UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT
Thurgood Marshall U.S. Courthouse 40 Foley Square, New York, NY 10007 Telephone: 212-857-8500

MOTION INFORMATION STATEMENT

Docket Number(s): 17-0474 Caption [use short title]

Motion for: Leave to file brief of amicus curiae Copeland et al. v. Vance et al.

Set forth below precise, complete statement of relief sought:

Leave of the Court to file the attached brief of proposed amicus curiae in support of petition for En Banc rehearing. (Appellants consent to filing).

MOVING PARTY: Proposed amicus curiae, Legal Aid Society **OPPOSING PARTY:** Appellees Vance, et al.

☐ Plaintiff ☐ Defendant
☐ Appellant/Petitioner ☐ Appellee/Respondent

MOVING ATTORNEY: Martin J. LaFalce **OPPOSING ATTORNEY:** Elizabeth Krasnow

[name of attorney, with firm, address, phone number and e-mail]

Legal Aid Society
49 Thomas St.
New York, N.Y. 10013

New York County District Attorney's Office
New York, N.Y. 10013

Court-Judge/Agency appealed from: United States Second Circuit Court of Appeals (C.J. Katzmann)

Please check appropriate boxes:

Has movant notified opposing counsel (required by Local Rule 27.1):
☑ Yes ☐ No (explain):

Opposing counsel's position on motion:
☐ Unopposed ☐ Opposed ☑ Don't Know

Does opposing counsel intend to file a response:
☐ Yes ☐ No ☑ Don't Know

FOR EMERGENCY MOTIONS, MOTIONS FOR STAYS AND INJUNCTIONS PENDING APPEAL:

Has request for relief been made below? ☐ Yes ☐ No
Has this relief been previously sought in this Court? ☐ Yes ☐ No
Requested return date and explanation of emergency:

Is oral argument on motion requested? ☐ Yes ☑ No (requests for oral argument will not necessarily be granted)

Has argument date of appeal been set? ☐ Yes ☑ No If yes, enter date:

Signature of Moving Attorney:
Martin J. LaFalce **Date:** 7/13/18 Service by: ☑ CM/ECF ☐ Other [Attach proof of service]

17-0474-cv

United States Court of Appeals

for the

Second Circuit

JOHN COPELAND, PEDRO PEREZ, NATIVE LEATHER, LIMITED,

Plaintiff Appellants,

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

Plaintiffs,

–against–

CYRUS R. VANCE JR., in his official capacity as THE NEW YORK COUNTY DISTRICT ATTORNEY, CITY OF NEW YORK,

Defendant-Appellees,

BARBARA UNDERWOOD, in her Official Capacity as Attorney General of the State of New York,

Defendant.

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

BRIEF OF AMICUS CURIAE LEGAL AID SOCIETY IN SUPPORT OF PLAINTIFFS-APPELLANTS PETITION FOR PANEL REHEARING *EN BANC*

William Gibney
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Attorneys for Amicus-Curiae

INTRODUCTION

Pursuant to Fed. R. App. Proc. 29, the Legal Aid Society (Legal Aid) requests leave to file the accompanying amicus curiae brief in support of plaintiffs John Copeland, Pedro Perez and Native Leather petition for En Banc rehearing. Appellants consented to filing by Legal Aid of an amicus brief, but the attorneys for Defendants-Appellees have not yet responded, thereby necessitating this motion.

I. IDENTITY AND INTEREST OF AMICUS CURIAE

The Legal Aid Society (LAS) is the oldest and largest private non-profit legal services agency in the nation, dedicated since 1876 to providing quality legal representation to low-income New Yorkers. It has served as New York's primary public defender since 1965. It has represented thousands of individuals arrested by NYPD and prosecuted by the New York County District Attorney's Office (DANY) for alleged violations of Penal Law Sections 265.01(1) and 265.02(1) for possession of so-called "gravity knives." Our lawyers have interposed a variety of defenses to these charges, from the systemic (challenges to the definition of a gravity knife and whether the crime should be, as it currently is, one of strict liability) to the individual (seeking dismissals in the interest of justice).

Our clients' perspectives show how an obscure provision of New York's weapons laws has ensnared thousands of innocent and law-abiding citizens who

use common folding knives for otherwise lawful purposes. That is a case study in the steady expansion of the criminal law, leading to prosecutorial overreach, all too familiar over the last half-century in the United States.

Plaintiffs speak as citizens who wish to use such knives and have a fear of being prosecuted under the law. We speak for those who have been and continue to be prosecuted in New York State courts, so that the Court can understand the operation of the law in day-to-day practice. In the end, we will ask an En Banc panel to find, as plaintiffs argue, that the statute as it currently operates is unconstitutionally vague.

II. AUTHORITY TO FILE THE AMICUS CURIAE BRIEF OF THE LEGAL AID SOCIETY

While serving on the U.S. Court of Appeals for the Third Circuit, Justice Samuel Alito stated, "I think that our court would be well advised to grant motions for leave to file amicus briefs unless it is obvious that the proposed briefs do not meet Rule 29's criteria as broadly interpreted. I believe that this is consistent with the predominant practice in the courts of appeals." *Neonatology Assocs., P.A. v. Comm'r*, 293 F.3d 128, 133 (3d Cir. 2002) (citing Michael E. Tigar and Jane B. Tigar, *Federal Appeals – Jurisdiction and Practice* 181 (3d ed. 1999) and Robert L. Stern, *Appellate Practice in the United States* 306, 307-08 (2d ed. 1989)). Judge Alito quoted the Tigar treatise for the statement that "'[e]ven when the other side

refuses to consent to an amicus filing, most courts of appeals freely grant leave to file, provided the brief is timely and well-reasoned.'" 293 F.3d at 133.

This circuit customarily grants leave to file amicus briefs. See, e.g., *Upstate Citizens for Equal., Inc. v. United States*, 841 F.3d 556, 560 n.2 (2d Cir. 2016); *Abdollah Naghash Souratgar v. Fair*, 720 F.3d 96, 101 (2d Cir. 2013) ("granted leave for the filing of amicus briefs"); *Olin Corp. v. Am. Home Assur. Co.*, 704 F.3d 89, 98 n.13 (2d Cir. 2012)

This motion for leave to file an amicus brief is timely because it is filed along with the accompanying brief within seven days of the filing of the Appellants' brief. There is no prejudice to Defendants-Appellees, which has not yet responded to Appellants' brief.

III. THE AMICUS BRIEF BY LEGAL AID WILL SERVE THIS COURT'S RESOLUTION OF THE ISSUES RAISED

Legal Aid has reviewed the briefs filed to date in this case in order to avoid unnecessary duplication of the parties' arguments. This case challenges defendants' enforcement of New York State's gravity knife statute on the grounds the Wrist-Flick Test renders P.L. §§ 265.01(1) and 265.02(1) void for vagueness. This brief will supplement the plaintiff's primary argument, that the Wrist-Flick Test is subjective and therefore makes it impossible for ordinary New Yorkers to comply with the gravity knife statute. This brief will advance three arguments: (1) it will demonstrate that the wrist flick test is indeterminate and vague with a

compelling recent wrist-flick example (2) it will show that NYPD and DANY discriminate in their enforcement of the statute and (3) it will that striking down the wrist flick test will curtail discriminatory policing against Black and Latino men.

This brief will argue that the Wrist-Flick Test is indeterminate Copeland, Pedro Perez and Native Leather, speculating as to what the commands. This brief will also narrate the stories of Legal Aid clients prosecuted for felony possession of a gravity knife, all of whom litigated their cases on appeal—against defendants—with well-developed records for this Court's review.

CONCLUSION

The accompanying amicus curiae brief would aid this Court with respect to the foregoing points of argument, from the relevant perspective of thousands of Legal Aid clients. Accordingly, Legal Aid respectfully requests leave to file the accompanying amicus curiae brief.

Respectfully submitted,

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Dated: July 13, 2018

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I. Statement of Interest

The Legal Aid Society is the oldest and largest private non-profit legal services agency in the nation, dedicated since 1876 to providing quality legal representation to low-income New Yorkers. As New York City's primary public defender, Legal Aid has represented thousands of New Yorkers ensnared by NYC's gravity knife enforcement regime and is uniquely positioned to share its perspective with this Court.

II. Summary of Argument

In this submission we advance three arguments in support of plaintiff's petition for En Banc rehearing. First, we provide an example of a current Legal Aid client prosecuted under the gravity knife law to show that the wrist flick test is wholly indeterminate. Second, discriminatory enforcement of the gravity knife law raises grave equal protection concerns, as the Panel decision noted. But it also creates a notice crisis that the Panel neglected to address. NYPD tactics leave a vast supply of folding knives on display throughout New York City, giving thousands of unwitting New Yorkers the impression that items on shelves at Ace Hardware or AutoZone are lawful tools. Third, striking down the wrist-flick test will not make folding knives any more available throughout New York City than they already are. Striking down the wrist-flick test will relieve thousands of Black and Latino men from the anguish of discriminatory policing and overzealous prosecution.

III. The Indeterminacy of The Wrist-Flick Test Makes It Impossible For People of Ordinary Intelligence to Steer Between Lawful and Unlawful Conduct

In the fall of 2017 police officers stopped a Black man, now represented by Legal Aid in Manhattan, for driving with tinted windows.[1] The arresting officer searched the car, recovered a folding knife from the glove compartment and claimed to be able to flick it open with one hand. The officer placed the client under arrest and the New York County District Attorney (DANY) charged him with criminal possession of a weapon. The client has made ten court appearances since he was arraigned. On seven dates the prosecutor answered not ready for trial. Recently, the arresting officer brought the recovered knife to the prosecutor's office and attempted the wrist-flick test. The officer tried to open the knife once and failed, then tried a second time and succeeded. The two attempts can be viewed here:

https://vimeo.com/279715177 (case sensitive password: Gravity!)

Defense counsel could not tell whether the officer had manipulated the blade with his fingers, so he asked the officer to demonstrate again. Within seconds of making the first attempts the officer tried again. This time he attempted nine times before he could force the knife open. The nine attempts can be viewed here:

https://vimeo.com/279715241 (case sensitive password: Gravity!)

[1] We keep this client's identity confidential while his case remains open.

Defense counsel asked the assigned ADA to dismiss the case, arguing that a two in eleven success rate should not trigger any liability. But the assigned ADA refused to dismiss, as did the assigned ADA's supervisor as did the Deputy Chief of the Trial Division for Criminal Court. As of this submission, DANY maintains that the knife was an illegal gravity knife and the case is scheduled for trial.

The officer's success rate was dismal, but New York courts have never held that a specific rate of success is necessary to establish criminal liability. *People v. Cabrera*, 135 A.D.3d 412 (1st Dept. 2016) (fact that officer needed to make several attempts before the knife opened did not undermine finding of operability); *People v. Smith*, 309 A.D.2d 608, 609 (1st Dept. 2003) (same).

State courts have imposed *no limits* on the wrist-flick test. So under New York law, it does not matter how many times a person may attempt to flick open a knife, one or one million. It does not matter when those attempts are made, at the time of arrest or trial. It does matter who makes those attempts—the defendant, a skilled officer, an average person or an Olympic athlete. It does not matter whether one knife responds differently to two or more people. The only thing clear under New York law is that if some officer can flick a folding knife open, the defendant is held strictly liable for that officer's skill. *People v. Parrilla*, 27 N.Y.3d 400, 402 (2016). This is not a simple functional test like a firearm "capable of being concealed on the

person" as the Panel reasoned. It is an indeterminate *gotcha* trap that varies wildly and ensnares thousands of unwitting New Yorkers.

IV. NYPD and DANY Aggressively Prosecute Black and Latino Men For Gravity Knife Possession But to Allow Retailers to Sell Openly

The Legal Aid Society estimates that at least 3,600 New Yorkers are prosecuted for gravity knife possession every year in New York City.[2] Eighty-four percent are Black or Latino.[3] Ninety-six percent are men. No retailer has ever been arrested. The grim reality is that NYPD's policing model treats knives as tools on store shelves, but as per se weapons once found in black and brown hands.

Such discriminatory enforcement is certainly relevant to an equal protection claim as the Panel suggested, but we argue that it creates a colossal notice problem as well. A person cannot steer between lawful and unlawful conduct when NYPD and DANY permit folding knives with locking blades to be sold openly throughout the city. *See U.S. v. Forbes*, 806 F.Supp.232 (D. Colo. 1992) (statutory definition of controlled substance analogue was unconstitutionally vague as applied to AET

[2] Legal Aid analysts reviewed all criminal complaints from July-December of 2015 that charged violations of Penal Law Section 265.01(1) and 265.02(1) as the top charge. Analysts concluded that 928 of 1672 complaints charged gravity knife possession as the top charge. Legal Aid represents approximately 50% of New Yorkers charged with crimes throughout the city. Legal Aid therefore estimates that NYC District Attorneys prosecute approximately 3,600 New Yorkers for gravity knife possession yearly.

[3] Legal Aid analysts compared OCA race data with reported Legal Aid race data to arrive at this percentage.

because AET was *freely available for purchase through the U.S. mails*) (emphasis added).

In our 2017 amicus submission we provided the Panel and parties with a map of 110 locations in Manhattan where folding knives with locking blades could be found:

http://bit.ly/2q9pLQp [4]

This year, only a few weeks after the Panel issued its decision, Legal Aid investigators identified *130 locations* in Manhattan where the knives continue to sell:

http://bit.ly/GravityKnives

Paragon Sports still sells expensive folding knives with DANY imprimatur https://bit.ly/2rPxgMN and less expensive knives openly: https://bit.ly/2ND8sDi. Major retailers like Walmart https://bit.ly/2m6XFVF, Ace Hardware https://bit.ly/2u5Kl82 Lowes https://low.es/2J9DorD, Dicks Sporting Goods https://bit.ly/2KWynri and Amazon.com https://amzn.to/2L2WdOI continue to sell across the state.

NYPD and DANY continue to take no action. And that inaction creates a notice crisis because the presence of folding knives at major retailers gives the impression that those knives are lawful. As the Panel reasoned, "businesses, which

[4] By clicking on the pinned map locations the Court and parties may see images of identified folding knives and the addresses where they are sold.

face economic demands to plan behavior carefully, can be expected to consult the relevant legislation in advance of action." *Hoffman Estates v. Flipside*, 455 U.S. 489, 498 (1982). A person of ordinary intelligence who wants to avoid carrying illegal items would be justified in thinking that an knife available at Benjamin Moore Paint is legal because businesses face demands to plan to sell only lawful goods.

Instead, with respect to the gravity knife law, the Panel shifts the burden away from defendants and heaps it on ordinary New Yorkers. The Panel expects them to be familiar with judicial opinions on a complex and controversial topic: "judicial authority is sufficient to have given an ordinary person notice that folding knives that may be opened with a one-handed flick of the wrist are banned by the gravity knife law[.]" The Panel's expectation is completely unreasonable. An ordinary New Yorker should be able to trust that what he or she purchases at a national chain is lawful. But when handymen Elliott Parrilla and Richard Gonzalez walked into Home Depot and purchased utility knives they had no reason to know about the indeterminate wrist-flick test, much less any reason to believe that mere possession of Husky knives was a class D felony punishable by years in prison. *People v. Parrilla*, 27 N.Y.3d 400 (2016); *People v. Gonzalez*, 25 N.Y.3d 1100 (2015).

V. Striking Down the Wrist-Flick Test Will Curtail Discriminatory Law Enforcement, It Will Not Make Folding Knives More Widely Available

At oral argument Chief Judge Katzmann asked plaintiffs' counsel if plaintiffs sought to disable the gravity knife statute as applied to all common folding knives:

> Chief Judge Katzmann: That what you're arguing for is really to disable the whole statute.
>
> Mr. Schmutter: As applied to common folding knives with a bias toward closure.
>
> Chief Judge Katzmann: The record shows right that the statute is principally and perhaps only enforced against uh folding knives right?
>
> Mr. Schmutter: That's correct your honor.

The exchange framed the issue inaccurately. The statute has not been principally enforced against folding knives, knives that can be found everywhere in the city. It has been principally enforced against Black and Latino men. Those men—thousands of men of color—have been aggressively policed and in far too many cases brutally prosecuted for doing nothing more than possessing a tool they bought at a hardware store and used for work.

For two consecutive years the Legislature has passed overhauls of the gravity knife statute by near unanimous margins to address this problem. Those overhauls that have garnered support from advocacy groups across the political spectrum. They seek codify the very relief that plaintiffs seek and Legal Aid supports here: eliminating the wrist-flick test as an absurd standard for criminal liability and bringing an end to defendants' discriminatory enforcement of the statute.

We urge the Court to grant En Banc review in this matter of exceptional importance.

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Dated: July 13, 2018

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 1,653 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.

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