

No. 18-918

In The
Supreme Court of the United States

JOHN COPELAND, PEDRO PEREZ,
AND NATIVE LEATHER, LTD.,

Petitioners,

v.

CYRUS VANCE, JR. IN HIS OFFICIAL CAPACITY
AS THE NEW YORK COUNTY DISTRICT
ATTORNEY, AND CITY OF NEW YORK,

Respondents.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit**

**MOTION FOR LEAVE TO FILE BRIEF AND
BRIEF FOR LEGAL AID SOCIETY AS AMICUS
CURIAE IN SUPPORT OF PETITIONERS**

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**MOTION FOR LEAVE TO FILE BRIEF
FOR AMICUS CURIAE**

The Legal Aid Society respectfully moves for leave to file the following brief as amicus curiae in support of the petition for certiorari. All parties were notified of amicus's intent to file this brief more than 10 days in advance of filing. Petitioner and Respondent New York City, Corporation Counsel have consented to the filing of this brief. Respondent Cyrus Vance Jr., New York County, District Attorney has taken no position.

Amicus's interest in this case arises from our representation of thousands of clients who have been charged with gravity knife possession under New York Penal Law Sections 265.01(1) and 265.02(1). This brief will show that our clients are innocent New Yorkers who are prosecuted for possessing tools that sell at major retailers across the country.

Our clients will continue to be unconstitutionally prosecuted if the decision below goes unreviewed by this Court. That decision—concluding that plaintiffs must show that a law is vague in all of its applications to succeed in a facial vagueness challenge—means that a finding of a single lawful application of New York's gravity knife statute will deny thousands of our

clients Due Process. We urge this Court to grant the petition and review the Second Circuit's decision.

Respectfully submitted,

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QUESTION PRESENTED

Whether a plaintiff need show that a law is vague in all of its applications to succeed in a facial vagueness challenge.

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INTEREST OF AMICUS CURIAE¹

The Legal Aid Society (Legal Aid) 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 and has represented thousands of individuals arrested by the New York City Police Department (NYPD) and prosecuted by the New York County District Attorney’s Office (DANY) for alleged violations of New York Penal Law Sections 265.01(1) and 265.02(1) for possession of so-called “gravity knives.” Legal Aid is deeply concerned that the decision below will perpetuate one of the nation’s most arbitrary law enforcement regimes, a regime where thousands of innocent New Yorkers are prosecuted for possessing tools that sell at major retailers across the country. That regime is an affront to the legitimacy of criminal law and a case-study in how vague criminal standards breed systemic law enforcement abuses.

If the decision below stands—that plaintiffs bringing a facial challenge must show no set of

¹ All parties were notified of amicus’s intent to file this brief more than 10 days in advance of filing. Petitioner and Respondent New York City, Corporation Counsel have consented to the filing of this brief. Respondent Cyrus Vance Jr., New York County, District Attorney has taken no position.

No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

circumstances under which a statute may be validly applied—Respondents’ arbitrary regime will remain intact and thousands of innocent New Yorkers will continue to be prosecuted for possessing tools that sell across the country. We urge this Court to grant the petition and review the Second Circuit’s decision.



SUMMARY OF THE ARGUMENT

On December 31, 2016 Governor Andrew Cuomo vetoed S6483A, a bill designed to overhaul New York State’s gravity knife statute. The veto was a setback for criminal justice reform, but the Governor’s message cemented a consensus that Respondents’ tortured interpretation of the gravity knife statute renders it vague, the very harm that Petitioners ask this Court to address. The Governor wrote:

Under current New York Law and practice knives that are classified as gravity knives are designed, marketed and sold as work tools for construction workers and day laborers at a variety of major retailers across the State. However, any person who goes into a store and purchases the product can be subsequently arrested and prosecuted for mere possession. This construct is absurd[.]

The bill seeks to amend a law designed to outlaw a knife created in the 1950s for use by German paratroopers, which could truly open by the force of gravity alone. The law has been subsequently interpreted to include knives

that could be opened with the flick of one hand. *This interpretation of the “gravity knife” has resulted in a definition that is both amorphous, subject to abuse and could include nearly any pocket knife.*

Governor Andrew M. Cuomo, Veto Message #299, December 31, 2016. (emphasis added).²

What the Governor conceded as absurd from the Executive Chamber—that tools sold across New York State may be deemed illegal weapons with the flick of a wrist—causes thousands of New Yorkers to suffer from Central Booking pens, and in some cases, for years from state prison cells.

We write on behalf of those New Yorkers, thousands of low-income clients who have been ensnared by Respondents’ absurd gravity knife enforcement regime, and denied Due Process as a result of the decision below, New Yorkers like Elliot Parrilla who was sentenced to 2.5 to 5 years in prison for possessing this utility knife that he purchased at Home Depot:

² Governor Cuomo explained that he vetoed the bill because, in his opinion, its language did not adequately address NYPD’s abusive use of the wrist-flick and that it would have placed a burden on law enforcement to determine the design attributes of all knives. His full veto message can be read here: <https://www.scribd.com/document/335423671/Veto-299-305>.



People v. Parrilla, 27 N.Y.3d 400 (2016).

Parrilla's freedom turned on whether an officer was skilled enough to force his knife open with the flick of a wrist, a test that the New York State Legislature never intended and has twice voted to repeal. S6483, Sen. Reg. Sess. 2015-2016 (N.Y. 2016); S4769A, Sen. Reg. Sess. 2017-2018 (N.Y. 2017). That test remains law because Governor Cuomo has deferred to Respondents' pleas to keep it intact. See Cyrus R. Vance Jr., *Letter To The Editor: Keep The Ban on Gravity Knives*, N.Y. Times, June 6, 2016; Rocco Parascandola, *Mayor de Blasio, Top Cop James O'Neill Plead for Gov. Cuomo to Keep Gravity Knives Illegal*, N.Y. Daily News, Oct. 11, 2016; Daniel Victor, *Cuomo Vetoes Bill to Overhaul Gravity Knife Law for Second Straight Year*, N.Y. Times, Oct. 24, 2017.

In the Court below, Petitioners correctly attacked that test—the Wrist-Flick Test—as rendering the gravity knife statute void for vagueness. The Test is impossible for ordinary New Yorkers to follow because under the Test criminal liability turns on a police officer’s skill, not the design or intended use of a knife. For example, in this video a police officer opens a folding knife after two attempts: <https://vimeo.com/279715177>. But seconds later, the same officer can only open same knife after nine attempts: <https://vimeo.com/279715241>.³ Similarly, an arresting officer is unable to open a folding knife here: <https://vimeo.com/316864880>. But seconds later, the prosecutor assigned to the case flicks open the same knife with relative ease: <https://vimeo.com/316864123>.⁴

Such a vague standard has generated widespread confusion as to what the gravity knife law commands. So much confusion that sophisticated law-abiding actors Home Depot, Amazon.com, Ace Hardware, Lowes, AutoZone and hundreds of other retailers have possessed and sold the very same knives that thousands of our low-income clients are prosecuted for possessing. *See, e.g., John Eligon, 14 Stores Accused of Selling*

³ These videos were filmed on May 16, 2018 at DANY offices at 80 Centre St. in Manhattan. Despite the officer’s poor success rate, DANY deemed the folding knife an unlawful gravity knife and prosecuted our client. The case was ultimately resolved with an adjournment in contemplation of dismissal and a requirement that our client perform community service.

⁴ These videos were filmed on May 8, 2018 at DANY offices at 1 Hogan Place in Manhattan. The case remains open and is charged as a felony.

Illegal Knives, N.Y. Times, June 17, 2010 (“A spokesman for Home Depot, Stephen Holmes, said the company did not know that the knives were illegal in New York.”). Even former NYPD Commissioner William J. Bratton revealed that he did not understand New York’s gravity knife law when he *encouraged* New Yorkers to possess the same knives that NYPD arrests thousands of New Yorkers for possessing: “There are many alternative cutting instruments for tradespeople, including the widely used utility knife with a half-inch blade and the standard folding knife that requires manual blade manipulation and some pressure to open.” William J. Bratton, *A Perilous Push to Legalize More Knives*, N.Y. Daily News, June 25, 2016. Commissioner Bratton did not understand that New Yorkers are regularly arrested for possessing utility knives and standard folding knives designed to require manual blade manipulation just like those pictured here:



See, e.g., People v. Parrilla, 27 N.Y.3d 400 (2016); *People v. Neal*, 79 A.D.3d 523, 524 (1st Dept. 2010), lv. denied, 16 N.Y.3d 799 (2011).

The decision below keeps this absurd regime in place where thousands of ordinary New Yorkers are ensnared by a statute that Home Depot, Amazon.com and Commissioner Bratton are unable to follow. The Second Circuit erroneously concluded that if a court can find that the statute was validly applied to a single plaintiff in the past—in this case Native Leather—then thousands of other New Yorkers must be denied systemic relief. *See United States v. Salerno*, 481 U.S. 739, 745 (1987). That conclusion ignores this Court’s decisions in *Johnson v. United States*, 135 S. Ct. 2551 (2015), and *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018) which relaxed such severe requirements.

In this brief we will demonstrate two grave consequences of the Second Circuit’s decision. First, the decision perpetuates a notice crisis. Folding knives are ubiquitous at major retailers and local hardware stores throughout New York City. Their presence gives ordinary New Yorkers the impression that they are lawful. A person cannot steer between lawful and unlawful conduct when a folding knife appears as a tool on a store shelf, but is treated as a *per se* weapon once purchased and found in a worker’s hand. Second, the decision allows Respondents to continue to treat the gravity knife statute as a modern-day vagrancy law, exploiting the vast net that the Wrist-Flick Test creates to punish Black and Hispanic men for innocent conduct, not individuals who have committed a clear

violation of a precise code. The Court's decision below insulates these systemic abuses from judicial scrutiny, leaving thousands of ordinary New Yorkers without relief. For those reasons, we urge this Court to grant the petition and review the Second Circuit's decision.

◆

ARGUMENT

I. The Second Circuit's Failure to Apply *Johnson* and *Dimaya* Perpetuates a Notice Crisis

On June 17, 2010, DANY called a press conference to announce that it had entered into deferred prosecution agreements with NYC retailers who it claimed were selling illegal gravity knives. John Eligon, *14 Stores Accused of Selling Illegal Knives*, N.Y. Times, June 17, 2010. Retailers like Native Leather had no reason to believe that they possessed unlawful items. They sold folding knives—tools—not knives that opened by force of gravity, nor knives that were designed to open with centrifugal force. But under Respondents' tortured interpretation of the gravity knife statute, where the amorphous Wrist-Flick Test triggers criminal liability, the retailers relented, and agreed to settle with DANY for \$2.8 million. Brief for Appellant at 23 *Copeland v. Vance*, 893 F.3d 101 (2d Cir. 2018).

At the time of the 2010 press conference, DANY announced that it would spend \$900,000 of the \$2.8 million on a knife education campaign, knife buy-back program and efforts to police retailers throughout the

city. Jon Campbell, *Did Authorities Lose More Than 1,300 Confiscated Knives*, Village Voice, May 21, 2015. As of 2015, more than \$800,000 of the \$900,000 remained unspent. *Id.*

DANY never initiated a knife education campaign or buy-back program. And folding knives remain for sale across the city and state at major retailers like AutoZone <https://bit.ly/2SKgEar>; 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>. None of the stores provide customers with warnings that the folding knives they sell may be deemed unlawful with the flick of a wrist, nor did DANY require retailers to provide warnings when it negotiated the deferred prosecution agreements.

Eight years after the DANY press conference, the knives remain ubiquitous in Manhattan, as shown in this map:⁵

<https://bit.ly/2MX9l8w>

Whether folding knives identified on the map can be flicked open depends entirely on the subjective skill of individual officers.

While folding knives sell across the city, Respondents aggressively target thousands of individual New

⁵ In June of 2018 Legal Aid Society investigators found 130 stores in Manhattan that sell folding knives that NYPD regularly arrests Legal Aid clients for possessing. Store locations and knife images can be seen by clicking on the map pin drops.

Yorkers who purchase and possess the very same knives. According to the Village Voice more than 60,000 New Yorkers were arrested for alleged gravity knife possession from 2000 until 2010. Jon Campbell, *How a '50's Era New York Knife Law Has Landed Thousands In Jail*, Village Voice, Oct. 7, 2014.

Additionally, at the time of the 2010 deferred prosecution agreements, DANY exempted Paragon Sports from selling high-end custom made knives—that NYPD and DANY consider gravity knives, if capable of being flicked open—on the unfounded rationale that expensive knives are not used to harm people. ADA Dan Rather explained the Paragon exemption during a deposition in *Copeland v. Vance*:

Q. At the end of this paragraph 4A there's a statement, "However, this agreement exempts Paragon's sale of custom knives, defined as individual, one of a kind handcrafted knives, separately marketed and sold to collectors."

A. I see that.

Q. And why was this provision included?

A. It was a negotiated provision in order to reach an agreement. Paragon uniquely based on our investigation—or almost uniquely had an inventory and displayed as merchandise very high end kind of one of a kind knives for—for collectors, real high end stuff. And it was negotiated that the agreement would not—that those knives if they did

constitute a prohibited knife would be excluded from the DPA. Both as an incentive to enter into the agreement, but also to reflect that we were just not seeing a thousand, or \$2,000, or \$5,000 knives being plunged into people's temples and cutting people up. And so that the risk comparatively of those knives was less than other knives.

Q. The basic rationale is someone is probably not going to spend a couple of thousand dollars to stab someone?

A. Essentially, yeah.

Rather Dep. 101-102, Apr. 27, 2012, *Copeland v. Vance*, 893 F.3d 101 (2d Cir. 2018). Today, Paragon sells expensive knives as authorized by DANY, <http://bit.ly/2rPxxgMN>, as well as the very same inexpensive knives that thousands of New Yorkers are regularly arrested for possessing, <http://bit.ly/2qLlAwR>.

Such arbitrary enforcement has created a notice crisis, forcing New Yorkers “of common intelligence [to] necessarily guess at [the statute’s] meaning and differ as to [its] application.” *See Connally v. General Construction Co.*, 269 U.S. 385 (1926); *Thornhill v. Alabama*, 310 U.S. 88, 97-98 (1940); *Papachristou v. City of Jacksonville*, 405 U.S. 156, 165-66 (1972).

New Yorkers cannot “steer between lawful and unlawful conduct” when a utility knife appears as a tool at Ace Hardware—and a collector’s item at Paragon—but is treated as an illegal weapon once a working person commutes with it to his construction site. *See*

Grayned v. City of Rockford, 408 U.S. 104, 108-09 (1972). New Yorkers who purchase folding knives at NYC retailers are not merely speculating as to what the law commands, they are hijacked by NYPD and DANY’s application of it. *See Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939). This sets an insidious trap for thousands of unwitting New Yorkers, “leaving [them] in the dark about what the law demands and allowing prosecutors and courts to make it up.” *Sessions v. Dimaya*, 138 S. Ct. 1204, 1224 (2018) (Gorsuch, J., concurring).

The Wrist-Flick Test breeds such grossly unequal enforcement, and the Second Circuit’s decision below perpetuates it. The Test is so vague that it cedes to Respondents unfettered discretion to target those groups deemed to merit their displeasure. *See Giaccio v. State of Pa.*, 382 U.S. 399, 402-03 (1966); *City of Chicago v. Morales*, 527 U.S. 41, 61 (1999).

II. The Second Circuit’s Failure to Apply *Johnson* and *Dimaya* Insulates Respondents’ Abuse of Black and Hispanic Men From Judicial Scrutiny

NYPD and DANY abuse the gravity knife statute to cast a vast net around thousands of New Yorkers every year to punish men of color. *See Giaccio v. State of Pa.*, 382 U.S. 399, 402-03 (1966); *City of Chicago v. Morales*, 527 U.S. 41, 61 (1999). According to a 6-month sample of Legal Aid criminal complaints, we estimate that 3,500 New Yorkers were arrested for gravity knife

possession in 2018. 85% of those New Yorkers were Black or Hispanic and 96% were men.⁶

Most New Yorkers arrested for gravity knife possession are charged with a misdemeanor punishable by up to one year in jail, and the majority of those charged with misdemeanors resolve their cases with non-jail, non-criminal dispositions. Of course, even a case that culminates in an eventual dismissal can wreak havoc on a person's life. Legal Aid clients endure the humiliation of arrest and detention, miss days of work, suffer suspensions and refrain from applying for work because of pending cases. They may be required to perform community service in order to obtain an adjournment in contemplation of dismissal or in exchange for a violation plea. If they are convicted of a violation or a misdemeanor, they pay mandatory surcharges and face jail time and the collateral consequences of a criminal conviction. *See* Issa Kohler-Hausmann, *Misdemeanor Justice: Control without Conviction*, *American Journal of Sociology* Vol. 119, No. 2 (September 2013); Malcolm Feeley, *The Process Is the Punishment*, Russell Sage Foundation (October 1979).

New Yorkers with previous criminal convictions fare even worse because prosecutors have vast

⁶ Legal Aid reviewed 2,775 criminal complaints from the first six months of 2018 that charged violations of Penal Law Sections 265.01(1) and 265.02(1). 885 of those cases charged gravity knife possession. Legal Aid represents approximately 50% of all defendants charged in New York City. Therefore, we estimate that approximately 3,500 New Yorkers were arrested for gravity knife possession in 2018.

discretion to charge them with felony gravity knife possession under N.Y. Penal Law § 265.02(1). The different practices of the different DA's offices in New York City illustrate the potential for abuse. DANY is singular in its prosecutorial overzeal. In 2018, it brought felony gravity knife charges against Legal Aid Society clients more often than all other New York City prosecutors combined.⁷

Such broad discretion conferred on prosecutors harkens to state abuse of vagrancy laws condemned in *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972). There, the Jacksonville vagrancy ordinance prohibited acts including “disorderly conduct,” “loitering” and “common thief,” and carried a penalty of up to 90 days in jail. The ordinance there, like the amorphous Wrist-Flick Test here, was designed “to allow the net to be cast at large, to enable men to be caught who are vaguely undesirable in the eyes of police and prosecution.” *Id.* at 166. It furnished “a convenient tool for ‘harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure.’” *Id.* at 170. Here, we narrate a selection of felony prosecutions to demonstrate what happens when NYPD and DANY exploit the gravity knife statute as a convenient tool to bludgeon men of color.

⁷ According to a 6-month sample of 2018 felony gravity knife complaints, prosecutors charged gravity knife possession at the following rates: 2 cases in Bronx County, 9 cases in Kings County, 9 cases in Queens County, 18 cases in Richmond County and 45 in cases New York County.

Antoine Best⁸

On September 17, 2006 Antoine Best, who was 22, Black and had a criminal record, had just finished working at Starbucks when he entered the subway area at Grand Central Station. He was headed to his home in Long Island, when plainclothes police officers stopped him for having a folding knife clipped to his jeans. He used the knife at Starbucks for cutting boxes. A police officer was able to flick it open with one hand. (B.R. 10). According to police, Best was calm and cooperative. There was no allegation that he attempted to use the knife unlawfully, nor any evidence that he could open the knife with the flick of a wrist, nor any evidence that he knew an officer could do so. Best was arrested and charged with felony possession of a weapon. At his first trial, the jury hung. DANY chose to try him again. He was convicted after a second trial. He was sentenced to 2.5 to 5 years in prison. *People v. Best*, 57 A.D.3d 279 (1st Dept. 2008) Eleven years after his arrest, Best's knife continued to sell in the heart of Manhattan at Henry Westpfal and Co. and continues to sell on Amazon.com today <https://amzn.to/2FIUiVD>:

⁸ "B.R.," "N.R.," "P.R.," "R.R." and "G.R." respectively refer to the Best, Neal, Parrilla, Rodriguez and Gonzalez state records on appeal.

Best Knife Henry Westpfal and Co. Knife⁹**Richard Neal**

On June 11, 2008 Richard Neal, who was 53, Black and had a criminal record, left his mother's home on the Lower East Side of Manhattan. He was walking with a friend when police approached and asked him what was clipped to his jeans. (N.R. 8). He told them it was a knife. A police officer took it from Neal and was able to flick it open with one hand. (N.R. 11). There was no allegation that Neal intended to use the knife unlawfully, nor any evidence that he could open the knife with the flick of a wrist, nor any evidence that he knew an officer could do so. Prosecutors elected to charge him with felony possession of a weapon. At trial a police officer described Neal as exhibiting a "very calm" demeanor at the time of his arrest. (N.R. 8). The officer additionally testified that Neal was "just talking, walking" with his friend. (N.R. 8). While testifying, the police officer opened the knife with the flick of a wrist. (N.R. 254-255). Neal was convicted. At sentencing the

⁹ This picture was taken by amicus counsel at Henry Westpfal and Co. on 115 W. 25th St. on February 21, 2017.

prosecutor congratulated himself for not asking the Court to treat Neal as a discretionary persistent felon and sentence him to life in prison:

Judge, as you know, based on this defendant's history, he is—he certainly would be a discretionary persistent. I'm not asking that you find him that at this time, but I'm just indicating to you the history that this defendant has of numerous felony convictions including for robbery in which he used a knife. In this case as you know, he had a knife on him. There is no allegations (sic) that he was actually using it, but he did have a knife on him, and with his multiple felony convictions, we are recommending three and a half to seven years in jail. (N.R. 445-446).

The robbery in which Neal had used a knife occurred 22 years prior. Nevertheless, Neal was sentenced to 3 to 6 years in prison, every day of which he served. *People v. Neal*, 79 A.D.3d 523, 524 (1st Dept. 2010), lv. denied, 16 N.Y.3d 799 (2011). In 2015, more than 8 years after NYPD and DANY committed Neal state prison, Neal's knife sold at Lowes in Brooklyn and today it continues to sell for \$6.95 on Amazon.com: <https://amzn.to/2SwdYtd>:

Richard Neal Knife Lowes Brooklyn Knife¹⁰



Elliot Parrilla

On February 3, 2011 Elliot Parrilla, who was 31, Hispanic and had a criminal record, was working, tiling a floor at his ex-girlfriend's home on 96th St. in Manhattan. (P.R. 456-457). When he was done working for the night, he placed his tools in his car including a Husky utility knife that he had purchased at Home Depot in the Bronx. (P.R. 457-460). Police officers stopped Parrilla on Lexington Avenue for driving with broken brake lights. (P.R. 268, 384-385). Police frisked Parrilla and searched his car. They recovered the Husky utility knife. An officer was able to flick it open with one hand. (P.R. 366, 397-399). There was no allegation that Parrilla attempted to use the knife unlawfully, nor any evidence that he could open the knife with the flick of a

¹⁰ This picture was taken by amicus counsel at Lowes Home Improvement 118 2nd Avenue Brooklyn, N.Y. on September 6, 2015.

wrist, nor any evidence that he knew that an officer could do so. Prosecutors charged him with felony possession of a weapon. At trial, the arresting officer struggled to open the knife with the flick of a wrist, but ultimately succeeded. (P.R. 402, 511). Prosecutors sought to preclude Parrilla from testifying that he purchased the knife at Home Depot in the Bronx. (P.R. at 232-236). Parrilla was convicted. He was sentenced to 2.5 to 5 years in state prison. *People v. Parrilla*, 27 N.Y.3d 400 (2016). Parrilla's knife is one of the most common utility knives in the country, and continues to sell at hundreds of stores across New York City and on Amazon.com: <https://amzn.to/2L8QJTH>.

Parrilla Knife



Ace Hardware Knife



Jesus Rodriguez

On August 24, 2011 police stopped Jesus Rodriguez on a stairwell in a public housing building on the Lower East Side of Manhattan. Rodriguez, who was 27, Hispanic and had a criminal record, was arrested for trespass, because he was unable to prove that he was an invited guest in the building. (R.R. 36). Police

searched Rodriguez and recovered a black carabiner that contained several tools including a bottle opener, screwdriver and fold-out knife. (R.R. 38). The arresting officer was able to force the carabiner's knife open with the flick of a wrist. (R.R. 40). There was no allegation that Rodriguez attempted to use the knife unlawfully against any person, nor any evidence that he could open the knife with the flick of a wrist, nor any evidence that he knew that an officer could do so. Rodriguez was initially charged with misdemeanor possession of a weapon. The prosecutor failed to answer ready for trial on multiple court dates. On July 20, 2012, in the face of an imminent speedy trial dismissal, without notice to Rodriguez, the assigned prosecutor extended the speedy trial clock by indicting the case as a felony. At trial Rodriguez's brother testified that he purchased the carabiner at a hardware store in Manhattan and gave it to Rodriguez to help him with maintenance work. (R.R. 121-122). His brother testified that he had never seen Rodriguez open the folding knife with the flick of a wrist. (R.R. 125). When the arresting officer testified, he struggled to open the knife, could not do so every time, but was ultimately able to open the knife. (R.R. 60, 102-103). Rodriguez was convicted. He was sentenced to 2 to 4 years in state prison. His conviction was reversed on speedy trial grounds, but only after he had spent more than two years in prison. *People v. Rodriguez*, 135 A.D.3d 587 (2016). Today, the carabiner continues to sell on Amazon.com for \$5.99: <https://amzn.to/2Qm0QtV>.

Rodriguez Carabiner Amazon.com Carabiner**Richard Gonzalez**

On April 14, 2011 Richard Gonzalez, who was 50, Hispanic and had a criminal record, was commuting from his home in the Bronx to a jobsite in New Jersey where he worked as a handyman. (G.R. 37). Gonzalez attempted to transfer from the 6 train to the 4/5 trains at the Lexington Avenue and 125th St. subway station. Several police officers were standing on the stairwell blocking Gonzalez from using the stairs. According to the officers Gonzalez said “Fuck you guys. This is bull-shit. You’re not doing anything at all. Stop blocking the stairs. Get out of my way.” (G.R. 220). Police stopped Gonzalez and searched him. They recovered a Husky utility knife that Gonzalez had purchased at Home Depot in the Bronx:



An officer was able to flick the knife open with one hand. (G.R. 18). There was no allegation that Gonzalez attempted to use the knife unlawfully, nor any evidence that he could open the knife with the flick of a wrist, much less that he knew an officer could do so. Nevertheless, prosecutors elected to charge him with felony possession of a weapon. At his suppression hearing, the Court found the police witnesses to be credible, and declined to suppress the utility knife. Gonzalez burst out:

Fucking cops do whatever the fuck they do, they steal, they rob drug dealers, they do every fucking thing, but they honest, right, because they cops. Cock sucker, you mother fucker, suck my dick [Judge] Farber, you son of a bitch. Now I'm fucking mad, now you can say I am being fucking disorderly, now. People fucking work and you cannot see that, you son of a bitch. (G.R. 69).

At trial, the arresting officer conceded that he had practiced the Wrist-Flick Test some 200-300 times before arresting Gonzalez. (G.R. 235). Gonzalez was convicted. The prosecutor sought a sentence of 3.5 to 7 years in prison, the maximum penalty permitted under the law:

I believe that the defendant should be sentenced to the maximum sentence allowed, which is three and a half to seven years. People are making this recommendation due to the defendant's extensive criminal history, due to the defendant's conduct during the course of this proceeding, as well as the hearing which included outbursts to Judge Farber, and as well as, your Honor, and as well as myself. (G.R. 348).

Gonzalez was sentenced to 3.5 to 7 years. His conviction was reversed by the Court of Appeals, but only after Gonzalez had spent more than 4 years in prison. *People v. Gonzalez*, 25 N.Y.3d 1100 (2015). At oral argument the Court of Appeals cut to the obvious. DANY penalized Gonzalez for his foul mouth, not because possessing a Home Depot utility knife was a clearly defined crime. Watch Gonzalez in his own words and portions of the Court of Appeals oral argument here: <http://bit.ly/2rbsLv3>.

◆

CONCLUSION

In 2017, the Legislature responded to Governor Cuomo's 2016 veto and voted to eliminate "centrifugal force" from the statutory definition of a gravity knife. S4769A, Sen. Reg. Sess. 2017-2018 (N.Y. 2017). That legislation passed by margins of 136-1 in the Assembly and 61-1 in the Senate. *Id.* It would have clarified the definition of a gravity knife, eliminated the Wrist-Flick Test, exempted possession of folding knives from prosecution and solved the enforcement problem that

Respondents have created. The Legislature explained its justification for the bill:

In the 1950s, amid a widespread fear of knife crime, the Legislature enacted a sweeping ban of switch blades and gravity knives. Decades later, the application of this law has been expanded to include any common folding knife . . . This bill will solve the problem by clarifying that the Legislature’s intent is not to ban all pocket knives, but to ban switchblades and gravity knives, two very specific kinds of weapons with very specific characteristic mechanisms.

Justification Statement, S4769A, Reg. Sess. 2017-2018 (N.Y. 2017).

But Respondents rallied in opposition and Governor Cuomo vetoed for a second straight year. Governor Andrew M. Cuomo, Veto Message #171, October 23, 2017.

What is at stake for the parties in this petition is not the presence of folding knives in New York City—they are already ubiquitous—but the power of police and prosecutors to arbitrarily choose whom to target, punish and imprison. Our clients—Elliot Parrilla, Richard Neal, Antoine Best, Jesus Rodriguez, Richard Gonzalez and tens of thousands of other men of color in New York—have long suffered under a law that is absurd, amorphous and subject to systemic abuse. It is a law that the Legislature does not support and the Due Process Clause does not permit. The Second Circuit’s decision insulates that law from meaningful scrutiny and prevents our clients from enjoying

systemic relief. We urge this Court to grant the petition and review the Second Circuit's decision.

Respectfully submitted,

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