17-0474-cv

United States Court of Appeals

for the

Second Circuit

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

Plaintiffs-Appellants,

–against–

CYRUS VANCE, JR., in his Official
Capacity as the New York County
District Attorney, CITY OF NEW YORK,

Defendants-Appellees.

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

MEMORANDUM IN SUPPORT OF MOTION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE LEGAL AID SOCIETY IN SUPPORT OF PLAINTIFFS-APPELLANTS IN SUPPORT OF REVERSAL

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INTRODUCTION

Pursuant to Fed. R. App. Proc. 29, the Legal Aid Society (Legal Aid) requests leave to file the accompanying amicus curiae brief in support of plaintiffs John Copeland, Pedro Perez and Native Leather and in support of reversal of the decision below. Appellants consented to filing by Legal Aid of an amicus brief, but the attorneys for Defendants-Appellees stated that they do not consent, thereby necessitating this motion.

I. IDENTITY AND INTEREST OF AMICUS CURIAE

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

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

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

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

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

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

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

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

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

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

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

retailers, coupled with its use of the subjective Wrist Flick Test, creates a notice crisis for unwitting New Yorkers who believe that knives sold throughout the city are lawful and (2) that defendants exploit the subjective Wrist Flick Test to target those individuals deemed to merit their displeasure. *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972); *Thornhill v. Alabama*, 310 U.S. 88 (1940).

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

CONCLUSION

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

Respectfully submitted,

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I. Introduction and Identity of Amicus Curiae

On December 31, 2016 Governor Andrew Cuomo vetoed A/9042A/S6483A, a bill designed to overhaul New York State's gravity knife statute and end NYPD's "Wrist-Flick Test." The veto was a setback for criminal justice reform, but the Governor's message cemented a consensus that NYC's tortured interpretation of the gravity knife statute renders it vague, the very harm that plaintiffs litigate before this Court. The Governor wrote:

> Under current New York Law and practice knives that are classified as gravity knives are designed, marketed and sold as work tools for construction workers and day laborers at a variety of major retailers across the State. However, any person who goes into a store and purchases the product can be subsequently arrested and prosecuted for mere possession. This construct is absurd[.]
>
> The bill seeks to amend a law designed to outlaw a knife created in the 1950s for use by German paratroopers, which could truly open by the force of gravity alone. *The law has been subsequently interpreted to include knives that could be opened with the flick of one hand. This interpretation of the "gravity knife" has resulted in a definition that is both amorphous, subject to abuse and could include nearly any pocket knife.* Emphasis added.

Governor Andrew M. Cuomo, Veto Message #299, December 31, 2016.[1]

What the Governor saw as absurd from the Executive Chamber—that tools sold across the state may be deemed illegal weapons with the flick of a wrist—

[1] Governor Cuomo explained that he vetoed the bill because, in his opinion, its language did not address the enforcement problem created by the Wrist-Flick Test and that it would have placed a burden on law enforcement to determine the design attributes of all knives. His full veto message can be read here: https://www.scribd.com/document/335423671/Veto-299-305.

thousands of New Yorkers suffer from the depths of a Central Booking pen, and in some cases, for years from the isolation of a state prison cell.

At the Legal Aid Society, we write on behalf of those New Yorkers, thousands of low-income clients ensnared by NYPD's absurd gravity knife enforcement regime. As the oldest and largest private non-profit legal services agency in the nation, dedicated since 1876 to providing quality legal representation to low-income New Yorkers, Legal Aid is uniquely positioned to share our clients' perspective as a friend of the Court.

II. Summary of Argument

In the Court below plaintiffs correctly argued that NYPD's Wrist-Flick Test renders the gravity knife statute void for vagueness. Plaintiffs had no notice of what the gravity knife statute prohibited because under the Wrist-Flick Test, their criminal liability turned on the subjective skill of individual police officers, not the design or intended use of the folding knives they possessed.

This amicus brief advances two arguments in support of plaintiffs. First, defendants' failure to consistently arrest and prosecute retailers for possessing and selling putative gravity knives exacerbates the vagueness problem created by the Wrist-Flick Test. No reasonable person has adequate notice of the law when NYPD treats an item as a tool on a store shelf, but an illegal weapon once purchased and clipped to their pants pocket. Second, defendants treat the gravity knife statute as a

modern-day vagrancy law, abusing it to sort and punish those people they deem undesirable, not individuals who have committed a clear violation of a precise code. Each of these harms supports plaintiffs' argument that the gravity knife statute, as applied by defendants, must be deemed void for vagueness.

III. Defendants' Arbitrary Enforcement Exacerbates Vagueness Created By The Wrist-Flick Test

On June 17, 2010 New York Country District Attorney Cyrus Vance Jr. called a press conference to announce that he had entered into deferred prosecution agreements with NYC retailers who he claimed were selling illegal gravity knives. John Eligon, *14 Stores Accused of Selling Illegal Knives*, N.Y. Times, June 17, 2010. Retailers, like plaintiff Native Leather, had no reason to believe that they possessed unlawful items. They sold folding knives with locking blades—tools—not knives that opened by force of gravity, nor knives that were designed to open with centrifugal force. But under NYC's tortured interpretation of the gravity knife statute, where the subjective Wrist-Flick Test triggers criminal liability, the retailers relented, and agreed to settle with DA Vance for $2.8 million. A.74-A81.

At the time of the 2010 press conference, DA Vance announced that he would spend $900,000 of the $2.8 million on a knife education campaign, knife buy-back program and efforts to police retailers throughout the city. A.737-A.847; Jon Campbell, *Did Authorities Lose More Than 1,300 Confiscated Knives*, Village Voice, May 21, 2015. As of 2015, more than $800,000 of the $900,000 remained

unspent. *Id.* DA Vance never initiated a knife education campaign or buy-back program. And folding knives with locking blades remain for sale across NYC at major retailers including Lowes, Ace Hardware, AutoZone, Benjamin Moore Paint, Dicks Sporting Goods, Paragon Sports and a host of small businesses and major websites including Amazon.com. Despite the DA Vance press conference, stores that sell the knives are ubiquitous in Manhattan:

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

Whether the identified folding knives can be flicked open is anyone's guess because it turns on the subjective flick of a wrist. Indeed, retailers themselves, like Native Leather, cannot follow the law when the Wrist-Flick Test is so vague.

While putative gravity knives sell across the city, NYPD and DA Vance aggressively target thousands of individual New Yorkers who purchase and possess the very same knives. According to the Village Voice more than 60,000 New Yorkers were arrested for alleged gravity knife possession from 2000 until 2010. Jon Campbell, *How a '50's Era New York Knife Law Has Landed Thousands In Jail*, Village Voice, October 7, 2014.

Additionally, at the time of the 2010 deferred prosecution agreements, DA Vance exempted Paragon Sports from selling high-end custom made knives—that

[2] In early 2017, amicus counsel directed a Legal Aid investigator to locate retailers throughout Manhattan that sold folding knives with locking blades. The investigator found over 110 stores.

defendants consider gravity knives, if capable of being flicked open—on the unfounded rationale that expensive knives are not used to harm people. Today, Paragon sells expensive knives as authorized by DA Vance, http://bit.ly/2rPxgMN, as well as inexpensive knives http://bit.ly/2qLlAwR, the very same inexpensive knives that thousands of low-income Legal Aid clients are regularly arrested for possessing.

Defendants' uneven enforcement of the gravity knife statute creates a notice crisis, forcing New Yorkers "of common intelligence [to] necessarily guess at [the statute's] meaning and differ as to [its] application." *See Connally v. General Construction Co.*, 269 U.S. 385 (1926); *Thornhill v. Alabama*, 310 U.S. 88, 97-98 (1940); *Papachristou v. City of Jacksonville*, 405 U.S. 156, 165-66 (1972). New Yorkers cannot "steer between lawful and unlawful conduct" when NYPD treats a utility knife as a tool at Ace Hardware but an illegal weapon once a person commutes with it to his or her construction site. *See Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972). New Yorkers who purchase folding knives at NYC retailers are not merely speculating as to what the law commands, *they are hijacked by defendants' application of it. See Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939). The combination of uneven enforcement *and* the subjective Wrist-Flick Test sets an insidious trap for thousands of unwitting New Yorkers who intend to purchase and use their tools lawfully.

The Wrist-Flick Test creates such grossly unequal enforcement. Either the Test is so vague and standardless that it prevents defendants from enforcing the law evenly *or* defendants intentionally exploit the vast discretion conferred by the Test to target those groups deemed to merit their displeasure. *See Giaccio v. State of Pa.*, 382 U.S. 399, 402-03 (1966)*; City of Chicago v. Morales*, 527 U.S. 41, 61 (1999). Whatever the reason, NYPD's failure to consistently enforce the law against retailers creates an impermissible notice problem for individual New Yorkers that renders the statute void for vagueness.

IV. Defendants Abuse the Statute To Punish Individuals They Deem Undesirable

Defendants NYPD and DANY abuse the gravity knife statute to cast a vast net around thousands of New Yorkers every year. Most New Yorkers arrested for gravity knife possession are charged with a misdemeanor punishable by up to one year in jail, and the majority of those charged with misdemeanors resolve their cases with non-jail, non-criminal dispositions. Of course, even a case that culminates in an eventual dismissal can wreak havoc on person's life. Legal Aid clients endure the humiliation of arrest and detention, miss days of work, suffer suspensions and refrain from applying for work because of pending cases. They may be required to perform community service in order to obtain a conditional dismissal. If they are convicted of a misdemeanor, they pay mandatory fines and surcharges, face jail time and the collateral consequences of a criminal conviction. See Malcolm Feeley, *The Process*

Is the Punishment, Russell Sage Foundation (October 1979); Issa Kohler-Hausmann, *Misdemeanor Justice: Control without Conviction*, American Journal of Sociology Vol. 119, No. 2 (September 2013).

New Yorkers with previous criminal convictions fare even worse. Under N.Y. Penal Law § 265.02(1), where a client has previously been convicted of any crime, no matter how many years previously, prosecutors have the discretion to charge the client with felony gravity knife possession. Under that provision clients face up to seven years in prison.

This broad discretion under the vague Wrist-Flick Test harkens to state abuse of vagrancy laws condemned in *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972). There, the Jacksonville vagrancy ordinance prohibited acts including "disorderly conduct," "loitering" and "common thief," and carried a penalty of up to 90 days in jail. The ordinance there, like the Wrist-Flick Test here, was designed "to allow the net to be cast at large, to enable men to be caught who are vaguely undesirable in the eyes of police and prosecution" *Id.* at 166. It furnished "a convenient tool for 'harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure.'" *Id*. at 170. Here, we narrate a selection of felony prosecutions to demonstrate what happens when law enforcement exploits the Wrist-Flick Test as a convenient tool to target those they deem undesirable.

Richard Neal[3]

On June 11, 2008 Richard Neal, who was 53, black and had a criminal record, left his mother's home on the Lower East Side of Manhattan. He was walking with a friend when police approached and asked him what was clipped to his jeans. (N.R. 8). He told them it was a knife. A police officer took it from Neal and was able to flick it open with one hand. (N.R. 11). There was no allegation that Neal intended to use the knife unlawfully, nor any evidence that he could open the knife with the flick of a wrist, nor any evidence that he knew an officer could do so. Prosecutors elected to charge him with felony possession of a weapon. At trial a police officer described Neal as exhibiting a "very calm" demeanor at the time of his arrest. (N.R. 8). The officer additionally testified that Neal was "just talking, walking" with his friend. (N.R. 8). While testifying, the police officer opened the knife with the flick of a wrist. (N.R. 254-255). Neal was convicted. At sentencing the prosecutor congratulated himself for not asking the Court to treat Neal as a discretionary persistent felon and sentence him to life in prison:

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

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

> we are recommending three and a half to seven years in jail. (N.R. 445-446).

The robbery in which Neal had used a knife occurred 22 years prior. Nevertheless, Neal was sentenced to 3 to 6 years in prison, every day of which he served. *People v. Neal*, 79 A.D.3d 523, 524 (1st Dept. 2010), lv denied 16 N.Y.3d 799 (2011). In 2015, more than 8 years after defendants committed Neal state prison, and 5 years after DA Vance's press conference, Neal's knife sold at Lowes in Brooklyn:

Richard Neal Knife

Lowes Brooklyn Knife[4]

Antoine Best

On September 17, 2006 Antoine Best, who was 22, black and had a criminal record, had just finished working at Starbucks when he entered the subway area at Grand Central Station. He was headed to his home in Long Island, when plainclothes police officers stopped him for having a folding knife clipped to his jeans. He used

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

the knife at Starbucks for cutting boxes. A police officer was able to flick it open with one hand. (B.R. 10). According to police, Best was calm and cooperative. There was no allegation that he attempted to use the knife unlawfully, nor any evidence that he could open the knife with the flick of a wrist, nor any evidence that he knew an officer could do so. Best was arrested and charged with felony possession of a weapon. At his first trial, the jury hung. DANY chose to try him again. He was convicted after a second trial. He was sentenced to 2.5 to 5 years in prison. *People v. Best*, 57 A.D.3d 279 (1st Dept. 2008) Today, more than 11 years after his arrest and nearly 7 years after DA Vance's press conference, Best's knife continues to sell in the heart of Manhattan:

Best Knife

Henry Westpfal and Co. Knife[5]

Elliot Parrilla

On February 3, 2011 Elliot Parrilla, who was 31, Hispanic and had a criminal record, was working, tiling a floor at his ex-girlfriend's home on 96th St. in

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

Manhattan. (P.R. 456-457). When he was done working for the night, he placed his tools in his car including a Husky utility knife that he had purchased at Home Depot in the Bronx. (P.R. 457-460). Police officers stopped Parrilla on Lexington Avenue for driving with broken brake lights. (P.R. 268, 384-385). Police frisked Parrilla and searched his car. They recovered the Husky utility knife. An officer was able to flick it open with one hand. (P.R. 366, 397-399). There was no allegation that Parrilla attempted to use the knife unlawfully, nor any evidence that he could open the knife with the flick of a wrist, nor any evidence that he knew that an officer could do so. Prosecutors charged him with felony possession of a weapon. At trial, the arresting officer struggled to open the knife with the flick of a wrist, but ultimately succeeded. (P.R. 402, 511). Prosecutors sought to preclude Parrilla from testifying that he purchased the knife at Home Depot in the Bronx. (P.R. at 232-236). Parrilla was convicted. He was sentenced to 2.5 to 5 years in state prison. *People v. Parrilla*, 27 N.Y.3d 400 (2016). Parrilla's knife is one of the most common utility knives in the country, and continues to sell at over one hundred stores across New York City.

Parrilla Knife

Ace Hardware Knife

Jesus Rodriguez

On August 24, 2011 police stopped Jesus Rodriguez on a stairwell in a public housing building on the Lower East Side of Manhattan. Rodriguez, who was 27, Hispanic and had a criminal record, was arrested for trespass, because he was unable to prove that he was an invited guest in the building. (R.R. 36). Police searched Rodriguez and recovered a black carabiner that contained several tools including a bottle opener, screwdriver and fold-out knife. (R.R. 38). The arresting officer was able to force the carabiner's knife open with the flick of a wrist. (R.R. 40). There was no allegation that Rodriguez attempted to use the knife unlawfully against any person, nor any evidence that he could open the knife with the flick of a wrist, nor any evidence that he knew that an officer could do so. Rodriguez was initially charged with misdemeanor possession of a weapon. The prosecutor failed to answer ready for trial on multiple court dates. On July 20, 2012, in the face of an imminent speedy trial dismissal, without notice to Rodriguez, the assigned prosecutor extended the speedy trial clock by indicting the case as a felony.[6] At trial Rodriguez's brother testified that he purchased the carabiner at a hardware store in Manhattan and gave it to Rodriguez to help him with maintenance work. (R.R. 121-122). His brother testified that he had never seen Rodriguez open the folding knife with the flick of a

[6] C.P.L. 30.30 provides that a criminal action must be dismissed where the prosecution is not ready for trial within six months of the commencement of the action where the defendant is accused of a felony, and must be dismissed within 90 days of the commencement of the action where the defendant is accused of a Class A misdemeanor.

wrist. (R.R. 125). When the arresting officer testified, he struggled to open the knife, could not do so every time, but was ultimately able to open the knife. (R.R. 60, 102-103). Rodriguez was convicted. He was sentenced to 2 to 4 years in state prison. His conviction was reversed on speedy trial grounds, but only after he had spent more than two years in prison. *People v. Rodriguez*, 135 A.D.3d 587 (2016). The carabiner continues to sell on Amazon.com for $3.75.

Rodriguez Carabiner

Amazon.com Carabiner

Richard Gonzalez

On April 14, 2011 Richard Gonzalez, who was 50, Hispanic and had a criminal record, was commuting from his home in the Bronx to a jobsite in New Jersey where he worked as a handyman. (G.R. 37). Gonzalez attempted to transfer from the 6 train to the 4/5 trains at the Lexington Avenue and 125th St. subway station. Several police officers were standing on the stairwell blocking Gonzalez from using the stairs. According to the officers Gonzalez said "Fuck you guys. This is bullshit. You're not doing anything at all. Stop blocking the stairs. Get out of my

way." (G.R. 220). Police stopped Gonzalez and searched him. They recovered a Husky utility knife that Gonzalez had purchased at Home Depot in the Bronx:

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

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

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

> I believe that the defendant should be sentenced to the maximum sentence allowed, which is three and a half to seven years. People are making this recommendation due to the defendant's extensive criminal

> history, due to the defendant's conduct during the course of this proceeding, as well as the hearing which included outbursts to Judge Farber, and as well as, your Honor, and as well as myself. (G.R. 348.)

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

V. Conclusion

The dramatically different outcomes for Richard Neal, Antoine Best, Elliot Parrilla, Jesus Rodriguez, Richard Gonzalez and the thousands of other New Yorkers arrested each year for gravity knife possession who receive non-criminal, non-jail dispositions is precisely the constitutional problem with the Wrist-Flick Test. *Papachristou*, 405 U.S. at 166. None of the defendants used their knives unlawfully, none had reason to know that criminal liability turns the flick of a police officer's wrist, and certainly none had reason to believe that possessing a folding knife sold openly across the city could be a crime. But the inherent vagueness of the Wrist Flick Test allows the state to unleash extreme punishment on those "undesirable in the eyes of police and prosecution." *Papachristou*, 405 U.S. at 166. This is not only absurd, as Governor Cuomo conceded, it is plainly unconstitutional.

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Dated: June 7, 2017

RULE 32(g)(1) CERTIFICATE

This brief complies with the type-volume limitation of Rules 29(a)(5) and 32(a)(7)(B) of the Federal Rules of Appellate Procedure and Local Rules 29.1(c) and 32.1(a)(4)(A) of the Local Rules and Internal Operating Procedures of the Court of Appeals for the Second Circuit because it contains 3,574 words, excluding the parts of the brief exempted by Rule 32(f).

This brief complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally-spaced typeface using Microsoft Word in Times New Roman 14-point font.

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