19-1129-cv

United States Court of Appeals
for the
Second Circuit

Joseph Cracco,

Plaintiff-Appellee,

– v. –

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.

On Appeal from the United States District Court
for the Southern District of New York

REPLY BRIEF FOR THE DISTRICT ATTORNEY

ELIZABETH N. KRASNOW
PATRICIA J. BAILEY
ASSISTANT DISTRICT ATTORNEYS
Of counsel

CYRUS R. VANCE, JR.
District Attorney of New York County
One Hogan Place
New York, New York 10013
(212) 335-9000

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PRELIMINARY STATEMENT

Defendant-appellant District Attorney Cyrus R. Vance, Jr. respectfully submits this reply brief in further support of his appeal from the district court's opinion granting summary judgment in favor of plaintiff-appellee Joseph Cracco. On appeal, the District Attorney seeks two forms of relief, the first being an order of this Court finding moot Cracco's vagueness challenge to the repealed gravity knife statute, vacating the district court opinion appealed from, and remanding the case for dismissal. Alternatively, the District Attorney asks this Court to reverse the district court's opinion based on the factual and legal errors identified in our merits brief, and to enter summary judgment for this office.

In opposition, Cracco leaves unanswered several arguments raised by the District Attorney in support of this relief. Cracco does not, for example, respond to the District Attorney's arguments that the remedy of vacatur is warranted; that the district court improperly granted summary judgment on a theory of arbitrary enforcement; that the district court made a host of factual findings without record support; that there is no evidence in the record to support a prospective as-applied theory of relief, which is the theory upon which the district court entered judgment; or that the uncertainty alleged by Cracco—e.g., the number of attempts of the wrist-flick test—is properly addressed by the prosecution's burden of proof, not vagueness doctrine. In this reply brief, the District Attorney responds only to the opposition points raised by Cracco, as well as the arguments raised by amicus curiae.

ARGUMENT

I. As the plaintiff agrees, "no live case or controversy" presently exists between the parties (Pl. Br. 7)

On appeal, the District Attorney principally argues that the intervening repeal of the gravity knife statute had the effect of mooting Cracco's as-applied challenge to the same. DA Br. 26-27. Because there is no reasonable possibility that the District Attorney will again prosecute Cracco under the repealed statute, this case is now moot. In his opposition brief, Cracco agrees as much. Specifically, he writes:

> Although the same action today would not likely be justiciable because there is no live case or controversy (and thus would amount to an advisory opinion), that is not the same as the decision below—properly rendered under the circumstances then present—being rendered moot following the post-decision repeal of the 'operative section' of the statute.

Pl. Br. 7. The District Attorney is not suggesting that the district court rendered an advisory opinion in the sense that the subsequent repeal of the statute retroactively removed the jurisdiction of the district court to have ruled on Cracco's claim. When the district court issued the opinion, the statute that Cracco challenges was still law. As the parties agree, however, its subsequent repeal extinguished any case or controversy that once existed.

The above passage from Cracco's brief is dispositive. The case-or-controversy requirement is not met by a snapshot of the litigation, taken when the plaintiff is most advantaged. Rather, the requirement "subsists through all stages of federal judicial

proceedings, trial and appellate." Keepers, Inc. v. City of Milford, 807 F.3d 24, 44 (2d Cir. 2015) (quotation omitted). The purpose of mootness doctrine is "to ensure that the litigant's interest in the outcome continues to exist throughout the life of the lawsuit, including the pendency of the appeal." Cook v. Colgate Univ., 992 F.2d 17, 19 (2d Cir. 1993). As Cracco agrees, the repeal of the challenged statute ended the interest that once existed in this case. While this may suit Cracco, who prevailed in the district court, the District Attorney is frustrated in his attempt to appeal from errors in an adverse opinion—one that could be relied upon to challenge our future enforcement of other criminal offenses that remain part of the Penal Law. The District Attorney therefore respectfully asks this Court to follow its "general" practice in such circumstances, which is to vacate the opinion appealed from and remand the case for dismissal. DA Br. 32-33 (collecting decisions).

As Cracco observes, the Penal Law definition of a gravity knife still exists. Cracco does not, however, argue that this fact sustains a case or controversy—which it does not, for many reasons already articulated by this office. DA Br. 27-31. Instead, he argues that the district court's opinion was not rendered advisory by the repeal of the statute because the opinion is based on the wrist-flick test, which in turn derived from the Penal Law definition. Pl. Br. 5-6. As noted, the District Attorney is not suggesting that the district court's opinion is advisory. While this office is seeking vacatur because we are unable to challenge an erroneous opinion due to the intervening mootness of the plaintiff's claim, we recognize that the statute still existed at the time the opinion issued.

It is not the opinion that has been mooted, as Cracco frames our position, Pl. Br. 6—it is the claim.

Nonetheless, the district court's opinion is not based simply on the Penal Law definition of a gravity knife. Like the claim that it adjudicated, the opinion is based on the perceived unfairness of charging someone who lacked any criminal intent with a criminal offense for possessing a knife that met that definition.[1] The gravity knife statute was not the only operative Penal Law section that applied that definition. See DA Br. 30-31. It was, however, the only operative section that did so without a requirement of criminal intent, and the only operative section that the plaintiff challenged. Had Cracco possessed his gravity knife in a manner that suggested an intent to use it unlawfully against another person, and had he been charged accordingly, see Penal Law §265.01(2), this litigation would have proceeded very differently (if at all). By removing from the Penal Law the precise conduct that Cracco alleged a wish to engage in—i.e., the simple possession of a gravity knife—the repeal of the gravity knife statute mooted his claim for prospective relief.

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The only insistence of a continued case or controversy between Cracco and the District Attorney comes from a third-party: amicus curiae "Knife Rights." Knife Rights

[1] See, e.g. SA22 ("Cracco seeks to carry an ordinary folding knife offered for sale at stores in New York that does not open on the first or second attempt of the wrist flick test—not one used to advance criminal purposes").

is an advocacy organization based in Arizona.[2] It was the "principal sponsor" of the litigation in Copeland v. Vance—which was similarly based on the former-gravity knife statute, and led to a decision from this Court that is central to the District Attorney's argument on the merits of the district court opinion below. KR Br. 1; see DA Br. 35-37, 44-51. The original caption of Copeland was Knife Rights v. Vance. Knife Rights was dismissed as a plaintiff for lack of standing because, as this Court found, it did not "even attempt" to allege that it or any of its members faced future harm arising from enforcement of the former-gravity knife statute. Knife Rights v. Vance, 802 F.3d 377, 389 (2d Cir. 2015). The same can be said of its amicus brief, as discussed herein.

The claim of the remaining plaintiffs in Copeland proceeded to a bench trial, at which the founder of Knife Rights demonstrated several knives. The demonstration did not include the plaintiffs' knives or knives of the same brand and model. None of the plaintiffs participated. The district court discredited Knife Rights' demonstration as an inaccurate portrayal of the wrist-flick test; found that the gravity knife statute had been fairly applied to all plaintiffs; and entered judgment for this office and the City, which had been included as a defendant based on allegedly unconstitutional enforcement practices of the NYPD. This Court affirmed the judgment, based largely on the lack of evidence of indeterminacy in the wrist-flick test. While the plaintiffs' petition for review by the Supreme Court was pending, the gravity knife statute was repealed. On June 17,

[2] Knife Rights Organizational Information & Resources, "Incorporation Documents," available at https://kniferights.org/about/organization/.

2019, certiorari was denied. Copeland v. Vance, 230 F. Supp. 3d 232 (S.D.N.Y. 2017), aff'd, 893 F.3d 101 (2d Cir. 2018), cert. denied, 139 S.Ct. 2714 (2019).

Now, Knife Rights argues that the plaintiff's claim in this case is not moot based on Knife Rights' allegation that non-party NYPD may use the wrist-flick test to enforce MTA regulations that are not part of this litigation. KR Br. 2-7. In response, the District Attorney relies largely on his merits brief, which anticipated this argument and explains why the MTA regulations do not sustain a case or controversy, DA Br. 27-32—except to make the following points.[3]

First, Knife Rights is incorrect in its characterization of NYPD policy after the repeal of the gravity knife statute. The City Law Department, as counsel for the agency, confirmed shortly after the repeal that the new legislation had caused the NYPD to "abandon" the wrist-flick test as a measure of illegality. 2d Cir. ECF 30 at 43; Ex. B at 7-8. This policy change was necessitated by the legislature's decision to decriminalize conduct that was formerly-identified solely by means of the same.[4] Although this policy

[3] The District Attorney identified two MTA regulations, whereas Knife Rights identifies three. The third regulation—21 N.Y.C.R.R. §1040.9—is only enforceable in Staten Island, which is why Mr. Vance, who is the District Attorney of New York County, did not list the regulation in his brief.

[4] Knife Rights suggests that this policy amounts to the type of "voluntary cessation" that can prevent a claim from becoming moot. KR Br. 6-7. That doctrine applies to action taken in response to the litigation, not action taken in response to external events. E.I. Dupont De Nemours & Co. v. Invista B.V. & Invista S.A.R.L., 473 F.3d 44, 47 (2d Cir. 2006). The NYPD's post-repeal policy is not "voluntary" in the former sense. It was adopted in response to the external decision of our elected branches of government to decriminalize conduct that was once identified solely by means of the wrist-flick test. Principles of voluntary cessation do not apply here, but the decisions of this Court

took effect while the litigation in Copeland was pending and was brought to Knife Rights' attention at that time, id., the amicus brief does not acknowledge it. The repeal of the gravity knife statute and the resulting NYPD policy took effect a year ago, yet Knife Rights does not allege that any stop, detention, arrest, or prosecution—of any of its members, or anyone else—has taken place at the direction any law enforcement officer or agency based on the application of the wrist-flick test, under the MTA regulations or any other statute or ordinance, since that date.[5]

Second, Knife Rights' argument on the issue of mootness is directed exclusively at the alleged continuation of an allegedly unconstitutional policy by the NYPD, which is not a party. KR Br. 4-7. It does not concern the only named defendant, the District Attorney. See, e.g., id. at 7 ("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"). Unlike Copeland, the plaintiff in this case has no claim arising from

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finding moot claims that arise from repealed or expired laws do. DA Br. 26-27 (collecting decisions).

[5] The Legal Aid Society previously appeared in this case as joint-amicus with Knife Rights in opposition to the District Attorney's motion to dismiss this appeal as moot. 2d Cir. ECF 48. Our consent for the Legal Aid Society to join the instant amicus brief, which addresses the same issue, was sought and given prior to filing. For unknown reasons, however, it elected not to appear. The Legal Aid Society also appeared as amicus curiae in Copeland, as New York City's "primary public defender" of persons arrested for possession of a gravity knife. 2d Cir. ECF 62 at 3 [17-474]. Despite its stronghold in this regard, the Legal Aid Society similarly did not, in opposition to the District Attorney's prior motion to dismiss, identify any stop, detention, arrest, or prosecution of any of its clients that took place at the direction any law enforcement officer or agency based on the application of the wrist-flick test since the repeal of the gravity knife statute.

alleged policies of the NYPD regarding the former-gravity knife statute—he does not even have a claim against the individual police officer who effected the arrest that led to his guilty plea and subsequently to the filing of this lawsuit. Cracco's claims arising from events attributable to the NYPD and the officer were dismissed in an opinion that is not challenged on appeal. SDNY ECF 37 at 4-5, 7-9. An otherwise-moot claim will remain live only if "the same parties" are "reasonably likely" to find themselves again in dispute over "the same issue" raised in the appeal. Dennin v. Connecticut Interscholastic Ath. Conf., 94 F.3d 96, 101 (2d Cir. 1996). Knife Rights' argument, however, is devoted to the speculative future enforcement of regulations that are not part of this lawsuit by an agency that is not a party to the lawsuit.

Finally, Knife Rights argues that vacatur is not warranted because the District Attorney "chose to support mootness." KR Br. 9. An appellant does not relinquish the equitable remedy of vacatur simply by taking the position that a case has become moot. Knife Rights states that its research "has found no similar case for comparison." Id. at 9. The District Attorney has brought such cases to Knife Rights' attention on several occasions. 2d Cir. ECF 30 at 19; 2d Cir. ECF 61 at 11. In E.I. Dupont De Nemours, cited in the District Attorney's motion to dismiss and in his opposition to the belated application of Knife Rights and the Legal Aid Society to intervene as joint-amicus, this Court granted the appellant's opposed motion to dismiss its own appeal as moot and

vacate the district court's opinion. 473 F.3d at 45.[6] Knife Rights further argues that an appellant "should be required to oppose mootness," KR Br. 10, yet several other decisions cited in the District Attorney's prior motion papers involve the grant of vacatur where the appellant conceded that the case had become moot. See, e.g., FDIC v. Regency Sav. Bank, F.S.B., 271 F.3d 75, 76-77 (2d Cir. 2001); Bragger v. Trinity Capital Enter. Corp., 30 F.3d 14, 16 (2d Cir. 1994).

In sum, Knife Rights' argument reflects a misunderstanding of vacatur, which is not a "win" for the appellant. KR Br. 9. A win for the appellant would be an opinion by this Court reversing the one below. The purpose of vacatur is simply to place the parties on their original, equal footing. An appellant who recognizes that a case or controversy has ceased to exist—as the parties agree happened here—should not be compelled to take the opposite position, despite its lack of merit, on pain of acquiescing in the judgment of the district court.

II. The district court entered summary judgment sua sponte on a claim not raised by Cracco, resulting in prejudice to the District Attorney

In this case, the district court granted summary judgment in favor of Cracco, sua sponte, on a "prospective as-applied" theory of relief that was not pled in the amended complaint or advanced by Cracco in his support of his motion. As shown in the District

[6] Other decisions of this Court similarly involve a motion to dismiss and vacate by an appellant who took the position that its own appeal was moot. See, e.g., Upstate N.Y. Eng'rs Health Fund v. S. Buffalo Elec., Inc., 2018 U.S. App. LEXIS 32190, *2 (2d Cir. May 10, 2018); Rone v. Shanahan, 2016 U.S. App. LEXIS 23524, *1-2 (2d Cir. Nov. 15, 2016).

Attorney's merits brief, this was error and it prejudiced the position of this office. DA Br. 33-40. In opposition, Cracco argues that the ground for the district court's opinion was not sua sponte and that, even if it was, the District Attorney was not prejudiced. Pl. Br. 1-4. For reasons that intertwine, neither argument is persuasive.

First, Cracco argues that the entry of summary judgment on a prospective as-applied claim did not amount to a sua sponte ruling because the claim pled in the amended complaint sought prospective relief. Id. at 1. In doing so, Cracco conflates the nature of the relief with the nature of underlying claim. The District Attorney is not suggesting that Cracco "did not seek prospective relief," as Cracco puts it. Id. Rather, the District Attorney is arguing that Cracco's claim was based exclusively on the events of his past arrest and prosecution, and the alleged function of the knife he possessed at that time. DA Br. 34. Litigants often seek prospective relief based on past behavior that they wish repeat.[7] If Cracco had successfully proven the statute vague as-applied to his past arrest, he would have been entitled to prospective relief enjoining its future enforcement under similar facts. Conversely, a prospective as-applied claim is based on "a different set of facts." Copeland, 893 F.3d at 112. It is brought by someone "who

[7] See, e.g. Hayes v. N.Y. Atty. Griev. Comm. of the Eighth Judicial Dist., 672 F.3d 158, 163-64 (2d Cir. 2012) (a plaintiff previously charged with violating a law brought an as-applied vagueness claim that sought prospective relief to enjoin future enforcement of the law in a similar manner); Perez v. Hoblock, 368 F.3d 166, 168-69, 170-71 (2d Cir. 2004) (same); Betancourt v. Guiliani, 2000 U.S. Dist. Court 18516, *1-2 (S.D.N.Y Dec. 26, 2000), aff'd, 448 F.3d 547 (2d Cir. 2006) (same); Chatin v. Coombe, 186 F.3d 82, 84, 86 (2d Cir. 1999) (same).

intends to engage in a course of conduct that differs from the conduct that gave rise to a prior enforcement action." Id. (emphasis added). Such a claim is based on "a different knife" than the one that led to the plaintiff's prior arrest—one that "responds differently to the wrist-flick test." Id.

Cracco did not bring a prospective as-applied claim. He brought an "ordinary as-applied challenge, where the claim is that a prior enforcement action was invalid." Copeland, supra, at 112. Specifically, Cracco claimed that the former-statute was vague as-applied to the alleged events of his prior arrest and that he wished to again engage in "similar or identical" conduct but refrained for fear that the alleged events would repeat themselves. A63.[8] As the District Attorney argued at summary judgment, the events of Cracco's arrest were disputed, yet they were material to the success of his motion and, ultimately, his claim. It would not have been unreasonable for a prosecutor to pursue a charge where the arresting officer maintained that the knife opened on every application of the wrist-flick test, as happened here. Because Cracco had not shown that the District Attorney applied the statute unfairly, he was not entitled to summary judgment. Because

[8] See also A501-02 (Cracco's S.D.N.Y. Local Rule 56.1 Statement, based entirely on the alleged events of his prior arrest and prosecution); A512 (Cracco's motion for summary judgment, arguing that "an as-applied prosecution requires a plaintiff to show that the challenged statute is unconstitutional when applied to the facts of his or her case;" that Cracco was "challenging the application of the gravity-knife statute as applied to have prosecuted him [sic], i.e., under circumstances in which the arresting officer required multiple attempts to get the knife open using the wrist-flick test…;" and that judgment in his favor would "require that any future prosecution instead be based on an allegation that the knife in question opened on the first application of the wrist-flick test").

the evidence precluded such a showing at trial, judgment should have been entered for the District Attorney. A600-01.

In entering summary judgment for Cracco, the district court relied exclusively on the prospective as-applied language from Copeland. SA15. But its reliance cannot be reconciled with this Court's description of the nature of such a claim and the proof that it entails. While the district court repeatedly invoked the alleged events of Cracco's prior arrest, see SA16-17, 22, a prospective as-applied claim is brought by a plaintiff who wishes to be "relieved of the burden to show that the prior proceeding was invalid." Copeland, 893 F.3d at 112. It is based on "a different set of facts," and requires "proof that specific knives [the plaintiff wishes] to possess responded inconsistently, if at all, to the wrist-flick test." Id. at 112-13. Cracco did not allege or offer, and has never claimed to have alleged or offered, any such proof in this case. The district court thus entered summary judgment in favor of the plaintiff on a claim that was not pled in the amended complaint or otherwise advanced by him at any other stage of the litigation.

Contrary to Cracco's suggestion, Pl. Br. 2-4, the district court's sua sponte ruling prejudiced the defense. The District Attorney litigated the cross-motions for summary judgment with the correct understanding that Cracco's claim was based on the alleged events of his prior arrest, see p. 11 and n.8, supra, and had no reason to dis-prove that Cracco's claim was actually about a "different knife," operating under "a different set of facts." Copeland, supra. However, had the district court given notice of its intent to enter summary judgment on a prospective as-applied claim, the District Attorney would

have raised the discovery response that confirmed Cracco lacked the proof required for such a vagueness challenge. DA Br. 36-37. The District Attorney also would have raised the language in Copeland that requires actual proof, not just disputed allegations, of the unfairness of the wrist-flick test as-applied to "specific knives" that a plaintiff wished to carry in the future. In opposition, Cracco argues generically that sua sponte summary judgment is not necessarily error so long as there is no plausible claim of prejudice. Pl. Br. 3. But he does not address the fact that his discovery response precluded his reliance on any knife or any set of facts other than "the specific folding knife" and alleged facts involved in his prior arrest. A249-50. Absent notice from the district court, the District Attorney was prejudiced in his ability to defend against summary judgment on a prospective as-applied claim, and to advance his own cross-motion. While Cracco further suggests that the District Attorney, in his own summary judgment brief, raised an issue "identical" to that presented by a prospective as-applied claim, the passage on which Cracco relies shows instead that the District Attorney was under the correct impression that this litigation was based upon the alleged events of October 2013. See Pl. Br. 3-4.

In sum, the prospective relief sought by Cracco was based on his desire to carry the same knife and engage in the same conduct underlying his prior arrest. That was the shared understanding of the parties in litigating summary judgment, as cemented further in the post-briefing letters on the significance of Copeland in relation to Cracco's claim. A611-14; 661 n.2. The district court, however, entered summary judgment on a claim

that requires proof of the functionality of a different knife, under a different set of facts. Through interrogatories served during discovery, the District Attorney confirmed that Cracco did not have, and did not otherwise intend to offer, any such proof. By sua sponte entering summary judgment on a claim other than the one advanced by the plaintiff, the district court deprived the District Attorney of the ability to raise this evidence and to advance other arguments about the nature of a prospective as-applied challenge, causing prejudice to the defense.

III. The district court erred in finding the former-statute vague

On the merit of the district court's opinion that the former-gravity knife statute was vague for lack of notice and arbitrary enforcement, Cracco limits himself to two points. First, Cracco argues that the district court's opinion is consistent with the pre-existing enforcement practice of the District Attorney's Office. Pl. Br. 8-10. This argument is factually incorrect, and also irrelevant inasmuch as proof beyond a reasonable doubt is a distinct concept from vagueness doctrine. Second, Cracco argues—based solely upon the language of the criminal complaint—that it was agreed between the People and the defense at the time of the underlying arrest and prosecution that the officer required five attempts of the wrist-flick test to open the knife. Id. at 10-11. This argument is similarly factually incorrect.

On the first point, Cracco argues that the declaration entered by the district court did not conflict with the enforcement practice of the District Attorney's Office under the former-statute, and therefore would have been "of no encumbrance." Pl. Br. 9. The

fact that this office, in an exercise of discretion, did not generally prosecute where the officer could not open the knife in less than three attempts of the wrist-flick test is not a concession that it would have been unconstitutional to do so where the officer could not open the knife on the first attempt—which is the ruling issued by the district court. And, while "encumbrance" is not the standard by which a plaintiff secures a judgment against a defendant, that would have been the effect of the district court's declaration had the statute had remained law. The former-statute embodied proactive, not reactive, enforcement: it sought to reduce the public presence of knives that functioned in an inherently dangerous manner to, in turn, reduce the risk of their future use in violent crimes. If, for example, a knife slipped from an officer's hand as he initially tried to test its operability but then opened consistently in response to repeated testing, the district court's declaration would have encumbered the ability of this office to remove an inherently dangerous knife from circulation. Going a step further, it would have been of little comfort to the victim of a subsequent slashing that the knife in question had been the subject of a prior arrest but the District Attorney had declined the prosecution and returned the knife under compulsion of the declaration.[9]

Not only was this office's practice different from the district court's ruling, it represented a conservative estimate of the evidence that would be required, in most

[9] See QNS, Cops cuff Brooklyn man who stabbed patron at Ridgewood McDonalds who refused to give him money, 3/18/19, https://qns.com/story/2019/03/18/cops-cuff-brooklyn-man-who-stabbed-patron-at-ridgewood-mcdonalds-who-refused-to-give-him-money/.

cases, to carry the People's burden to prove the classification of a knife at trial, which is a distinct concept from vagueness.[10] As the District Attorney has argued, concerns that relate to whether an incriminating fact has been proven (as opposed to what that fact is) do not implicate vagueness doctrine and instead are properly addressed by the People's burden of proof. DA Br. 48-49, citing United States v. Williams, 554 U.S. 285 (2008).[11] The practice that Cracco cites is not an admission of liability for purposes of a vagueness challenge—and certainly not an as-applied challenge arising from a prosecution where the officer maintained that the defendant's knife opened on every application of the wrist-flick test. While the practice shed light on the enforcement standard of this office in relation to its obligation of proof beyond a reasonable doubt, it was irrelevant to the separate issue of vagueness and did not excuse Cracco of his responsibility to marshal evidence to prove his claim.

On the second point, p. 14, supra, the dispute between Cracco and the officer as to the function of Cracco's knife has existed since the date of his arrest. In an attempt to manufacture some ambiguity on this score, Cracco cites the silence of the criminal complaint as to whether multiple attempts of the wrist-flick test were required. Based

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[10] A269 ("While the First Department of the Appellate Division is clear that the People can meet their burden [of proof] even if multiple attempts of the wrist-flick test are required to open a knife to a locked position…I am not aware of any prosecution going forward where the officer could not open the knife…in less than three attempts").

[11] The "incriminating fact" of the former-gravity knife statute was clear: a knife was required to open in response to centrifugal force (i.e., in response to the wrist-flick test). The number of attempts needed to open the knife bore on whether that fact had been proven, not what that fact was.

on this fact alone, Cracco suggests that the officer conceded Cracco's allegation and the District Attorney's Office nonetheless continued the prosecution. Notably, this point was not adopted by the district court—although it was advanced by Cracco below. A569-70. The district court was willing to enter summary judgment against the District Attorney regardless of whether this office, at the time of the underlying prosecution, reasonably credited the officer in relation to Cracco's claim that multiple attempts of the wrist-flick test were required to open the knife. SA3, 8-9.

Nonetheless, the criminal complaint does not establish—or even suggest—that this office pursued a prosecution where the officer admittedly required five attempts of the wrist flick test to open a knife. The document states: "I opened the knife with centrifugal force by flicking my wrist while holding the knife, thereby releasing the blade." A315. The interpretation of this language that Cracco now advances is contrary to its plain import and the testimony of all witnesses in this case, who agree—consistent with the officer's intended meaning—the language conveyed that the knife opened in response to one application of the wrist flick test.[12] Cracco's present interpretation is

[12] A396 ("Question: But from your perspective, is [the criminal complaint] accurate, is it true? Cracco: I think that the way it is worded implies that it happened with one simple flick of the wrist, which is not the case"); A391 ("Question: So a person reading this document would assume that [the officer] was able to open the knife with the first flick of his wrist; correct? Cracco: Correct"); see also A310-11, 323-24, 427. Beyond the agreement of the witnesses in this case, the Court of Appeals has considered similar language in another criminal complaint—namely, a statement that the officer "tested the … knife and determined that it was a gravity knife"—and found the document to convey that "the officer flicked the knife open with his wrist." People v. Sans, 26 N.Y.3d 13, 15, 17 (2015).

also contrary to the clear position of this office in opposing his motion to dismiss the criminal charge. A325, 342 (arguing that Cracco's allegation that the officer required multiple attempts to open the knife "raises factual issues to be adjudicated at [the criminal] trial" and "conflicts with [the officer]'s statements in the [criminal] complaint"). Finally, Cracco's present interpretation appears to have been necessitated by his decision not to take depositions, for it is raised without any acknowledgment of the officer's declaration that Cracco's knife functioned consistently as a gravity knife each time the officer has handled it, including during a visit to the District Attorney's Office in the midst of the prosecution when he tested the knife in the presence of the assigned Assistant. A310-13, 320-21. Cracco's suggestion that the dispute between himself and the officer did not "arise until well after [summary judgment] motion practice in this federal case," Pl. Br. 10, cannot be squared with the record.

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The merits portion of Knife Rights' brief presents as an attempt to re-litigate its own unsuccessful vagueness challenge to the former-gravity knife statute. Specifically, Knife Rights resurrects the plaintiffs' central argument in Copeland that the wrist-flick test was inherently indeterminate because its results depended on the strength and skill of the tester. KR Br. 13-14. This is problematic, for several reasons.

First, there is no evidence to elevate this argument from allegation to fact. There is no such evidence in this case, and there was none in Copeland, either. 893 F.3d at 118-19. Second, the relief sought by Cracco was already broader than his allegations—

i.e., five alleged attempts to open a knife, versus a declaration limiting prosecutions to one attempt—which, as the District Attorney argued, should have driven the needle of this as-applied vagueness challenge closer to facial and increased the burden of proof correspondingly. DA Br. 50-51.[13] Knife Rights' argument pins the needle: Success on a claim that the wrist-flick test was inherently vague would have "disable[d] the entire statute," thereby triggering the stringent standard for a facial challenge. Copeland, supra, 112. There is no proof that the District Attorney applied the statute unfairly with respect to the plaintiff himself, let alone in all applications—or the majority, or even some meaningful fraction—over the 60-year lifespan of the law.[14] Third, Knife Rights' argument is misplaced in a case where the plaintiff never tested his own knife, such that there can be no claim that the results of the test depended on disparate traits between Cracco and the officer (nor is there any evidence of what those traits might be in relation to those two individuals).

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[13] See also Vt. Right to Life Comm., Inc. v Sorrell, 758 F.3d 118, 126-27 (2d Cir. 2014) (noting that the burden of proof in a vagueness challenge depends on whether the relief sought extends beyond the plaintiff's "particular circumstances").

[14] In Copeland, the plaintiffs "conceded" that a facial claim requires a challenger to prove a law invalid in all respects, so this Court applied that standard. Id. at 113. In seeking certiorari, the plaintiffs argued—despite their concession—that its application was error. Specifically, they argued that the Supreme Court's pre-existing decision in United States v. Johnson, __ U.S. __, 135 S.Ct. 2551 (2015), "relaxed" the standard for a facial claim. Johnson is a narrow decision based on a sentencing law with unique flaws that were not shared by the former-gravity knife statute. Id. at 2557-58. But, no matter the standard, there is simply no proof of any unfair application in this case.

Overall, Knife Rights' theory flows from principles of knife design, KR Br. 11-12, yet possession of a gravity knife was one of the few weapons possession charges in the Penal Law that did not depend on the weapons' design. DA Br. 5-6. As argued in the District Attorney's merits brief, it was clear from the plain language of the former-statute that design was irrelevant to a charge of possession of a gravity knife. The reason for this is similarly clear: Because the inherent danger of a gravity knife derived from its ability to deploy rapidly, and because that ability could change in response to several variables, including intentional modification, the goal of keeping dangerous knives off the streets was served only by enforcement that depended on a knife's present function. Id. As noted, there is no evidence in the record that the District Attorney's reliance on the results of a functional test violated the constitutional rights of this plaintiff or any other individual. But, several findings in Copeland preclude such a result. Specifically, this Court found that "legislatures may functionally define crimes;" that pre-existing state court decisions gave notice that the former-statute was enforced via a functional test; and those courts had not adopted the "design-based interpretation of the gravity knife law" that the Copeland plaintiffs advocated for and that Knife Rights continues to advocate for here. 893 F.3d at 115-16, 119.

Finally, even if there were some form of proof in this case—such as proof that the officer in fact required multiple attempts to open Cracco's knife; proof that Cracco had applied the wrist-flick test to his knife with negative results; proof that he monitored the tightness of the blade of his knife; or proof that the officer possessed unique

dexterity or strength in relation to Cracco—the uncertainties raised by Cracco's claim and Knife Rights' argument are properly addressed by the People's burden of proof at trial. DA Br. at 48. If an officer required multiple attempts to open a defendant's knife, the defense could have argued to the jury that the People failed to establish that the knife functioned as a gravity knife. The defense could have also cross-examined the officer on his experience opening knives or his strength relative to the defendant, or called a witness to demonstrate difficulty opening the knife via the wrist-flick test or to provide evidence concerning the condition of the knife when purchased or at the time of arrest. All these avenues were open to a defendant to attack the former-statute's application to his knife, but the statute was not unconstitutional simply because it employed a functional standard without simultaneously creating a safe-harbor from prosecution—which is the heart of the district court's decision. SA22-23.

CONCLUSION

For the reasons identified by the District Attorney in his merits brief and this reply, the repeal of the gravity knife statute that is the subject of Cracco's as-applied vagueness challenge had the effect of mooting his claim. In the alternative, the district court erred by granting summary judgment for Cracco on a claim he did not advance, crediting Cracco's version of events in relation to facts that were material to his ability to prove his claim, and finding the former-statute vague for lack of notice and risk of arbitrary enforcement despite the absence of record evidence to support either finding. The District Attorney respectfully asks this Court to vacate the challenged opinion on

mootness grounds and remand the case for dismissal or, alternatively, reverse the result below and enter summary judgment in his favor.

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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 hereby certify that this brief was prepared using Microsoft Word 2013, and according to that software, it contains 6,233 words, not including the cover, the table of contents, table of authorities, the signature block, and this certificate.

ENK

ELIZABETH N. KRASNOW