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): 19-1129 Caption [use short title] Cracco v. City of New York

Motion for: Vacatur and dismissal

Set forth below precise, complete statement of relief sought:

Defendant-appellant D.A. Vance asks the Court to dismiss this appeal as moot, vacate the judgment and decisions of the district court that are the subject of this appeal, and remand the case to the district court for dismissal pending the resolution of plaintiff-appellee Joseph Cracco's outstanding motion for attorneys' fees.

MOVING PARTY: D.A. Vance **OPPOSING PARTY:** Joseph Cracco

☐ Plaintiff ☑ Defendant

☑ Appellant/Petitioner ☐ Appellee/Respondent

MOVING ATTORNEY: Elizabeth Krasnow **OPPOSING ATTORNEY:** James Maloney

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

New York County District Attorney's Office
One Hogan Place, New York, NY 10013
(212) 335 4210; krasnowe@dany.nyc.gov

Law Office of James M. Maloney
33 Bayview Avenue, Port Washington, NY 11050
maritimelaw@nyu.edu; (516) 708 1395

Court-Judge/Agency appealed from: SDNY (Crotty, J.)

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: n/a

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: /s Elizabeth N. Krasnow **Date:** 6/28/2019 Service by: ☑ CM/ECF ☐ Other [Attach proof of service]

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Joseph Cracco,

Plaintiff-Appellee,

-against-

Cyrus R. Vance, Jr.,

Defendant-Appellant,

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

Defendants.

DECLARATION IN SUPPORT OF THE DISTRICT ATTORNEY'S MOTION TO DISMISS AND VACATE

Docket No. 19-1129

ELIZABETH N. KRASNOW declares, under penalty of perjury, that the following is true and correct:

1. I am Assistant District Attorney at the New York County District Attorney's Office and counsel for defendant-appellant New York County District Attorney Cyrus R. Vance, Jr. on this appeal. I submit this declaration in support of the motion of D.A. Vance to: vacate the judgment and opinions of the district court dated December 9, 2015, January 18, 2016, March 27, 2019, and March 28, 2019; dismiss as moot D.A. Vance's appeal from that judgment and those opinions; and remand this

case for dismissal pending the district court's resolution of plaintiff Joseph Cracco's outstanding motion for attorneys' fees.

2. As explained in D.A. Vance's motion, this case has become moot because the criminal statute that is the basis of Cracco's claim has been repealed, effective immediately.

3. When Cracco commenced this lawsuit against D.A. Vance in February 2015, he asserted a void-for-vagueness challenge to §§265.00(5) and 256.01(1) of the New York Penal Law. Those two sections, referred to by the parties as the "gravity knife statute," rendered possession of a gravity knife a misdemeanor criminal offense. Cracco sought equitable relief to prohibit future enforcement of the statute with respect to a certain class of knives. In this action, D.A. Vance appeals from a judgment and opinions of the district court denying D.A. Vance's motion to dismiss, denying his motion for reconsideration of the same, denying his motion for summary judgment, and granting Cracco's cross-motion for summary judgment.

4. On May 30, 2019, after D.A. Vance filed his notice of appeal in this case, the Governor of New York signed into law Assembly Bill 5944, entitled "An Act to amend the penal law, in relation to gravity knives," following unanimous passage of the bill by both houses of the state Legislature. Assembly Bill 5944 removed the term "gravity knife" from the list of weapons that can support a criminal charge of

misdemeanor possession under Penal Law §265.01(1). A copy of the legislation and the Governor's memorandum are appended to this declaration as Exhibit A.

5. This case is one of two federal lawsuits filed against D.A. Vance involving a void-for-vagueness challenge to the gravity knife statute. The other lawsuit, captioned *Copeland, et al. v. Vance, et al.*, was filed in the Southern District of New York in June 2011 under Docket No. 11-3918. In addition to D.A. Vance, the plaintiffs in *Copeland* named the City of New York as a defendant. Like Cracco, the plaintiffs in *Copeland* sought equitable relief to enjoin future enforcement of the gravity knife statute.

6. On January 27, 2017, after a bench trial, the district judge presiding over *Copeland* entered judgment in favor of D.A. Vance and the City. *Copeland v. Vance*, 230 F. Supp. 3d 232 (S.D.N.Y. 2017). On June 22, 2018, this Court affirmed. *Copeland v. Vance*, 893 F.3d 101 (2d Cir. 2018).

7. When the Governor signed Assembly Bill 5944, the plaintiffs' petition for a writ of certiorari in *Copeland* was pending in the U.S. Supreme Court under Docket No. 18-918. The parties filed a letter and briefs on the issue raised here: whether Assembly Bill 5944 rendered moot the plaintiffs' vagueness challenge to the gravity knife statute. The City and D.A. Vance argued that the claim was moot because the statute challenged by the plaintiffs had been repealed. A copy of the supplemental brief filed by the City and D.A. Vance is appended to this declaration as Exhibit B. On June

17, 2019, the Supreme Court denied the petition for a writ of certiorari. *Copeland v. Vance*, 2019 U.S. LEXIS 4081 (June 17, 2019).

8. Assembly Bill 5944 has similarly rendered moot Cracco's claim for equitable relief to enjoin future enforcement of the now-repealed gravity knife statute. Because a live controversy no longer exists between the parties that would permit this Court to review the judgment and opinions that are the subject of this appeal, D.A. Vance respectfully moves this Court to vacate that judgment and those opinions, dismiss the appeal as moot, and remand the case to the district court for dismissal pending the resolution of Cracco's outstanding motion for attorneys' fees.

Dated: New York, New York
June 28, 2019

ENK

Elizabeth N. Krasnow

Ex. A

STATE OF NEW YORK

S. 3898 A. 5944

2019-2020 Regular Sessions

SENATE - ASSEMBLY

February 20, 2019

IN SENATE -- Introduced by Sen. JACKSON -- read twice and ordered printed, and when printed to be committed to the Committee on Codes

IN ASSEMBLY -- Introduced by M. of A. QUART -- read once and referred to the Committee on Codes

AN ACT to amend the penal law, in relation to gravity knives

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Subdivision 1 of section 265.01 of the penal law, as amended by chapter 1 of the laws of 2013, is amended to read as follows:

(1) He or she possesses any firearm, electronic dart gun, electronic stun gun, [~~gravity knife,~~] switchblade knife, pilum ballistic knife, metal knuckle knife, cane sword, billy, blackjack, bludgeon, plastic knuckles, metal knuckles, chuka stick, sand bag, sandclub, wrist-brace type slingshot or slungshot, shirken, or "Kung Fu star"; [~~or~~]

§ 2. Subdivision 12 of section 10.00 of the penal law, as amended by chapter 257 of the laws of 2008, is amended to read as follows:

12. "Deadly weapon" means any loaded weapon from which a shot, readily capable of producing death or other serious physical injury, may be discharged, or a switchblade knife, [~~gravity knife,~~] pilum ballistic knife, metal knuckle knife, dagger, billy, blackjack, plastic knuckles, or metal knuckles.

§ 3. Subdivision 5-c of section 265.00 of the penal law, as added by chapter 510 of the laws of 2007, is amended to read as follows:

5-c. "Automatic knife" includes a stiletto, a switchblade knife, [~~a gravity knife,~~] a cane sword, a pilum ballistic knife, and a metal knuckle knife.

§ 4. Subdivisions 1 and 2 of section 265.10 of the penal law, as amended by chapter 257 of the laws of 2008, are amended to read as follows:

EXPLANATION--Matter in *italics* (underscored) is new; matter in brackets [-] is old law to be omitted.

LBD08025-02-9

1. Any person who manufactures or causes to be manufactured any machine-gun, assault weapon, large capacity ammunition feeding device or disguised gun is guilty of a class D felony. Any person who manufactures or causes to be manufactured any switchblade knife, [~~gravity knife,~~] pilum ballistic knife, metal knuckle knife, billy, blackjack, bludgeon, plastic knuckles, metal knuckles, Kung Fu star, chuka stick, sandbag, sandclub or slungshot is guilty of a class A misdemeanor.

2. Any person who transports or ships any machine-gun, firearm silencer, assault weapon or large capacity ammunition feeding device or disguised gun, or who transports or ships as merchandise five or more firearms, is guilty of a class D felony. Any person who transports or ships as merchandise any firearm, other than an assault weapon, switchblade knife, [~~gravity knife,~~] pilum ballistic knife, billy, blackjack, bludgeon, plastic knuckles, metal knuckles, Kung Fu star, chuka stick, sandbag or slungshot is guilty of a class A misdemeanor.

§ 5. Subdivision 3 of section 265.15 of the penal law, as amended by chapter 257 of the laws of 2008, is amended to read as follows:

3. The presence in an automobile, other than a stolen one or a public omnibus, of any firearm, large capacity ammunition feeding device, defaced firearm, defaced rifle or shotgun, defaced large capacity ammunition feeding device, firearm silencer, explosive or incendiary bomb, bombshell, [~~gravity knife,~~] switchblade knife, pilum ballistic knife, metal knuckle knife, dagger, dirk, stiletto, billy, blackjack, plastic knuckles, metal knuckles, chuka stick, sandbag, sandclub or slungshot is presumptive evidence of its possession by all persons occupying such automobile at the time such weapon, instrument or appliance is found, except under the following circumstances: (a) if such weapon, instrument or appliance is found upon the person of one of the occupants therein; (b) if such weapon, instrument or appliance is found in an automobile which is being operated for hire by a duly licensed driver in the due, lawful and proper pursuit of his or her trade, then such presumption shall not apply to the driver; or (c) if the weapon so found is a pistol or revolver and one of the occupants, not present under duress, has in his or her possession a valid license to have and carry concealed the same.

§ 6. Paragraphs 2 and 6 of subdivision a of section 265.20 of the penal law, paragraph 2 as amended by chapter 189 of the laws of 2000 and paragraph 6 as amended by chapter 1041 of the laws of 1974, are amended to read as follows:

2. Possession of a machine-gun, large capacity ammunition feeding device, firearm, switchblade knife, [~~gravity knife,~~] pilum ballistic knife, billy or blackjack by a warden, superintendent, headkeeper or deputy of a state prison, penitentiary, workhouse, county jail or other institution for the detention of persons convicted or accused of crime or detained as witnesses in criminal cases, in pursuit of official duty or when duly authorized by regulation or order to possess the same.

6. Possession of a switchblade [~~or gravity knife~~] for use while hunting, trapping or fishing by a person carrying a valid license issued to him pursuant to section 11-0713 of the environmental conservation law.

§ 7. This act shall take effect immediately.

STATE OF NEW YORK
EXECUTIVE CHAMBER
ALBANY 12224

APPROVAL # 2
CHAPTER # 34

May 30, 2019

MEMORANDUM filed with Assembly Bill 5944, entitled:

"AN ACT to amend the penal law, in relation to gravity knives"

APPROVED

This bill, unanimously passed by the Legislature, would legalize the possession of commonly sold and lawfully used folding knives by removing the term "gravity knife" from the Penal Law, while leaving intact law enforcement's ability to pursue those who otherwise use these knives unlawfully.

This is not the first time the Legislature has sought to remove the criminal sanctions associated with possessing these knives, which are widely available in hardware and sporting goods stores. Indeed, in 2016 and 2017, I was constrained to veto similar bills (see Veto No. 299 of 2016 and Veto No. 171 of 2017). As I explained in each of those instances, despite recognizing the absurdity of a criminal justice system which has regularly charged individuals for simply carrying folding knives designed, marketed and sold as work tools for construction workers, artisans, restaurant workers, and day laborers, the uniform opposition of the State's law enforcement entities and mayors could not be ignored. Recognizing the concerns on both sides of this issue, the Executive strived to reach a compromise over the past three years, carefully constructing bills that would have legalized these knives in a limited fashion so that individuals using them for work could not be prosecuted. None of those attempts to reach a resolution proved successful.

As I review this bill for a third time, the legal landscape has changed. In March of this year, the United States District Court for the Southern District of New York declared the State's existing "gravity knife" ban unconstitutional. As argued by many who have advocated for this change in law, the court reasoned that the existing law could result in arbitrary and discriminatory enforcement.

While I remain aware of the cautious community voices, I cannot veto a bill passed by the Legislature to address a decided constitutional infirmity in existing law, as recently affirmed by a federal court. I remain confident that our law enforcement community will continue to keep our communities safe by pursuing anyone who uses, or attempts to use, one of these knives in an unlawful manner.

This bill is approved.

Ex. B

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

RESPONDENTS' JOINT SUPPLEMENTAL BRIEF

ZACHARY W. CARTER
Corporation Counsel of the City of New York
100 Church Street
New York, NY 10007
(212) 356-2500
rdearing@law.nyc.gov
Counsel for City Respondent

RICHARD DEARING*
CLAUDE S. PLATTON
NWAMAKA EJEBE

CYRUS R. VANCE, JR.
District Attorney of New York County
One Hogan Place
New York, NY 10013
(212) 335-9000
krasnowe@dany.nyc.gov
Counsel for the District Attorney Respondent

ELIZABETH N. KRASNOW*
PATRICIA J. BAILEY

**Counsel of Record*

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

INTRODUCTION 1

ARGUMENT 3

A. The administrative transportation regulations were never a part of this litigation and cannot save the case from mootness. 3

B. Petitioners' mootness argument based on the administrative regulations rests on unfounded assumptions. 6

C. Petitioners' argument based on the possibility of future prosecution for past conduct has no basis in the record. 8

CONCLUSION 10

TABLE OF AUTHORITIES

Page(s)

Cases

Adickes v. S. H. Kress & Co.,
398 U.S. 144 (1970) 4

Bunting v. Mellen,
541 U.S. 1019 (2004) (opinion of
Stevens, J. respecting the denial
of certiorari) 9

Corso v. City of New York,
No. 17 Civ. 6096 (NRB),
2018 U.S. Dist. LEXIS 161113
(S.D.N.Y. Sept. 20, 2018) 7

Knife Rights, Inc. v. Vance,
802 F.3d 377 (2d Cir. 2015) 5

People v. Behlog,
74 N.Y.2d 237 (1989) 8

People v. Oliver,
1 N.Y.2d 152 (1956) 8

People v. Roper,
259 N.Y. 170 (1932)..... 9

People v. Walker,
81 N.Y.2d 661 (1993) 8

United States v. United Foods,
533 U.S. 405 (2001) 4

Statutes

N.Y. Gen. Constr. Law § 93 8

N.Y. Penal Law § 265.00(5) 2, 3, 8

N.Y. Penal Law § 265.01(1) 3, 8

Other Authorities

21 N.Y.C.R.R. § 1040.9 ..... 4, 7

21 N.Y.C.R.R. § 1050.8 ..... 4, 7

21 N.Y.C.R.R. § 1050.10 4

21 N.Y.C.R.R. § 1044.11 ..... 4, 7

INTRODUCTION

Respondents the City of New York and New York County District Attorney (DA) Cyrus Vance, Jr., submit this joint supplemental brief under Supreme Court Rule 15(8) in response to petitioners' supplemental brief. As explained in respondents' joint letter of June 4, 2019, this case is now moot because the central criminal statute that petitioners challenged as unconstitutionally vague has been repealed. Because petitioners sought solely prospective relief against enforcement of this statute, there is no remedy that the Court could now grant.

Petitioners try to avoid the mootness of their case by changing it. They now seek to challenge regulations of the Metropolitan Transportation Authority (MTA) that make it a violation—the lowest level of offense—to possess "weapons" and "dangerous instruments" in the New York City public-transit system, including items that are otherwise lawful like box cutters and now gravity knives. But those regulations, which are broader than the criminal statute challenged in the complaint, were never a part of this case and cannot be brought into it now. Their newly framed vagueness challenge would also be premature, as the state courts have rarely addressed the MTA regulations and have had no opportunity to construe them following the repeal of the state criminal prohibition of gravity knives.

Pointing to a statement of a New York City Police Department (NYPD) spokesperson, petitioners incorrectly suggest that the NYPD will continue to use the "wrist-flick test" and the definition of a "gravity knife" under N.Y. Penal Law § 265.00(5) to specifically target possession of gravity knives in the subways. But neither point is true. Following the repeal, the NYPD has renounced reliance on the "wrist-flick test" on which petitioners' constitutional challenge has hinged. The quoted statement was simply expressing the NYPD's view that although the possession of a gravity knife is now de-criminalized under the state law, commuters remain prohibited from bringing them, like any other "weapon" or "dangerous instrument," into the transit system.

Petitioners also cannot avoid mootness by speculating that they could face prosecution in the future for pre-repeal possession of a gravity knife. It is doubtful that New York law would even allow such a prosecution and entirely speculative for petitioners to suggest that one might occur.

Because the case is moot, the Court would lack jurisdiction to address the question proposed in the petition. But the petition also raises no cert-worthy question for a number of reasons unrelated to the recent repeal, as explained in respondents' briefs in opposition. Petitioners' labored efforts to avoid mootness, even if they had any merit, certainly cannot and do not cure those pre-existing defects.

ARGUMENT

A. The administrative transportation regulations were never a part of this litigation and cannot save the case from mootness.

When petitioners commenced this suit in 2011, they asserted a void-for-vagueness challenge only to two sections of the New York Penal Law: § 265.00(5), which defines a "gravity knife," and § 265.01(1), which defines misdemeanor possession of a weapon. These two provisions, when read together, criminalized the possession of a gravity knife. The complaint sought a declaration that the provisions were unconstitutional and an injunction against their continued enforcement (Second Circuit Joint Appendix (JA) 51–52). The prohibition of possession of a gravity knife in § 265.01(1) has now been repealed.

In an attempt to save the case from becoming moot, petitioners now point for the first time to administrative regulations promulgated by the MTA governing the possession of various "weapons" and "dangerous instruments" on New York City subways, buses, and trains. Those regulations make it a violation (a form of offense less serious than a misdemeanor) to possess, in the various components of the transit system, weapons and dangerous instruments including, but not 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." 21 N.Y.C.R.R. § 1050.8; *see* 21 N.Y.C.R.R. §§ 1040.9, 1044.11 (similar).* In eight years of litigation, petitioners have never mentioned these MTA regulations as the source of any alleged injury sought to be remedied by this lawsuit. Nor have they ever argued that the MTA regulations are impermissibly vague or otherwise violate their constitutional rights.

Petitioners cannot bring these regulations into the case via a last-minute filing in the Court of last review. *See, e.g.*, *United States v. United Foods*, 533 U.S. 405, 417 (2001) (rejecting petitioner's attempt "to assert new substantive arguments" that were not presented below); *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970) (refusing to entertain arguments about a new statute that petitioner had failed to address before the court of appeals, explaining that "[w]here issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them"). To properly challenge these regulations, and to even have standing to make the claim, petitioners needed to have included them in their complaint

* Contrary to petitioners' assertions (Pets. Supp. Br. 4), a violation of the MTA regulations that cover New York City subways can result in a maximum of ten days, not 30 days, of imprisonment. 21 N.Y.C.R.R. § 1050.10.

and alleged that they had fear of future prosecution under the regulations. They never did so.

While petitioner Pedro Perez happened to be arrested inside a subway station, he was charged with a violation of the criminal statute, not the MTA regulations. Petitioners have consistently maintained that the basis of their challenge was their fear of future prosecution for engaging the same conduct that led to their arrests. *See Knife Rights, Inc. v. Vance*, 802 F.3d 377, 387 (2d Cir. 2015); JA44, 46, 55, 60; Pet. 8–9. Yet Perez did not challenge the MTA regulation, which he now claims would have prohibited possession of the knife that he possessed at the time of his arrest. Indeed, no petitioner alleged in the complaint or asserted in any other filing, in the lower courts or before this Court, that he feared prosecution under the MTA regulations for carrying a knife on public transportation in the future, gravity knife or otherwise.

The MTA regulations thus are simply not in this case. The petitioners have always sought to bar future enforcement of the state criminal prohibition of the possession of gravity knives. Because the Court can grant no prospective relief regarding that now-repealed statute, this case is moot.

B. Petitioners' mootness argument based on the administrative regulations rests on unfounded assumptions.

In addition to falling outside of the scope of this case, petitioners' suggestion that a challenge to the MTA regulations would raise a similar vagueness question as was raised by their challenge to the now-repealed Penal Law provisions rests on a number of unwarranted assumptions. At a minimum, before petitioners' arguments about the MTA regulations could even be appropriately presented to this Court, petitioners' assumptions would need to be tested in the lower courts.

The core assumption underlying petitioners' supplemental brief is that the MTA regulations prohibiting the possession of weapons or other dangerous instruments in the transit system are now and will be enforced in the same way as the former gravity-knife statute that forms the basis of petitioners' suit. But the transit rules are broadly worded, barring the possession of any "weapon" or "dangerous instrument" in the transit system, and they cite gravity knives only as one of a nonexclusive list of examples of such weapons or instruments. On the face of the regulations, the "common folding knives" that petitioners seek to possess may be unlawful weapons or dangerous instruments even if they are not gravity knives as defined in the Penal Law.

The state courts have had little opportunity to construe the MTA regulations. Indeed, a federal district court recently observed that "New York courts have not squarely interpreted [21 N.Y.C.R.R. § 1050.8] and its use of the terms 'weapon' and 'dangerous instrument' in particular," describing a "dearth of authority" on this point. *Corso v. City of New York*, No. 17 Civ. 6096 (NRB), 2018 U.S. Dist. LEXIS 161113, at *19–20 (S.D.N.Y. Sept. 20, 2018). The illustrative list of weapons or dangerous instruments under the regulations is not coextensive with definitions from the state penal law. For example, state law does not criminalize the possession of box cutters or define the term, but the MTA rules include box cutters in the illustrative list of weapons and dangerous instruments that cannot be possessed on subways, buses, or trains. 21 NYCRR §§ 1040.9, 1044.11, 1050.8. Thus, the application of the MTA regulations to a folding knife may not turn on whether it would qualify as a "gravity knife" under the Penal Law definition. Until such interpretive questions are addressed, it is far from clear that petitioners' vagueness arguments are even relevant to the MTA regulations.

And indeed, the NYPD does not intend to use the wrist-flick test in enforcing the MTA regulations. Counsel for respondents have been informed by the NYPD, and have been authorized to inform the Court, that the NYPD determined after repeal of the gravity-knife statute that New York City police officers will no longer be trained

on, or authorized to use, the wrist-flick test to identify an illegal gravity knife. The NYPD will thus enforce the prohibition of weapons or other dangerous instruments on public transit under the MTA regulations without reference to whether the weapon constitutes a "gravity knife" as defined under N.Y. Penal Law § 265.00(5) and without reference to the wrist-flick test. That test has been the basis of petitioners' case since its inception (JA37, 42; Pet. 3, 6–8). The NYPD's abandonment of the test confirms that petitioners' core vagueness argument no longer applies.

C. Petitioners' argument based on the possibility of future prosecution for past conduct has no basis in the record.

Pointing to a general savings clause in the New York statutes, N.Y. Gen. Constr. Law § 93, petitioners also resist mootness on the ground that retailers like Native Leather will continue to fear prosecution under the now-repealed Penal Law § 265.01(1) until the two-year limitations period for that former statute has elapsed. But the purpose of the savings clause is to address a scenario where an existing criminal penalty is *increased* after the defendant commits the offense. New York decisions generally do not apply the savings clause to an "ameliorative amendment," such as Assembly Bill 5944, that eliminates conduct from the scope of an existing criminal statute. *See, e.g., People v. Walker*, 81 N.Y.2d 661, 666 (1993)*; People v. Behlog*, 74 N.Y.2d 237, 240–41 (1989); *People v.*

Oliver, 1 N.Y.2d 152, 158–59 (1956); *People v. Roper*, 259 N.Y. 170, 178–179 (1932).

Even if prosecution under the statute could be legally permissible, there is absolutely no evidence in the record that criminal charges against Native Leather or any other retailer are pending or contemplated. There is not even a suggestion in the record that the police or DA investigators have inspected Native Leather's inventory of knives in the past two years, let alone identified a knife that would have constituted a prohibited gravity knife. Mere speculation cannot save petitioners' case from becoming moot. *See, e.g., Bunting v. Mellen*, 541 U.S. 1019, 1021 (2004) (opinion of Stevens, J. respecting the denial of certiorari) ("[S]peculation cannot 'shield [a] case from a mootness determination.'" (quoting *City News & Novelty, Inc. v. City of Waukesha*, 531 U.S. 278, 283 (2001))).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

ZACHARY W. CARTER
Corporation Counsel of the
City of New York

Counsel for City Respondent

RICHARD DEARING*
CLAUDE S. PLATTON
NWAMAKA EJEBE
New York City Law
Department
100 Church Street
New York, NY 10007
(212) 356-2500
rdearing@law.nyc.gov

CYRUS R. VANCE, JR.
District Attorney
of New York County

Counsel for the District Attorney Respondent

Elizabeth N. Krasnow*
Patricia J. Bailey
New York County District
Attorney's Office

One Hogan Place
New York, New York 10013
(212) 355-9000
krasnowe@law.nyc.gov

* *Counsel of Record*

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Joseph Cracco,

Plaintiff-Appellee,

-against-

Cyrus R. Vance, Jr.,

Defendant-Appellant,

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

Defendants.

MOTION OF THE DISTRICT ATTORNEY TO DISMISS AND VACATE

Docket No. 19-1129

PRELIMINARY STATEMENT

Appellant-defendant District Attorney Cyrus R. Vance, Jr. respectfully moves this Court to: vacate the judgment and opinions of the district court dated December 9, 2015, January 18, 2016, March 27, 2019, and March 28, 2019; dismiss as moot D.A. Vance's appeal from that judgment and those opinions; and remand this case for dismissal pending the district court's resolution of plaintiff Joseph Cracco's outstanding motion for attorneys' fees.

This case is moot because the criminal statute that Cracco challenged has been repealed. In the operative complaint, filed in January 2015, Cracco raised an as-applied vagueness challenge to §§265.00(5) and 265.01(1) of the New York

Penal Law. These sections, referred to by the parties as the "gravity knife statute," rendered possession of a gravity knife a misdemeanor criminal offense. During the pendency of this appeal, new legislation took effect that removed the term "gravity knife" from the list of weapons that can support a criminal charge of misdemeanor possession under Penal Law §265.01(1).

Because Cracco sought solely prospective relief against enforcement of a now-defunct statute, no live controversy exists between the parties. As a result, the judgment against D.A. Vance and the opinions of the district court denying D.A. Vance's motion to dismiss, denying his motion for reconsideration of the same, denying his motion for summary judgment, and granting Cracco's cross-motion for summary judgment are no longer reviewable by this Court. Where, as here, mootness frustrates an appellant from challenging otherwise reviewable district court opinions, the equitable remedy of vacatur is appropriate.

The undersigned has conferred with plaintiff's counsel, who intends to oppose this motion.

BACKGROUND

The gravity knife statute, enacted in 1958, employed a functional test to determine whether a knife was illegal. *Copeland v. Vance*, 893 F.3d 101, 107-108 (2d Cir. 2018). To determine whether a knife was a gravity knife, law enforcement used "the force of a one-handed flick-of-the wrist to determine

whether a knife will open from the closed position, a method known as the wrist-flick test." *Id.* at 108 (quotation omitted). "The courts of New York State have long upheld the application of the gravity knife law to common folding knives via the wrist-flick test." *Id.* at 115 (collecting decisions).

On October 18, 2013, N.Y.P.D. Officer Jonathan Correa arrested plaintiff Joseph Cracco inside a subway station after the officer applied the wrist-flick test to a knife that was clipped to Cracco's clothing. ECF 9 at ¶¶10, 13, 15-18; ECF 64 at ¶¶14-20.[1] As reflected in the record of the underlying prosecution, a dispute existed between Cracco and Officer Correa as to whether multiple attempts of the wrist-flick test were required to open the knife. ECF 9 at Ex. A; ECF 64 at ¶¶22-24; ECF 65 at ¶¶8-15 and Exs. DA-9, DA-10. In pursuing the charge, the assigned Assistant D.A. credited Officer Correa that the knife opened on every occasion that the officer applied the test. ECF 64 at ¶¶8-9, 19, 24-32; ECF 65 at ¶¶9-10, 14-15. Cracco moved to dismiss the charge in reliance on his allegation that multiple attempts were required, but abandoned the motion in favor of a guilty plea. ECF 9 at ¶¶36-40; ECF 65 at ¶8 and Ex. DA-9.[2]

---

[1] Unless otherwise specified, ECF references are to the Southern District docket for this case (14-8235).

[2] While the gravity knife charge was pending, Cracco was arrested due to unrelated events. ECF 23 at Ex. 1; ECF 65 at ¶19. In a single appearance, Cracco pled guilty to two counts of disorderly conduct in satisfaction of both dockets. ECF 23 at Ex. 2; ECF 65 at ¶20.

On October 15, 2014, Cracco filed this lawsuit in federal court. ECF 2. The original complaint sought damages for false arrest under 42 U.S.C. §1983 and named Officer Correa and the City of New York as defendants. *Id.* On January 12, 2015, the City defendants announced their intention to move to dismiss on several grounds, including the fact that Cracco's guilty plea barred his damages claim. ECF 6. On January 14, 2015, Cracco responded that, "in the face of dismissal of his false arrest and other claims," he intended to amend the complaint to also seek equitable relief. ECF 7 at 3. On February 17, 2015, Cracco filed an amended complaint that added D.A. Vance as a defendant and sought a declaration that the gravity knife statute was void-for-vagueness as-applied to knives with a "bias towards closure"—which Cracco defined as knives that did not open on the first attempt of the wrist-flick test. ECF 9 at ¶¶77-80.

On May 22, 2015, D.A. Vance and the City defendants moved to dismiss in separate filings. ECF 22-27. D.A. Vance raised several grounds for dismissal under F.R.C.P. 12(b)(1) and (b)(6). First, Cracco lacked standing to seek equitable relief because his injury was caused by Officer Correa's alleged fabrication of the operability of the knife, not by any alleged vagueness in the gravity knife statute. ECF 24 at 8-15. Second, Cracco had an adequate remedy at law: the legality of his arrest was at issue in his damages claim against Officer

Correa.[3] *Id.* at 15-17. Third, Cracco could not invoke §1983 to seek equitable relief because his guilty plea established that Officer Correa's determination that the knife was a gravity knife was lawful. *Id.* at 17-19. Fourth, Cracco failed to state a claim because the statute and decisions interpreting it gave clear notice of the prohibited conduct and clear directives to law enforcement. *Id.* at 19-22.

Throughout his motion, D.A. Vance argued that the relevant scenario was not a prosecution where the officer required five attempts to open the defendant's knife, but, a prosecution where the defendant alleged that to be true, the arresting officer disputed the defendant's version of events, and the defendant pled guilty. *Id.* at 2, 8, 12, 14-15. While "the operability and classification of plaintiff's knife would have presented issues of fact for the jury to resolve in holding the prosecution to its burden of proof at a criminal trial," D.A. Vance argued, "these issues [could] not support a finding by a federal court that the statutory prohibition on gravity knives [was] unconstitutionally vague as applied to plaintiff." *Id.* at 22.

On November 4, 2015, the district court dismissed the City defendants from the case, finding that Cracco's guilty plea barred his damages claim because a judgment in his favor would undermine his conviction. ECF 37 at 4-5. On

[3] As were plaintiff's allegations of excessive force and infliction of emotional distress.

December 9, 2015, the district court denied D.A. Vance's motion to dismiss. ECF 38. The district court found that Cracco's guilty plea did not bar his claim for equitable relief and that he had standing to seek a declaration "that his knife choice is lawful." *Id.* at p. 5-6. The district court further found that Cracco's vagueness challenge raised "factual questions not ripe for adjudication on a motion to dismiss." *Id.* D.A. Vance filed a motion for reconsideration, which the district court denied on January 28, 2016. ECF 39-40, 43, and 46.

The parties engaged in discovery from February 23 to June 22, 2016. ECF 45, 47-49. During this period, there were two external events relevant to Cracco's claim. On June 15, 2016, the State Legislature passed an amendment to the gravity knife statute to exclude knives with "a bias towards closure" from the definition of a gravity knife.[4] On June 16, 2016, D.A. Vance and the City concluded a bench trial in *Copeland v. Vance*, wherein the plaintiffs similarly sought a declaration that the statute was vague as applied to knives with a "bias towards closure"—although they, unlike Cracco, did not define the relief sought in terms of the number of attempts of the wrist-flick test to be applied to a knife. S.D.N.Y. Docket No. 11-3918, ECF 128 at 2, 9-10, 55.

[4] *See* https://www.nysenate.gov/legislation/bills/2015/S6483 (under "Bill Text PDF").

On June 22, 2016, the district court stayed this case pending action by the Governor regarding the amendment and a decision by the district judge presiding over *Copeland*. ECF 49, 54. On December 31, 2016, the Governor vetoed the amendment. ECF 50 at Ex. 1. On January 27, 2017, the district judge presiding over *Copeland* issued a decision in favor of D.A. Vance and the City, finding that the statute provided clear notice of the prohibited conduct and clear standards to those tasked with enforcing it. *Copeland v. Vance*, 230 F. Supp. 3d 232, 236 (S.D.N.Y. 2017). The district judge found that the wrist-flick test was applied in a consistent manner and with consistent results, both as a general matter and in the context of the plaintiffs' prior arrests and prosecutions. *Id.* at 242, 249-251.

On February 21, 2017, the parties in this case appeared before the district court and agreed to proceed by cross-motions for summary judgment. *See* ECF 57 at 1-2 and Minute Entry dated February 21, 2017.

In his motion, D.A. Vance raised several grounds for dismissal under F.R.C.P. 56. ECF 68. The summary judgment record confirmed the existence of a dispute between Cracco and Officer Correa as to the operability of the knife and, further, that this office did not enforce the statute with respect to knives that functioned as alleged by Cracco. Any relief resting on the premise that this office would have charged Cracco had Officer Correa agreed that five attempts of the wrist-flick test were required to open the knife (or even three or four)

would be based on speculation. *Id.* at 16.[5] Hewing closely to the facts of Cracco's prosecution, as is required in an as-applied challenge, *Copeland*, 230 F. Supp. 3d at 236, a declaration in his favor could act as a bar to prosecution wherever a dispute existed between the arresting officer and the defendant as to facts bearing on the viability of a charge. Such disputes are not unique to the gravity knife statute and cannot form the basis of a ruling that D.A. Vance has enforced a law unreasonably—especially where the defendant pled guilty. ECF 68 at 1, 14-17.

D.A. Vance further argued that the relief Cracco sought was divorced from the facts. Cracco claimed that Officer Correa required five attempts of the wrist-flick test to open the knife, yet he sought a declaration enjoining prosecutions where the knife did not open on the first attempt. Cracco thus sought a constitutional ruling that was broader than the record and in conflict with state court decisions finding that a knife need not open on every attempt to trigger the statute. *Id.* at 24-25. Alternatively, were it undisputed that Officer Correa required five attempts to open Cracco's knife, D.A. Vance argued that the gravity knife statute and state court decisions interpreting it provided notice

[5] Had Officer Correa agreed with Cracco's version of events, the Assistant D.A. would have sought the approval of a supervisor to dismiss the charge. ECF 65 at ¶¶10-12, 15.

and guidance with respect to all aspects of the law that Cracco claimed rendered it vague. *Id.* at 17-24.

Meanwhile, the *Copeland* plaintiffs filed an appeal. ECF 83. On March 2, 2018, the district court stayed this case *sua sponte* pending resolution of that appeal. *Id.* The district court reasoned that the allegation of inherent vagueness in the wrist-flick test raised by the *Copeland* plaintiffs "directly b[ore]" on whether the statute was constitutional as applied to a knife that did not open on the first attempt of the wrist-flick test. *Id.* at 2.

On June 22, 2018, this Court affirmed the judgment in *Copeland*. 893 F.3d at 107. On appeal, the *Copeland* plaintiffs disavowed any reliance on their prior arrests and prosecutions. *Id.* at 111-112. The panel that heard the case agreed "in principle" that someone "previously convicted for carrying what is indisputably a gravity knife" could raise a "prospective as-applied" challenge to the statute. *Id.* at 112. Assuming the viability of such a claim, the panel found that the plaintiffs failed to offer evidence to support it:

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

Id. at 112-113. Because the plaintiffs' "manner of proof" was divorced from their own conduct—past and prospective—the panel deemed their challenge to

be facial and held that it failed due to the admittedly clear application of the wrist-flick test to a significant class of knives. *Id.* at 113, 121.[6]

This Court's opinion in *Copeland* did not suggest that the wrist-flick test suffered from inherent vagueness; on the contrary, the opinion highlighted the lack of evidence to that effect. *Id.* at 107, 113, 118-119. Regarding a scenario where multiple attempts of the wrist-flick test were hypothetically required to open a knife,[7] the panel suggested that enforcement with respect to a knife that opened "once in twenty attempts" could have implicated the notice requirement of vagueness doctrine. *Id.* at 117.

On March 27, 2019, the district court in this case denied D.A. Vance's motion for summary judgment and granted Cracco's cross-motion. ECF 91. Without record support, the district court found that there has "long been disagreement in the state of New York" over when to prosecute someone for possession of a gravity knife. *Id.* at 1.[8] Without record support, the district court

---

[6] In support of the theory that the statute's clear application in the past could be overlooked, the panel relied solely on *Expressions Hair Design v. Schneiderman*, 137 S.Ct. 1144 (2017). *Copeland*, 893 F.3d at 112. *Expressions Hair Design* involved a pre-enforcement challenge to a law that implicated a fundamental right. 137 S.Ct. at 1150-51. The plaintiffs in *Copeland*, like the plaintiff here, brought a post-enforcement challenge to a law that did not.

[7] None of the plaintiffs in *Copeland* alleged that multiple attempts of the wrist-flick test were required to open their knives.

[8] In *Copeland*, this Court found that state courts have "long upheld" the application of the statute via the wrist-flick test. 893 F.3d at 115-116 (collecting

found that "because the wrist-flick test is a functional one, it is difficult if not impossible" to determine whether a knife is illegal. ECF 91 at 1.[9] Also without record support, the district court theorized that someone could apply the wrist-flick test to a knife in a store with negative results, immediately encounter a police officer who is "more adept" at applying the test, and be subject to arrest for possession of a gravity knife. ECF 91 at 1-2.[10]

Relying on the "prospective, as-applied" language in *Copeland*, the district court held that Cracco was "entitled" to a declaratory judgment based on his claim of future unfairness in the application of the wrist-flick test. ECF 91 at 15-16. The district court found that, unlike the *Copeland* plaintiffs, Cracco's "manner of proof" was tailored to "specific conduct that he wants to pursue." *Id.* at 15.

---

decisions). This Court distinguished the sole federal decision relied on by the district court in this case as a misinterpretation of the statute that was never adopted by the state courts. *Id.* at 119. The district court in this case further suggested that the wrist-flick test was invented by the District Attorney's Office. ECF 91 at 4. In *Copeland*, this Court observed that a description of the wrist-flick test appears in the statute's Bill Jacket and found that law enforcement has "consistently" used the wrist-flick test "since the [statute] was enacted." 893 F.3d at 115.

[9] In *Copeland*, this Court found that legislatures may functionally define crimes without violating due process. 893 F.3d at 116. This Court rejected the theory embraced below that the wrist-flick test is unconstitutional because it measures illegality as opposed to legality. *Id.*

[10] In *Copeland*, this Court found that an identical scenario raised by the plaintiffs was unsupported by the record and could not support an "as-applied" challenge because it was hypothetical. 893 F.3d at 113.

In support of his summary judgment motion, Cracco did not offer proof that application of the wrist-flick test would be unclear with respect to any knife. Cracco never attempted to apply the wrist-flick test to the knife underlying his arrest. ECF 91 at 6. Nor did he offer evidence to suggest that application of the test to a knife he wished to carry in the future would be unclear. The only evidence of the wrist-flick test was submitted by D.A. Vance: a video of Officer Correa applying the test to Cracco's knife five times in a row with a 100% success rate. ECF 64 at ¶¶31-32 and Exs. DA-7, DA-8. Although he sought summary judgment, Cracco continued to rely exclusively on the disputed events of his arrest. ECF 80 [Cracco Decl.] at ¶¶4-6 (disputing that Officer Correa opened the knife as shown in the D.A.'s video exhibit). This Court in *Copeland* found a similar lack of proof to be fatal to the plaintiffs' as-applied prospective challenge (to the extent the panel agreed, "in principle," that such a claim was cognizable). 893 F.3d at 112-113; *id.* at 118,[11] 119.[12]

The district court in this case further distinguished *Copeland* by finding that Cracco, unlike the *Copeland* plaintiffs, sought a declaration that was grounded in

---

[11] "Walsh made no meaningful effort to verify that [her] knives did not respond to the wrist-flick test…[Her] lack of diligence significantly limits [her] ability to show that the statute provided insufficient notice…"

[12] "Native Leather did not show that the seized knives responded inconsistently to the wrist-flick test. Native Leather's misconduct therefore fell within the core of the statute's prohibition…"

the "facts of his actual criminal prosecution." ECF 91 at 15. The facts of Cracco's prosecution amount to an allegation by a convicted defendant that was refuted by the arresting officer and reasonably discredited by the Assistant D.A. The statute would not have been unconstitutional as applied to a knife that opened every time an officer performed the wrist-flick test, as asserted by Officer Correa and reasonably credited by the prosecutor.

Meanwhile, on January 14, 2019, the *Copeland* plaintiffs filed a petition for a writ of certiorari to the U.S. Supreme Court. On May 13, 2019, D.A. Vance and the City filed briefs in opposition.

On May 30, 2019, the Governor signed Assembly Bill 5944, entitled "An Act to amend the penal law, in relation to gravity knives," following passage of the bill by both houses of the state Legislature. Krasnow Decl., Ex. A. Assembly Bill 5944 removed the term "gravity knife" from the list of weapons that can support a charge of misdemeanor possession under Penal Law §265.01(1), thereby de-criminalizing possession of a gravity knife.[13] The legislation took effect immediately.

From June 4 to June 12, 2019, the *Copeland* parties filed letters and briefs on the issue raised here: whether Assembly Bill 5944 rendered moot the

[13] The legislation further removed the term "gravity knife" from all sections of the Penal Law that define a criminal offense.

plaintiffs' vagueness challenge to the gravity knife statute. *See* Krasnow Decl., Ex. B. On June 17, 2019, the Supreme Court denied the petition for a writ of certiorari. *Copeland v. Vance*, 2019 U.S. LEXIS 4081 (June 17, 2019).

ARGUMENT

Because new legislation has rendered moot D.A. Vance's appeal by repealing the statute that is the basis of Cracco's claim for prospective relief, this Court should vacate the opinions and judgment of the district court that are the subject of this appeal and remand the case for dismissal pending the resolution of Cracco's outstanding motion for attorneys' fees.

A. Assembly Bill 5944 has rendered moot Cracco's claim for prospective relief

Article III of the Constitution requires "a live case or controversy at the time that a federal court decides [a] case; it is not enough that there may have been [one] when the case was decided by the court whose judgment [is under review]." *Burke v. Barnes*, 479 U.S. 361, 363 (1987). A challenge to the validity of a law that has been repealed does not satisfy this requirement where the plaintiff seeks only prospective relief. *Id.*; *see also Diffenderfer v. Central Baptist Church of Miami, Florida, Inc.*, 404 U.S. 412, 414-415 (1972) (*per curiam*);[14] *Hall v.*

[14] "The only relief sought in the complaint was a declaratory judgment that the now repealed Fla. Stat. §192.06(4) is unconstitutional as applied to a church parking lot used for commercial purposes and an injunction against its

Beals, 396 U.S. 45, 48 (1969) (finding a claim for prospective relief moot where voters who had been disenfranchised would not suffer the same fate under an amended law); *Catanzano v. Wing*, 277 F.3d 99, 102, 107 (2d Cir. 2001) (finding a claim for prospective relief moot where the challenged law "expired" and there was no reason to expect that it would be reenacted) (citing *Burke*, *supra*); *Associated Gen. Contractors v. City of New Haven*, 41 F.3d 62, 63-64, 67 (2d Cir. 1994) (same).

When D.A. Vance was added to this lawsuit as a defendant in February 2015, Cracco raised a vagueness challenge to the then-existing gravity knife statute. ECF 9 at ¶¶5, 77-80. The relief he sought was prospective in nature. Specifically, Cracco sought a declaration as to the applicability of the statute to "his future possession of a folding knife similar or identical to the folding knife that was in [his] possession" on the date of his arrest. *Id.* at ¶5.

With the repeal of the gravity knife statute, no controversy remains between the parties. A declaratory judgment against D.A. Vance that the statute is vague as applied to the class of knives described in the complaint will not benefit Cracco because the statute no longer exists and cannot be enforced by this office. Assembly Bill 5944 passed both houses of the Legislature unanimously; there is no colorable possibility that the statute will be reenacted.

---

application to said lot. This relief is, of course, inappropriate now that the statute has been repealed." *Id.* at 414-415.

By removing from the Penal Law the very conduct that Cracco wishes to engage in—simple possession of a gravity knife—Assembly Bill 5944 has rendered moot his claim for prospective relief. *Cf. Burke, Diffenderfer*, *Hall*, *Catanzano*, *Associated Gen. Contractors*, p. 15, *supra*.

In *Copeland*, the plaintiffs tried to avoid the mootness of their claim by changing it. In a supplemental brief, they raised administrative regulations of the Metropolitan Transportation Authority ("MTA") that make it a violation—a non-criminal offense—to possess a "weapon" or "dangerous instrument" in the public-transit system, including items that are otherwise lawful such as boxcutters and now gravity knives. 21 N.Y.C.R.R. §1050.8; *see* 21 N.Y.C.R.R. §1044.11 (similar). These regulations, the plaintiffs argued, sustained their claim because Assembly Bill 5944 did not disturb the definition of a "gravity knife" found in Penal Law §265.00(5). Based on my conferrals with counsel, I understand that Cracco anticipates opposing this motion on the same ground.

As argued by D.A. Vance and the City in *Copeland*, to properly challenge the MTA regulations and to even have standing to make the claim, Cracco needed to include them in his complaint and allege a fear of future prosecution under the regulations. Krasnow Decl., Ex. B at 4. He did neither. Although he was arrested inside a subway station, Cracco has consistently raised the gravity knife statute as the sole source of his injury. He did not assert a fear of

prosecution under the MTA regulations for carrying a knife on public transportation—gravity knife or otherwise—or seek relief against the transit adjudication bureau or transit enforcement officers that share authority to enforce them. *See* 21 N.Y.C.R.R. §§1050.10(b), 1050.12, 1044.14(b). Instead, Cracco premised his claim on the alleged unfairness of charging someone who acted without criminal intent with a criminal offense under Penal Law §265.00(1). ECF 9 at ¶¶5 (naming D.A. Vance as "the person responsible for the potential prosecution of [Cracco] under those criminal statutes in the future").[15]

Nor would a challenge to the MTA regulations raise a similar issue as was raised by Cracco's challenge to the now-repealed criminal statute. Krasnow Decl., Ex. B at 6-7. The MTA regulations are broadly worded, barring the possession of any "weapon" or "dangerous instrument," and they cite gravity knives only as one of a nonexclusive list of examples. That list is not coextensive with definitions from the Penal Law. For example, the Penal Law does not criminalize the possession of boxcutters or define that term, but the MTA regulations include boxcutters as a weapon or dangerous instrument that cannot be possessed on public transportation. On the face of the regulations, a folding

[15] Although the term "gravity knife" appeared in other Penal Law sections that define a criminal offense prior to the passage of Assembly Bill 5944, Cracco did not challenge those sections, either—further confirming that the criminalization of "simple possession" was the basis of his claim. *Id.* at ¶43.

knife may be a prohibited weapon or dangerous instrument regardless of whether it is a gravity knife under the Penal Law definition. The state courts have rarely addressed the regulations, *see Corso v. City of New York*, 2018 U.S. Dist. LEXIS 161113, *19-20 (S.D.N.Y. Sept. 20, 2018) (describing a "dearth of authority" on this point), and have had no opportunity to do so since the repeal of the criminal statute. And although Cracco did not raise his claim for prospective relief against the City, it bears noting that the N.Y.P.D. has abandoned the wrist-flick test following the repeal of the criminal statute and will enforce the MTA regulations without reference to whether a weapon is a gravity knife under the Penal Law. Krasnow Decl., Ex. B at 7-8.

Cracco has always sought to bar enforcement of the criminal prohibition on the possession of gravity knives. The MTA regulations cannot be brought into the case at this late hour and, given their broad scope, the regulations do not present the same issue as the now-repealed statute challenged in the complaint. Because prospective relief cannot be granted with respect to that statute, this case is moot.

B. The judgment and opinions that are the subject of this appeal should be vacated

"When a civil case becomes moot while an appeal is pending, it is the general practice of the appellate court to vacate the unreviewed judgment granted

in the court below and remand the case to that court with directions to dismiss it." *Bragger v. Trinity Capital Enter. Corp.*, 30 F.3d 14, 17 (2d Cir. 1994); *see also Camreta v. Greene*, 563 U.S. 692, 712 (2011) (the "established practice" when mootness frustrates a party's right to appeal is to vacate the challenged rulings) (quotation omitted). The decision to vacate "depends on the equities of the case," with the "primary concern" being the "fault of the parties in causing the appeal to become moot." *E.I. Dupont De Nemours & Co. v. Invista B.V. & Invista S.A.R.L.*, 473 F.3d 44, 48 (2d Cir. 2006) (quotations omitted).

Where an appeal has been mooted through "no fault or machination" of the appellant, "it would be unfair to require that [party to] acquiesce in the judgment of the district court." *Id.* (quotation omitted); *see also FDIC v. Regency Sav. Bank, F.S.B.*, 271 F.3d 75, 77-78 (2d Cir. 2001) (*per curium*) (declining to dismiss an appeal outright, as requested by the appellees, where the appellant was not at fault for the case becoming moot; instead, vacating the decision below). "When a judgment becomes moot it is like hanging a doubt on it;" by eliminating that judgment, "the rights of all the parties are preserved." *Bragger*, 30 F.3d at 15, 17; *see also New York City Employees' Retirement Sys. v. Dole Food Co.*, 969 F.2d 1430, 1435 (2d Cir. 1992) ("The reason for [vacatur] is precisely to avoid giving preclusive effect to a judgment never reviewed by an appellate court"). This Court is "generally liberal in granting [vacatur]" where the equities warrant it, *E.I.*

Dupont, 473 F.3d at 48 (quotation omitted), regardless of whether the Court "agrees with the reasoning of the district court." *Bragger*, 30 F.3d at 17.

Now that this case is moot, D.A. Vance has been frustrated in his intention to challenge the opinions of the district court denying his motion to dismiss, denying his motion for reconsideration of the same, denying his motion for summary judgment, and granting plaintiff's cross-motion.[16] Those opinions raise a host of issues with respect to which D.A. Vance can no longer seek appellate review, namely, the issue of a convicted defendant's standing to seek equitable relief against a District Attorney in an as-applied vagueness challenge; the issue of whether an adequate remedy at law exists under such circumstances; the issue of the correct application of the summary judgment standard where a prosecutor reasonably credited the arresting officer's version of events; the issue of the viability of a "prospective as-applied" challenge where a fundamental right is not implicated and the proof required to sustain such a claim (assuming it exists); and the issue of the correct application of vagueness doctrine. While not essential to the decision to vacate, which depends on whether D.A. Vance is at fault for the mootness of the case, the adverse rulings of the district court on

[16] *See* Notice of Appeal filed April 24, 2019; Form C filed May 9, 2019.

these issues have potential application to this office's enforcement of any one of the hundreds of other criminal statutes.

Although D.A. Vance has actively pursued this appeal, the intervening mootness has prevented this Court from considering the otherwise reviewable judgment and opinions of the district court. As a local law enforcement official, D.A. Vance played no role in bringing about the change in State legislation that has ended the controversy between the parties. D.A. Vance therefore asks this Court to follow the "general duty to vacate and dismiss" that applies in such circumstances. *Bragger*, 30 F.3d at 17.

***

The final issue is the status of Cracco's motion for attorney's fees as the "prevailing party" under 42 U.S.C. §1988(b). Because the district court reserved decision until the resolution of this appeal, *see* ECF 100, this case should be remanded for dismissal pending the district court's consideration of the motion. *Cf. Associated Gen. Contractors*, 41 F.3d at 68.

CONCLUSION

The challenged gravity knife statute no longer exists, the controversy between the parties is no longer live, and D.A. Vance's ability to pursue appellate review is precluded through no fault of this office. Under the circumstances, this Court should vacate the judgment and opinions of the district court that are the subject of this appeal, dismiss the appeal as moot, and remand the case to the district court.

Dated: New York, New York
June 28, 2019

Respectfully submitted,

CYRUS R. VANCE, JR.
New York County District Attorney

By: ENK
Elizabeth N. Krasnow
Patricia J. Bailey
Assistant District Attorneys

New York County District
Attorney's Office
One Hogan Place
New York, New York 10013
(212) 335-4210
krasnowe@dany.nyc.gov

CERTIFICATE OF COMPLIANCE

I certify that this motion was prepared using Microsoft Word 2013 and that, according to that software, it contains 5,188 words, not including the accompanying documents authorized by FRAP 27(a)(2)(B) or this certificate.

ENK

Elizabeth N. Krasnow