ct. Bronx County July 11, 2014), available at http://tinyurl.com/k32ek6u. A copy of this decision is annexed.

It is worth noting in this regard that in 2010, when the District Attorney of New York seized some 1,300 purportedly illegal gravity knives, he obtained them not from the pockets of robbers, or from smugglers, or from black marketeers — but from the aisles of ordinary stores including Orvis and Home Depot.

The final factor pushing the Folding Knife Law's strict liability well beyond the "outer limits of what is permissible" under the Due Process clause is the extent of the potential sanction. Violation of the Folding Knife Law is no "minor" violation. Jail time is available for misdemeanor convictions, and even more troubling, violations can be punished as felonies. Specifically, violation of the Folding Knife Law can be charged as a Class D Felony, under the so-called "felony bump-up rule," if the defendant has previously been convicted of another crime.[30] In felony cases, in particular, the Folding Knife Law presents a scenario where strict liability is extremely likely to run afoul of the Due Process Clause.[31]

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[30] N.Y. P.L. §§ 70.00(2)(d), (3)(b); 265.02(1).

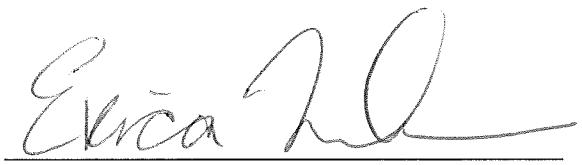
[31] See Staples, 511 U.S. at 618-19.

IV. CONCLUSION

Of the many objectives of the criminal law, certainly one goal must be to ensure that innocent people, engaged in innocent conduct, will not face the stigma of criminal prosecution and conviction — much less conviction for a felony. Yet under the Folding Knife Law, the State of New York indisputably has charged and convicted large numbers of New Yorkers who have no culpability whatsoever. At the heart of New York's fundamental error is its failure to impose the mens rea requirement compelled by the Due Process Clause.

For all these reasons, and those previously advanced, this Court should grant the relief sought by the Defendant-Appellant.

July 27, 2018



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WORD COUNT CERTIFICATION

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People v. Trowells

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART 92

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THE PEOPLE OF THE STATE OF NEW YORK

-against- **DECISION AND ORDER**
Ind. 3015/2013

ANTHONY TROWELLS,

Defendant.

----------X

WEBBER, J.:

Defendant, Anthony Trowells, is charged, *inter alia*, with Criminal Possession of a Weapon in the Third Degree (PL § 265.02[1]). By Notice of Motion dated May 14, 2014, defendant moves for dismissal of the indictment in the interest of justice pursuant to CPL § 210.40. The People submitted papers in opposition to the motion on May 30, 2014.

Background

It is alleged that on or about June 12, 2013 at approximately 10:05 a.m., the defendant was walking in the vicinity of the Major Deegan Expressway and Jerome Avenue in Bronx County, when he was observed by Detective Keith Ames of the Bronx Narcotics Squad to have a gravity knife clipped to his belt. The People claim the knife was in plain view. The defendant claims that Det. Ames attempted to engage him in a drug-related conversation, and when he refused to respond and attempted to walk away from him, Det. Ames then physically stopped the defendant, conducted a search of defendant's person and recovered the gravity knife. The defendant was arrested for Criminal Possession of a Weapon in the Third Degree (PL § 265.02[1]) and Criminal Possession of a Weapon in the Fourth Degree (P.L. § 265.01). He was arraigned on June 13, 2013. On September 26, 2013, the defendant was indicted for Criminal Possession of a Weapon in the Third Degree (PL § 265.02[1]) and Criminal Possession of a Weapon in the Fourth Degree (P.L. § 265.01). The elevation to a felony charge was due to defendant's 2007 conviction for Possession of a Forged Instrument in the Second Degree (P.L.

§170.25). The People have offered the defendant the opportunity to enter a plea of guilty to the misdemeanor Criminal Possession of a Weapon in the Fourth Degree (PL § 265.01[1]) with a conditional discharge, stating that a misdemeanor deposition and not a felony disposition is appropriate.

CPL § 210. 40

As stated above, defendant seeks dismissal of the indictment in the furtherance of justice pursuant to CPL § 210.40 (*see also People v Clayton*, 41 AD 2d 204 [2d Dept 1973]).

CPL § 210.40 permits dismissal of an indictment where, for a variety of reasons, the merits are not at issue and the interest of justice would be served by the termination of prosecution (*Clayton* at 206; *see also People v Quill*, 11 Misc 2d 512, 513 [County Ct, Kings County 1958]). In determine whether granting or denying the motion to dismiss would serve justice,the Court may consider the existence of any compelling circumstance (*see* CPL § 210.40[1]; *Clayton* at 207). Such dismissal may only be granted where a court explicates the reasons for dismissal on the record (*see* CPL § 210.40[3]). In sum, CPL § 210.40 permits dismissal for reasons other than substantial defects in evidence or required procedure while providing a safeguard to prevent a dismissal of the indictment "unless the public interests are as fully protected as the individual interest of the defendant for justice and mercy"(*Clayton* at 208).

In evaluating whether there exists a compelling basis for dismissal, CPL § 210.40[1] sets out ten factors a court may consider. The ten factors are as follows:

(a) the seriousness of the crime;
(b) the extent of harm caused by the offense;
(c) the evidence of guilt, whether admissible or inadmissible at trial;
(d) the history, character and condition of the defendant;
(e) any exceptionally serious misconduct of law enforcement personnel in the investigation, arrest and prosecution of the defendant;
(f) the purpose and effect of imposing upon the defendant a sentence authorized for the offense;
(g) the impact on the public interest of a dismissal of the indictment;

(h) the impact of a dismissal on the safety or welfare of the community;
(i) where the court deems it appropriate, the attitude of the complainant or victim with respect to the motion;
(j) any other relevant fact indicating that a judgment of conviction would serve no useful purpose.

Indeed, a court need not explicitly address every factor, it must consider the "real and compelling" reasons to warrant dismissal (*People v Rickert,* 58 NY2d 122, 128 [1983]). Courts have made it clear that no one of these ten factors is dispositive, however, taken as a whole, they serve to balance the interests between the individual and the state. Thus, this Court must balance all the factors, as well as any other relevant factors in deciding defendant's motion. In so doing, defendant's motion to dismiss is granted.

Discussion

In 1958, the Legislature enacted Penal Law § 265.01[1] criminalizing the mere possession of a gravity knife, i.e., deeming it a "per se" weapon. The statute was in response to what was then characterized as great public concern over the rampant criminal use of gravity knives by New York City juveniles[1] (*see United States v Irizzary*, 509 F Supp 2d 198, 204 [ED NY 2007]). Penal Law § 265.00[5] defines 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, lever, spring or other device." Centrifugal force is not defined in the Penal Law, however, it is well-settled law that releasing the blade from the handle of the knife by flicking the wrist constitutes centrifugal force (*see People v Birth*, 49 AD 3d 200 [1st Dept 2008]; *People v Smith*, 309 AD 2d 608 [1st

[1] Gravity knives were first produced in around 1937, and were issued to flight crews and paratroops, primarily for the purpose of cutting a trapped parachutist from his rigging in case he landed with a tangled parachute.

Dept 2003]; *People v Kong Wang,* 17 Misc 3d 133(A), 2007 NY Slip Op 52112(U) [App Term, 1st Dept 2007]).

Notwithstanding their illegality, gravity knives are widely manufactured and sold across the country in hardware and outdoor stores under brand names such as Clip-it, Husky Utility Folding Knives and other brands. They are sold for and are used for purely legitimate purposes. Despite "locking" safety features, many can be "flicked" open with the appropriate amount of force. Thus, these knives are routinely carried by many New Yorkers for legitimate purposes ignorant of the fact that they may be in violation of the law and face a potential automatic one-year jail sentence.

The law has been criticized by many as resulting in the prosecution of many law-abiding New York City citizens and visitors including artists, construction workers, electricians and others who carry gravity knives for work and other lawful endeavors (*see* David B. Kopel et al., *Knives and the Second Amendment*, 47 U Mich JL Reform 167, 210-211 [2013]; Ian Weinstein, Note, *Adjudication of Minor Offenses In New York City,* 31 Fordham Urb LJ 1157, 1167 [2004]). For example in 2011, New York police arrested John Copeland, a painter, for carrying a Benchmade three-inch folding knife in his pocket. The knife was alleged to be a gravity knife (*see* Melissa Grace, *Artist Furious for Being Busted on Weapons Possession over a Pocket Knife He Uses for Work,* 2011, http://www.nydailynews.com/new-york/artist-furious-busted-weapons-possession-pocket-knife-workarticle-1.155163#ixzz2KSCt0Z5z, accessed July 7, 2014). The charges against Copeland were ultimately dismissed after a showing was made that Copeland was an artist and legitimately used the knife to cut canvas for his artwork. In 2012, Clayton Baltzer was on a field trip to New York City with his fine-arts classmates from Pennsylvania's Baptist Bible College & Seminary (*see* Jeb Phillips, *Bible-College Student's Pocketknife Spoils Trip to New York City,* 2012, http://www.dispatch.com/content/stories/local/2012/06/12/knife-

trouble-in-a-new-york-minute.html, accessed July 7, 2014). While riding the subway, a police officer observed what he believed to be a gravity knife clipped to Baltzer's belt. After many failed attempts to flick open the knife, the officer was finally able to open it and placed Baltzer under arrest for the possession of the gravity knife. Baltzer was convicted of the misdemeanor possession of the gravity knife and was sentenced to pay a fine in the amount of $125 fine and to complete two (2) days of community service.

These and other cases have led to various proposed amendments of the statute. While apparently recognizing the societal shift from rampant criminal use of gravity knives of the 1950s to the widespread, legitimate possession of gravity knives of today, in 2011, the New York Assembly passed Bill 2259A. It called for the amendment of PL § 265.01 to the extent that an individual would be guilty of criminal possession of a weapon in the fourth degree when he or she "possesses a gravity knife *with the intent to use the same unlawfully against another*" (2011 New York Assembly Bill No. 9522, New York Two Hundred Thirty-Fifth Legislative Session). Similarly, in 2013, Senate Bill 5650 proposed to amend PL § 265.15 to create an affirmative defense for criminal possession of a gravity knife. The affirmative defense would be that the possessor *did not intend to use it unlawfully* (2013 New York Senate Bill No. 5650, New York Two Hundred Thirty-Sixth Legislative Session). Clearly, the Legislature is addressing the need to delineate the criminal possession versus the lawful possession of gravity knives.

While this Court is in no way minimizing the defendant's actions, it notes that the defendant was not using the gravity knife unlawfully against another, nor was he threatening its use. Rather the gravity knife was found in his possession following a search of his person by law enforcement.

The stop and subsequent search of the defendant's person is also at issue. It is unclear as to the basis for defendant's stop as well as subsequent search of his person. The People assert

that the gravity knife was in plain view, clipped to defendant's belt. The defendant asserts that he refused to respond to questions posed to him by the narcotics detective regarding drug activity in the area, and that he attempted to walk away from the detective. This behavior allegedly prompted the physical stop and search by Det. Ames. While this would not rise to serious misconduct on the part of law enforcement, it certainly calls into question the legality of the stop and admissibility of the gravity knife.

Finally, while certainly cognizant of the defendant's criminal background---nineteen (19) misdemeanor convictions and one (1) felony conviction, the aforementioned and last conviction for Criminal Possession of a Forged Instrument in the Second Degree (P.L. §170.25) for which he received a sentence of probation--- this Court does not believe that dismissal of the indictment would result in any negative impact on the confidence of the public in the system, or that dismissal of the indictment would have any impact on the safety and welfare of the community.

Based on the aforesaid, defendant's motion to dismiss the indictment in the furtherance of justice is granted.

This constitutes the decision[2], order and opinion of the Court.[3]

Dated: July 11, 2014
Bronx, N.Y.

Troy K. Webber, J.S.C.

[2] This written decision incorporates the Court's oral decision of June 6, 2014.
[3] The Court acknowledges law-student intern Stephen Chyi of CUNY School of Law for his assistance in the preparation of this decision.

COURT OF APPEALS
STATE OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK,
Plaintiff-Respondent,

-against-

STEVEN BERREZUETA,
Defendant-Appellant.

APL-2017-00224

AFFIRMATION OF SERVICE BY FEDERAL EXPRESS OVERNIGHT

Erica T. Dubno, an attorney duly admitted to practice law in New York, hereby affirms under penalties of perjury that on July 27, 2018, she served one copy of the (1) motion to file brief of amici curiae; (2) affirmation of Erica T. Dubno; and (3) proposed brief, by Federal Express, standard overnight delivery on the following:

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