UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
----------X

JOSEPH CRACCO,

Plaintiff-Appellee,

- against -

CYRUS R. VANCE, JR.,,

Defendant-Appellant.

THE CITY OF NEW YORK, Police Officer JONATHAN CORREA, Shield 7869, Transit Division District 4, and Police Officer JOHN DOE,

Defendants.

----------X

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

Case 19-1129

James M. Maloney, an attorney at law admitted to practice before this Honorable Court, declares under penalty of perjury as follows:

1. I am the attorney of record for Plaintiff-Appellee, and submit this declaration, together with the exhibit and memorandum that follow, in opposition to the motion by Defendant-Appellant (2d Cir. ECF Document 30) to vacate four (4) judgments and/or opinions of the court below in this case and to dismiss this appeal as moot. See "Declaration in Support of the District Attorney's Motion to Dismiss and Vacate" (hereinafter, "Krasnow Dec.") at ¶ 1.

2. Although the recent enactment, Assembly Bill 5944, removed "gravity

knife" from the list of prohibited instruments contained in New York Penal Law § 265.01, it did not remove the statutory definition of "gravity knife" from Penal Law § 265.00, where it remains at subsection 5. A "gravity knife" is defined as "any knife which has a blade which is released from the handle or sheath thereof by the force of gravity or the application of centrifugal force which, when released, is locked in place by means of a button, spring, lever or other device." N.Y. Penal Law § 265.00(5).

3. Given that it is that definition that is the source of the wrist-flick test, and given further that other prohibitions of "gravity knives" exist that rely on that definition, the issues before this Court may not be moot.

4. That very argument was recently made and supported by parties adverse to Defendant-Appellant in the case of *Copeland v. Vance* at the petition-for-certiorari stage. Cf. Krasnow Dec. at ¶ 7. Attached hereto as Exhibit 1 are true copies of the Supplemental Brief for Petitioners filed with the United States Supreme Court in *Copeland v. Vance*, No. 18-918, on June 7, 2019, and of the Appendix submitted therewith.

5. Through counsel, Plaintiff-Appellee, in correspondence to Defendant-Appellant dated June 19, 2019, has affirmed his willingness to stipulate to dismissal of this appeal under Rule 42 of the Federal Rules of Appellate Procedure. Plaintiff-Appellee does not, however, consent to vacatur of any of the decisions below, least of all *Cracco v. Vance*, 376 F. Supp. 3d 304 (2019), which

is the final decision that interpreted the still-viable definition of "gravity knife" contained at Penal Law § 265.00(5) in terms of the wrist-flick test and the as-applied vagueness inherent in the use of that test without limitation as to the number of attempts to open a given knife that may take place.

6. Plaintiff-Appellee takes no formal position as to whether this appeal is moot by virtue of the enactment of Assembly Bill 5944, and leaves it to this Honorable Court to make that determination, but argues in the memorandum that follows that, should this Court dismiss this appeal for any reason (including but not limited to a determination of mootness), vacatur of the decisions below would be unwarranted and inequitable.

I declare under penalty of perjury that the foregoing is true and correct.

/sJMM
James M. Maloney

Port Washington, New York
July 8, 2019

EXHIBIT 1

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

SUPPLEMENTAL BRIEF FOR PETITIONERS

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June 7, 2019

TABLE OF APPENDIX

ARGUMENT

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

In their letter dated June 4, 2019, Respondents New York County District Attorney Cyrus A. Vance, Jr. (the "DA") and the City of New York (the "City") argue that legislation signed into law on May 30, 2019 renders the Petition moot. Respondents, however, misleadingly failed to inform the Court that gravity knives remain illegal on public transportation in the City, and the New York Police Department ("NYPD") intends to continue enforcing these unconstitutionally vague prohibitions.

Respondents are correct that Assembly Bill 5944 ("AB 5944") was signed on May 30, 2019 by Governor Andrew Cuomo, repealing the prohibition on gravity knives found in N.Y. PENAL LAW § 265.01(1). However, Respondents failed to inform the Court that AB 5944 did not repeal the definition of "gravity knife" found in N.Y. PENAL LAW § 265.00(5), which as Respondents acknowledge, is one of the statutory provisions being challenged in this lawsuit, and which is the very source of the unconstitutionally

vague "Wrist Flick Test" -- the main subject of this vagueness challenge.

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

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

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

21 NYCRR § 1050.8.

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

21 NYCRR § 1040.9.

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

21 NYCRR § 1044.11.

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

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

Thus, in reality, gravity knives remain illegal to possess in the City if you happen to be one of the more than 5 million New Yorkers who ride the subway or the nearly 2 million New Yorkers who ride the bus to work every day. *See* http://web.mta.info/nyct/facts/ridership/ (last accessed June 6, 2019). Significantly, Petitioner Pedro Perez's 2010 arrest took place in the subway. C.A.App.59.

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

> The NYPD opposed the legislation because gravity knives are in reality rapidly-deployable combat knives, and there have been more than 1600 stabbings and slashings

> in New York City so far this year.[1] The public should also be aware that the possession of gravity knives in the New York City subway system remains illegal. The NYPD will continue its work to ensure New York City remains the safest big city in America.

(*See* e-mail from DCPI to New York Times Albany Bureau Chief Jesse McKinley and New York Times story dated May 31, 2019. Supp.App.1a-8a.)

The NYPD statement makes it clear that the City does not consider AB 5944 the end of the story regarding gravity knife enforcement against ordinary law abiding New Yorkers possessing common folding knives, the most commonly possessed pocket knives in the United States. The use of aggressive and misleading hyperbole such as "rapidly-deployable combat knives" (which they are not) and the promise that NYPD will "continue its work" in this regard makes the City's intention to continue its unconstitutionally vague gravity knife enforcement activities unmistakable. Indeed, the inconsistent messages from the state and the City do little more than set a trap for the unwary and compounds the existing vagueness and notice problems – New Yorkers who believe the Governor

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

that the ban has been repealed may be fooled into mistakenly believing that they can carry their work tools on their person and find themselves confronted by the police on public transportation as a result.

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

Thus, in reality, little has changed with the signing of AB 9544. Law abiding New Yorkers are still at risk of being charged by the NYPD with unlawful gravity knife possession using the unconstitutionally vague Wrist Flick Test that is being challenged in this lawsuit, and Petitioners John Copeland and Pedro Perez, and millions of other New Yorkers remain prospectively in jeopardy. Accordingly, the Petition is not moot.

II. Assembly Bill 5944 Did Not Moot the Petition Because Retailers Potentially Remain Subject to Future Prosecution for Conduct Prior to the Repeal

There is a second reason the Petition is not moot after the signing of AB 9544. Nothing in AB 9544 indicates that it is intended to be retroactive. Thus, in accordance with New York's "savings statute," N.Y. GEN. CONSTR. LAW § 93, this means that there

is a potential for any New York City retailer, including Petitioner Native Leather, Ltd., to be prosecuted for selling common folding knives during the two year statute of limitations period prior to May 30, 2019. *See* N.Y. CRIM. PROC. LAW § 30.10 (2)(c). For the same reason that Petitioners Copeland and Perez could not know which common folding knives were legal for them to possess due to the inherent vagueness of the Wrist Flick Test, retailers could not be sure which knives were legal for them to sell. Until the two year statute of limitations runs out, they all remain at risk, and therefore the Petition is not moot.

CONCLUSION

The Petition is not moot, and for all the reasons previously presented to the Court, the Petition should be granted.

Respectfully submitted,

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Counsel for Petitioners

JUNE 7, 2019

Supp. App. 1

---------- Forwarded message --------
From: **DCPI** <DCPI.DCPI@nypd.org>
Date: Fri, May 31, 2019 at 5:48 PM
Subject: RE: NYT: Gravity knife ban - any comment
To: McKinley, Jesse <jemcki@nytimes.com>

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

--

Jesse McKinley

New York Times

Bureau Chief

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Supp. App. 2

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Supp. App. 3

The New York Times

The 'Gravity Knife' Led to Thousands of Questionable Arrests. Now It's Legal.

Black and Latino men had often been charged under New York's unusual ban on the knives, which are opened with a flick of the wrist.

The Manhattan district attorney, Cyrus Vance, has said that the ban on gravity knives has enhanced public safety and pushed lawmakers to keep it.
Hiroko Masuike for The New York Times

By Jesse McKinley

May 31, 2019

Over the past 60 years, tens of thousands of black and Latino New Yorkers have been arrested for carrying so-called gravity knives – small, easy-to-access blades

that are used by everyone from stagehands to steelworkers.

But on Thursday, in another demonstration of New York's surging progressive wing's influence, Gov. Andrew M. Cuomo ended that practice, signing a bill to remove such knives from the category of "deadly weapons," a designation reserved for guns, daggers and switchblades, and allow their possession.

New York law defines a gravity knife as a knife with the blade in the handle that can be opened with a one-handed flick of the wrist. They differ from switchblades, which use a spring to propel the blade into an open position automatically with the push of a button.

But critics of the old law said common folding knives and tradespeople's knives could be deemed gravity knives if an officer was able to flick them open with centrifugal force, and some people had been arrested for possessing ordinary knives they needed for work.

In signing the bill – passed unanimously by the Democratic-led Legislature – the governor cited a March decision from the United States District Court for the Southern District of New York, which found the gravity-knife law "presents a high risk of arbitrary and discriminatory enforcement" and was "unconstitutionally vague."

The decision was immediately hailed by public defenders and other legal advocates.

The ban and the way it was enforced constituted "one of the most discriminatory policing practices in our

state," said Tina Luongo, a lawyer with the Legal Aid Society, which issued a 2018 report showing the racial disparity in the way the law was carried out.

"For far too long, the N.Y.P.D. exploited the gravity-knife ban to drive up arrest numbers at the expense of our clients," she said.

Gravity knives have been outlawed in New York since 1958, when the State Legislature banned a Nazi-era weapon known as "the Luftwaffe gravity knife," according to Martin J. LaFalce, another Legal Aid lawyer.

The decision by the governor came after seven years of lobbying by lawmakers and two previous vetoes of similar legislation by Mr. Cuomo in the face of opposition from law enforcement and elected officials.

The bill's signing on Thursday marked the latest setback for the state's prosecutors, traditionally a powerful political force. In March, Mr. Cuomo approved legislation to create a commission to investigate prosecutorial misconduct. That commission has been challenged by the District Attorneys Association of the State of New York, which also had lobbied in the past against lifting the gravity-knife ban.

Prosecutors have also been adapting to recent changes in the state's discovery law and its bail system, both of which were hailed as major victories by advocates for criminal justice reform, particularly in regard to treatment of minority groups.

The association held tight to its position on gravity knives on Friday.

"We continue to believe that gravity knives are dangerous weapons which do not belong in densely populated areas," said Albany County District Attorney David Soares, the association's president. "The governor and State Legislature have made it clear they feel differently."

In a statement after the bill was signed, the New York Police Department said it had "opposed the legislation because gravity knives are in reality rapidly deployable combat knives."

"There have been more than 1,600 stabbings and slashings in New York City so far this year," the department said, adding, "The public should also be aware that the possession of gravity knives in the New York City subway system remains illegal."

The Assembly sponsor of the gravity knife bill, Dan Quart, a Democrat from Manhattan, said that the bill signing was a clear victory over "a deep problem in the penal law" and the policies of Cyrus R. Vance Jr., the borough's district attorney.

"It's impossible not to look at the arrest and prosecution numbers in Manhattan, under Cy Vance, and not see a deep disproportionate racial impact," Mr. Quart said.

A spokesman for Mr. Vance, Danny Frost, struck a conciliatory tone. "We continue to believe that gravity knives make our streets and subways less safe," Mr. Frost said in a statement on Friday. "But we respect

that state lawmakers have a different view and we are moving swiftly to implement this legislative change."

Mr. Quart said that a gravity knife "doubles as a work tool," and indeed, the Legal Aid Society's 2018 report found that such knives are easily found at scores of hardware stores.

Eric Correa, a 34-year-old New York City parks department employee who was arrested on charges of possessing a knife last year, said he bought his at a uniform shop in Jamaica, Queens.

Mr. Correa said in an interview that he used it to clean his weed-whacker at work, as well as to open cans of paint. But when an officer noticed it clipped to his pants on the subway, Mr. Correa was arrested.

"It felt like maybe it was a quick collar," said Mr. Correa, who is part Latino and part African-American. The charges against him were eventually dismissed in exchange for community service, but he lost time at work.

In previous vetoes, Mr. Cuomo had acknowledged the tension "between protecting public safety and addressing an absurd contradiction in existing commercial and enforcement practices."

But he wrote on Thursday: "While I remain aware of the cautious community voices, I cannot veto a bill passed by the Legislature to address a decided constitutional infirmity."

Mr. Cuomo added: "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."

Jesse McKinley is The Times's Albany bureau chief. He was previously the San Francisco bureau chief, and a theater columnist and Broadway reporter for the Culture Desk. @jessemckinley

A version of this article appears in print on, on Page A19 of the New York edition with the headline: 'Gravity Knives,' Which Led to Questionable Arrests, Are Now Legal. Order Reprints | Today's Paper | Subscribe

UNITED STATES COURT OF APPEALS
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- against -

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THE CITY OF NEW YORK, Police Officer JONATHAN CORREA, Shield 7869, Transit Division District 4, and Police Officer JOHN DOE,

Defendants.

----------X

MEMORANDUM IN OPPOSITION TO THE DISTRICT ATTORNEY'S MOTION TO DISMISS AND VACATE

Whether this appeal has been rendered moot by the recent enactment of Assembly Bill 5944 is a mixed question of fact and law. The law prong is relatively simple: if there is no live case or controversy, there is no jurisdiction, and the appeal is moot on that basis. But the fact that Assembly Bill 5944, although it removed "gravity knife" from the list of prohibited instruments contained in New York Penal Law § 265.01, neglected to repeal the statutory definition of "gravity knife" as well, sets the stage for a considerably more complex factual analysis that bears not only on mootness but perhaps on ripeness for appellate review as well.

It is undeniable that the legal basis for the wrist-flick test is the "centrifugal force" clause in the statutory definition of "gravity knife," a provision that remains in full force and effect, and which reads as follows:

> any knife which has a blade which is released from the handle or sheath thereof by the force of gravity or *the application of centrifugal force* which, when released, is locked in place by means of a button, spring, lever or other device.

N.Y. Penal Law § 265.00(5) (emphasis added).

As the court below explained:

> In contrast to other weapons, a gravity knife is defined by its function and not its design. . . . In order to determine whether a knife is a gravity knife, police officers and prosecutors utilize the "wrist flick test." . . . The wrist flick test involves holding a knife by the handle and flicking one's wrist; if the blade exits the handle and locks into place automatically, it is a gravity knife under the statute. . . . The wrist flick test is a procedure used by the District Attorney's office to identify gravity knives; it is not codified and there is no prescribed number of wrist flick attempts for determining what is or is not a gravity knife.

Cracco v. Vance, 376 F. Supp. 3d 304, 307 (2019) (citations omitted).

With the removal of the "gravity knife" from the list of prohibited instruments contained in New York Penal Law § 265.01 through the enactment of Assembly Bill 5944, it might appear at first blush that the District Attorney's office would never again have occasion to credit the wrist-flick test—whether limited in number of attempts or not—in a prosecution for possession of the instrument. But that is not necessarily the case.

As detailed in the Supplemental Brief for Petitioners filed with the United States Supreme Court in *Copeland v. Vance*, No. 18-918, on June 7, 2019, and as supported by the evidentiary material contained in the Appendix submitted therewith (which together comprise Exhibit 1 to these papers), it may indeed be the case that enforcement of simple possession of so-called "gravity knives" will continue. Were the decision below to be vacated, the constitutionally permissible parameters of the wrist-flick test would again be returned to the pre-*Cracco* status quo: no limitation on the number of attempts made to open a given knife would apply.

Put another way, the still-existing definition at §265.00(5) of the Penal Law, with its reference to centrifugal force, is the very basis for the wrist-flick test, and if the *Cracco* final order were to be vacated, the wrist-flick test could be used as before (i.e., with an indefinite number of multiple tries permitted and with no requirement that the accusatory instrument set forth the number of tries it took to open the knife). That vague standard would thus once again be applicable in any future criminal or civil enforcement efforts under any statutes, regulations, or ordinances referencing the "gravity knife" definition that may exist now, or that may be promulgated in the future, in any jurisdiction or administrative setting within the State of New York. Removing the bar of the *Cracco* decision would, it is submitted, only encourage such arbitrary promulgation and/or enforcement.

Such potential alternative enforcement contexts are not merely hypothetical.

See Exhibit 1 (discussing MTA regulations). Perhaps a bit more hypothetical are criminal or civil enforcement efforts under regulations or ordinances referencing the "gravity knife" definition that may be promulgated in the future. Still, vacating the decision below would undeniably open the door to the possibility of a resurgence of such arbitrary enforcement and, as noted, would even encourage it.

As noted initially above, the question of whether this appeal has been rendered moot by the recent enactment of Assembly Bill 5944 is a mixed question of fact and law. The lack of final resolution on the factual prong speaks, though, to an issue other than mootness. It is generally not the role of appellate courts to resolve questions of fact. Thus, dismissal of this appeal and remand to the court below may be appropriate even if the question of mootness of the underlying legal issues is not resolved at this stage.

In that sense, the question of mootness may itself be moot for the moment.

But whatever this Court decides, vacatur of the decisions below is wholly inappropriate at this juncture.

The "rule" of automatic vacatur after a finding of mootness on appeal, best expressed in *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950), was rejected by the Supreme Court in *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18, 23-24 (1994). Instead, as the Court explained, a vacatur, which is an "extraordinary" and equitable remedy, is to be granted only after a fact-specific balancing of the equities between the parties. 513 U.S. at 26. The

Court continued:

> As always when federal courts contemplate equitable relief, our holding must also take account of the public interest. "Judicial precedents are presumptively correct and valuable to the legal community as a whole. They are not merely the property of private litigants and should stand unless a court concludes that the public interest would be served by a vacatur." *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 510 U.S. 27, 40, 114 S.Ct. 425, 428, 126 L.Ed.2d 396 (1993) (STEVENS, J., dissenting).

Bancorp, 513 U.S. at 26-27.

Here, the holding of the court below stands as a bulwark to prevent the use of the wrist-flick test without limitation on the number of attempts that may be made when testing a given folding knife. That test, in turn, derives from the still-applicable definition of the "gravity knife," specifically its reference to centrifugal force, which remains in full force and effect and is incorporated in the MTA rules.

In addition to the public-interest concern, the equitable relief of vacatur also considers balancing the equities as between the parties. In this context, that usually means consideration of whether one of the parties took action that rendered the matter moot. Here, neither did. But one equitable consideration is worth noting. In the proceedings below, Defendant-Appellant strongly implied in his papers that if more than two attempts of the wrist-flick test are required to open a given knife to a fully open and locked position, it should *not* result in a prosecution. See Document 63 below (Rather Declaration) at ¶ 30 (page 5 of 6) ("nor am I aware of any prosecution going forward where the officer could not

open the knife to a locked position by application of the wrist flick test in less than three attempts.").

Here, the principal holding of the court below was that the application of the wrist-flick test would be vague as applied to knives that require more than one or two attempts (i.e., not "less than three attempts") to open. It would seem, therefore, that, based on the assertion made in the Rather Declaration, Defendant-Appellant should be equitably estopped from asserting that that holding must be vacated.

Respectfully submitted.

/sJMM
James M. Maloney

Port Washington, New York
July 8, 2019