UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

JOHN COPELAND, PEDRO PEREZ, AND NATIVE LEATHER, LTD., Plaintiffs, v. CYRUS VANCE, JR., in his Official Capacity as the New York County District Attorney, CITY OF NEW YORK, Defendants.	Case No.: 1:11-cv-03918-KBF-RLE

AMICUS CURIAE BRIEF

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STATEMENT OF AMICUS INTEREST

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 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).

In this amicus curiae submission we supplement written legal argument with video recorded client interviews, images of the original gravity knife, video of retail locations where so-called gravity knives are sold and recordings of oral argument in relevant appellate cases. We do so to share our clients' stories and to immerse the Court in the state of gravity knife prosecutions from a defender perspective.

LAS Amicus Video Link: https://vimeo.com/165907233

Our clients' stories 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 work. 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.

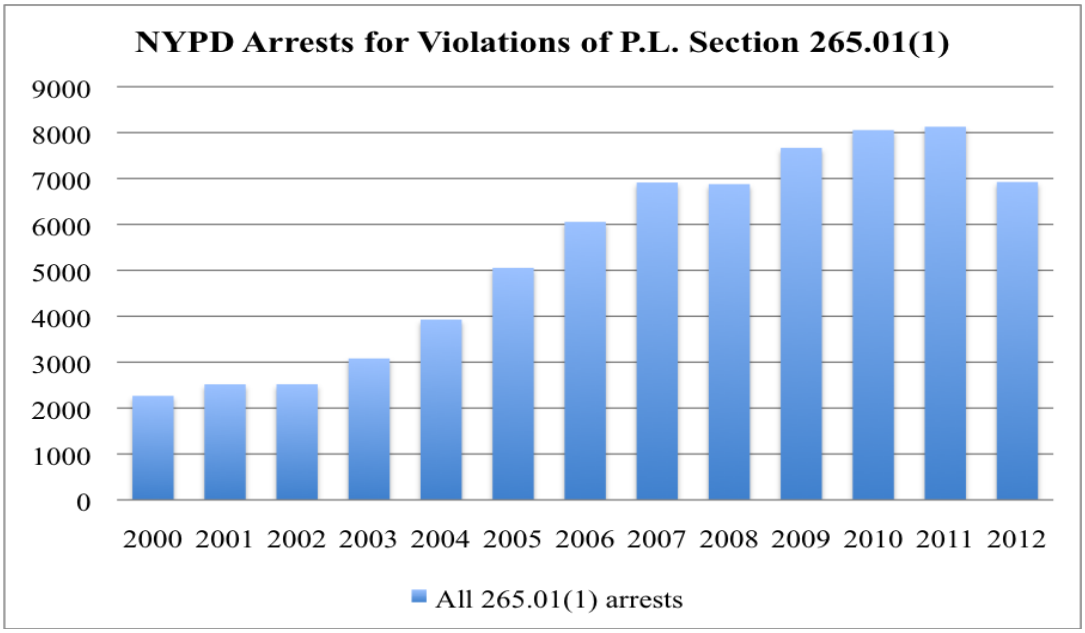
INTRODUCTION

DANY gravity knife prosecutions are an astounding affront to the legitimacy of criminal law. The prosecutions systematically disregard foundational principles that shield individuals from the arbitrary power of the state: proportionality, notice, mens rea and non-discriminatory enforcement. They ensnare thousands of ordinary New Yorkers who, just like plaintiffs John Copeland, Pedro Perez and Carol Walsh at Native Leather, have no reason to believe that they have committed any crime.

In 1958, the New York State Legislature banned gravity knives under P.L. § 265.01(1) as per se weapons: unlawful to possess for any purpose. The consequences of possessing a per se weapon vary dramatically depending on one's prior criminal history and the discretion of the prosecutor. The baseline offense is a Class A misdemeanor, punishable by up to one year in jail.

Between 2000 until 2012 the New York City Police Department (NYPD) made 69,999 arrests for P.L. § 265.01(1).[1]

[1] These numbers are based on annual arrest data from the NYPD on file with amicus.



Most arrests for violations of P.L. § 265.01(1) are for alleged gravity knife possession. According to data compiled by LAS, from July 1, 2015 until December 31, 2015 DANY prosecuted 363 LAS clients for violations of P.L. § 265.01(1). Of those, 254, or 69%, were for alleged gravity knife possession.[2] DANY resolved misdemeanor gravity knife cases with pleas to non-criminal violations (35%), adjournments in contemplation of dismissal (23%), pleas to criminal charges (12%) and dismissals (8%).[3] Based on our review of the selected complaints, few defendants plead guilty to accompanying crimes. For example, only one client pled guilty to P.L. § 120.14(1), Menacing in the Second Degree.

If the possessor has previously been convicted of any crime, a felony or a misdemeanor, no matter how many years they were previously convicted, possession is

[2] P.L. § 265.01(1) bans possession of 18 types of per se weapons including a gravity knife. Because arrest data is classified by penal law section, not weapon type, the number of gravity knife prosecutions can only be determined by reading each criminal complaint.

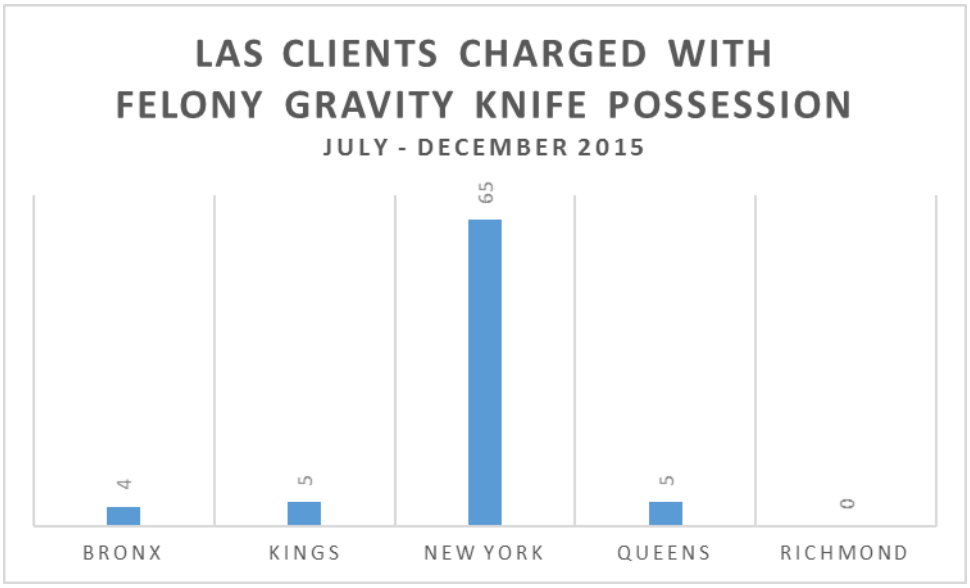
[3] The remaining 22% of cases remain open or were transferred to other public defense providers.

deemed a Class D felony, punishable by up to 7 years in prison. P.L. §§ 70.00 (2)(d), (3)(b); 265.02(1). This is the so-called "felony bump-up" rule. Prosecutors have *unfettered* discretion over whether to file bump-up charges.

If the possessor has a prior felony within the last ten years, the consequences are even more severe. The minimum sentence is 2 to 4 years in prison. No non-incarceratory sentencing options are available. P.L. § 70.06(3)(d), (4)(b). In the most extreme cases, if the possessor has previously been sentenced as a second felony offender, a gravity knife conviction can serve as the basis for a so-called "discretionary persistent felony" finding which carries a minimum of 15 years to life in prison. P.L. § 70.10.

According to data compiled by LAS, from July 1, 2015 until December 31, 2015, DANY charged 65 LAS clients with gravity knife possession as a felony. Other prosecutors brought felony prosecutions far less frequently: Bronx (4), Kings (5), Queens (5) and Richmond (0).[4]

[4] According to citywide arrest data maintained by the Office of the Chief Clerk of New York City Criminal Court, the Legal Aid Society represented the following percentage of defendants in each county of New York City in 2014, the most recent year that the data has been recorded: Bronx (52.50%), Kings (65.33%), New York (65.37%), Queens (58.44%), Richmond (80.50%).



Clearly DANY is singular in its prosecutorial overzeal, aggressively ratcheting up potential penalties for defendants. The Legislature never intended such aggressive prosecutions.

In 1958, at the time of the original gravity knife ban, the Legislature had an unmistakable weapon in mind: a German knife designed so that the blade dropped out of the handle effortlessly and locked into place. *Ban Asked On Teen-Agers' Weapons*, N.Y. Times, February 7, 1958. The Legislature defined the gravity knife in a way that described the original German weapon that it intended to ban:

> [A]ny 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.
>
> P.L. § 265.00(5)

The Legislature used the phrase "centrifugal force" to describe the way the original gravity knife operated for *any person, every time* that person used it in order to

limit the reach of law enforcement to that specific weapon. *See LAS Amicus Video*. That definition, applied to the original weapon, was not vague because any person could open the original gravity knife with application of centrifugal force. *See LAS Amicus Video*.

Today, NYPD and DANY use the wrist-flick test to target common folding knives—knives that do not open easily or consistently for every person with the flick of a wrist—not the original gravity knife. Furthermore, courts have held defendants liable for folding knives that do not consistently open with centrifugal force, even under the NYPD's expansive wrist flick test.

The result has been both an explosion of prosecutions, with harsh incarceratory consequences, and the transformation of what was an objective standard for law enforcement into a subjective test that turns on the skill, strength and training of police officers.

By expanding the standard for prosecution to include common folding knives, which are not obvious weapons to the ordinary citizen, New York's application of P.L. §§ 265.01(1) and 265.02(1) "fails to meet the requirements of the Due Process Clause [because] it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits" and leaves arresting officers, prosecutors, "judges and jurors free to decide without any legally fixed standards, what is prohibited and what is not in each particular case." *Giaccio v. State of Pa.*, 382 U.S. 399, 402-03 (1966). This practice is constitutionally intolerable because it is impossible for otherwise law-abiding citizens to "steer between lawful and unlawful conduct" as they cannot anticipate the athletic

prowess of the police officer they may encounter. *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972). The subjective test is also "the principal source of the vast discretion conferred on the police" and prosecutors. *City of Chicago v. Morales*, 527 U.S. 41, 61 (1999). That level of discretion is impermissible because it fails to rationally delineate objective standards for law enforcement. *Id*. Taken together, these infirmities render the statute vague. *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).

In deciding whether a state's application of its own laws is unconstitutionally vague, one of the most important considerations is whether the statute has a mens rea requirement that would prevent successful prosecution of innocent conduct. *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498-99 (1982). Here is where New York most flagrantly violates standards of due process, because it has insisted on treating the gravity knife statute as a strict liability offense. Just this month, the New York State Court of Appeals declined an opportunity to limit the statute's reach by requiring prosecutors to show that the possessor was aware of the characteristics of the knife that rendered it a so called "gravity knife." *People v. Parrilla*, 2016 N.Y. Slip Op 03417 (decided May 3, 2016). Thus, under New York law, prosecutors need only prove that the defendant knew that he possessed a knife, and that the knife could be opened by *someone* with gravity or centrifugal force. The prosecutor does not need to show that the

defendant knew that the knife could be opened with centrifugal force or had opened it that way in the past.

The New York rule is radically at odds with the common law tradition where "the existence of a mens rea is the rule of, rather than the exception to, the principles of Anglo American criminal jurisprudence." *United States v. Gypsum*, 438 U.S. 422, 436 (1978); *Elonis v. U.S.*, 15 S.Ct. 2001, 2015 (2015); *Staples v. U.S.*, 511 U.S. 600 (1994); *Morissette v. U.S.*, 342 U.S. 246 (1952) (mens rea universal and persistent in mature systems of law); Gideon Yaffe, *A Republican Crime Proposal That Democrats Should Back*, N.Y.Times, February 12, 2016 (explaining foundation of criminal law is "a legal principle, mens rea means that causing harm should not be enough to constitute a crime; knowingly causing harm should be."). However, if New York chooses to impose strict liability, it raises the risk of the statute being declared unconstitutionally vague under *Village of Hoffman Estates*.

The combined effect of these forces is devastating. Severe criminal sanctions, vague and unpredictable definition of the offense, dramatic expansion of the law enforcement net, strict liability: these forces are enough in themselves to conclude that the statute, as currently enforced, is unconstitutionally vague. Worse still, defense attorneys investigating their clients' stories find that retailers throughout New York City are openly selling knives that could fall afoul of DANY's standards. And, remarkably, DANY has even explicitly agreed to permit sale of so-called "collectors" knives, which

cost thousands of dollars, while continuing to prosecute ordinary citizens who use a less expensive version of the knife as part of their employment.

This brief will demonstrate each of the forces unleashed by exploitation of the wrist-flick test through the stories of indigent defendants ensnared by the law, stories that support the plaintiffs' argument that the gravity knife statute is void for vagueness and should be struck down by this Court.

I. THE LEGISLATURE TARGETED WEAPONS, NOT WORKERS

The New York State Legislature banned gravity knives in response to "hoodlum" youth gang violence. *Court Bans Sales of Gravity Knives*, N.Y. Times, February 6, 1958. The Legislature targeted a WWII era German knife that was the successor to the switchblade, not folding knives used for work. Emma Harrison, *Group Seeks Ban on Gravity Knife*, N.Y.Times, December 19, 1957.

Today, NYPD and DANY exploit the wrist-flick test to target almost exclusively common folding knives, casting the net created by the 1958 law far broader than the Legislature ever intended. Oral Argument, *People v. Gonzalez*, 25 N.Y.3d 1100 (2015) ("But you're catching the dolphins with the tuna here. I mean if you've got an innocent person you're saying hey, too, bad, you're caught in the net.").[5]

In recent years, this net has trapped tens of thousands of people for violations of P.L. §§ 265.01(1) and 265.02(1). Jon Campbell, *How a '50's Era New York Knife Law Has Landed Thousands In Jail*, Village Voice, October 7, 2014 (estimated 60,000 people

[5] The full transcript and video recording of oral argument in *Gonzalez* can be viewed here: https://www.nycourts.gov/ctapps/arguments/2015/Apr15/Apr15_OA.htm.

arrested for gravity knife possession citywide from 2003 until 2013); *see also U.S. v. Irizarry*, 509 F.Supp.2d 198, 199 (E.D.N.Y. 2007) (treating common folding knife as gravity knife "would transform thousands of honest mechanics into criminals, subject to arrest at the whim of any police officer.").

The following selected, but representative, client stories will show that NYPD and DANY trap indigent defendants who use common folding knives for work, not "hoodlum" teenagers bracing for a street fight.

Walt[6]

Walt, age 57, worked as an electrician at the New York City Department of Education (DOE). *See LAS Amicus Video*. He had never been arrested in his life. He purchased a Benchmade knife online and used at work to strip wire and cut boxes. On the date of his arrest, police stopped him during work hours, while he was crossing the street, just yards from the school where he was working. At the time, he was on a break going to get coffee at a nearby deli. Walt noticed a black car parked illegally in the middle of the street. Assuming the car had been involved in an accident, he approached it to see if anyone was injured. As he approached, police exited the car and told him to put his arms up. They told him they were stopping him because they saw a knife clipped to his pants. He explained that he worked as an electrician for the DOE, but the police seized the knife, arrested him and charged him with P.L. § 265.01(1). He had no idea that possession of his folding knife was illegal.

[6] This brief omits clients' last names and other identifying information unless that information is publicly accessible. If requested by the Court, amicus counsel can submit redacted criminal complaints for review by the Court and parties.

Walt was not permitted to work for two months because the DOE, like most public sector and licensed occupations have automatic suspension policies while a criminal case is pending. Walt agreed to complete community service and his case was subsequently dismissed.

James

James, age 25, worked as a data technician installing cables. He had no criminal record. One night he was driving on the Henry Hudson Parkway. He missed his exit and turned into Ft. Tryon Park to make a U-turn. NYPD stopped him for being in the park after dark. They found a folding knife in the center console of his car along with Ethernet cables, plastic electrical outlets and other tools of his trade. James used the knife to strip cables and cut through sheetrock while at work. Like Walt, he was charged with violating P.L. § 265.01(1).

James missed seven days of work due to court appearances. He pled guilty to disorderly conduct, completed two days of community service and paid a mandatory court surcharge of $120.

Jerome

Jerome, age 37, was employed as a custodian in Brooklyn for the New York City Human Resources Administration (HRA) for six years. He purchased a folding knife at AutoZone in the Bronx. Having no idea that a work tool sold by a major retailer was illegal, he used it in the stockroom at his job to cut boxes and plastic wrap. On the date of his arrest, he was driving home after dropping off his wife at her church. Police told him

that they stopped his car for tinted windows. They directed him to exit the car and then arrested him for the folding knife that was clipped to his pants pocket.

Unlike Walt and James, Jerome had a criminal record. At his arraignment, DANY charged him with misdemeanor gravity knife possession and offered him time served in exchange for an immediate plea of guilty to the charge. His defense attorney explained that DANY could upgrade the charge to a felony with a potential 7-year prison sentence, if he turned down the plea at arraignments. Not surprisingly, Jerome took the plea just hours after his arrest, saddling his record with a fresh misdemeanor conviction.

Mustafa

Mustafa, age 31, worked at Delco Electrical Corp. after completing a job training program called the Center for Employment Opportunities (C.E.O.) *See LAS Amicus Video.* C.E.O. is a non-profit organization that helps people with criminal convictions find employment. Upon his graduation from the program, C.E.O. gave him a list of tools that he would need to manage his work and directed him to a S&A Hardware store in the Bronx where he could purchase the items at a discount. Mustafa purchased the discounted items at S&A Hardware and purchased additional tools there, including a utility folding knife.

One morning after he began work at Delco, he and his co-workers took a smoke break at their job site at 113th St. and Morningside Drive in Manhattan. Police were patrolling the area. They yelled out to Mustafa that they smelled marijuana and were convinced he was the one smoking it. He disputed the allegation and the police forced

him against stones that led down the stairs at Morningside Park. Mustafa shouted for his foreman, but police tackled him to the ground. They searched him and seized the utility folding knife from his pants pocket. The foreman rushed to the scene and pleaded unavailingly with police not to arrest Mustafa, pointing out the other tools that were present at the site and explaining that they were doing electrical work just across the street.

Mustafa was on felony parole when he was arrested. DANY followed its standard policy of charging him with felony gravity knife possession for possessing the utility folding knife. He was also charged with a parole violation which in itself could have sent him back to prison for many months. Ironically, the police suspicions that led them to confront Mustafa in the first place – supposedly smoking marijuana – were immediately disproved because Parole gave Mustafa a chemical test immediately after his arrest, which came back negative.

Fortunately, Mustafa's defense attorney persuaded Parole and DANY to dismiss his cases, but only after he sat at Rikers Island for three weeks without income, away from his wife and two sons.

****

LAS represents thousands of indigent defendants just like Walt, James, Jerome and Mustafa who use common folding knives for work. Neither workers like them, nor the common folding knives that they use, were the intended target of the Legislature's gravity knife ban, but they bear its brunt. Even if charges are ultimately dismissed,

indigent 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 substantial 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); Alexandra Natapoff, *Misdemeanors*, 85 Southern California Law Review 1313 (2011).

Prosecuting ordinary working New Yorkers for common folding knives is extremely controversial. David B. Kopel et al., *Knives and the Second Amendment*, 47 U Mich JL Reform, 167, 177, 210-211 (2013) (New York gravity knife prosecutions are "abusive" and have "no connection to criminal misuse[.]"); Ian Weinstein, *Adjudication of Minor Offenses in New York City*, 31 Fordham Urb LJ 1157, 1165 (2004).

The non-partisan New York State Office of Court Administration (OCA) has repeatedly recommended that P.L. § 265.15 be amended to provide an affirmative defense to criminal possession of a gravity knife if the defendant can show the item is possessed for innocent purposes, such as in connection with employment. https://www.nycourts.gov/ip/judiciaryslegislative/pdfs/2016-CriminalLaw&Procedure-ADV-Report.pdf. The New York State Assembly has voted overwhelmingly to require that prosecutors show that defendants have "intent to use the same unlawfully against

another." A04821, June 10, 2015 (Floor Vote 106-40). However, to date, reform efforts have died in the New York State Senate. Jon Campbell *Will New York Republicans Kill Knife Law Reform For the Second Year in a Row*, Village Voice, June 19, 2015.

II. DANY IS OVERZEALOUS AND SEEKS HARSH SENTENCES

DANY felony prosecutions can result in staggering sentences and sharpen the constitutional stakes in the plaintiffs' vagueness challenge before this Court. *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498-99 (1982). Where a criminal statute is vague and authorizes severe penalties, a reviewing court must scrutinize the statute and its application vigilantly. *Id*. Cases like Richard Neal's and Richard Gonzalez's illustrate just why this Court should be so vigilant.

Richard Neal

On June 11, 2008 Richard Neal was arrested for possessing a folding knife that NYPD and DANY characterized as a gravity knife. *See LAS Amicus Video*. In 2014, the Village Voice detailed Mr. Neal's ordeal:

> A trim, soft-spoken 59-year-old, Neal has had his share of problems with the law. More than his share, in fact, as he'll readily admit. He has spent nearly a quarter of his life in prison. There was a burglary charge in 1978, followed by an assault charge in 1982. A nonviolent drug-distribution charge in 2002 landed him back inside.
>
> Today, he acknowledges these incidents with some regret, in a voice that's incongruously deep and sometimes trails off mournfully. He especially regrets the crimes that involved hurting other people.
>
> But he's a bit old for that kind of thing now. So Neal wasn't worried when he saw police prowling the grounds of the Lower East Side project that night in 2008. For once, Neal wasn't doing anything wrong. Even when two police officers approached and began asking questions, Neal was

> feeling just fine. His life had been inching back toward some semblance of order recently. After months staying with friends and family and bouncing between city homeless shelters—common way stations for newly released prisoners—Neal had finally found an apartment. For the first time in a long time, he had a place of his own. And the fact that his new home was near the LaGuardia Houses, where his ailing mother lived, was just a bonus.
>
> Besides, he'd been out of trouble for a good long while, and he certainly wasn't up to anything that night. He and a friend were just milling around outside the building, watching the action. In court testimony, a police officer would later describe Neal as "very calm," "just talking [and] walking" with his friend. Not making a scene. And when one of the officers, glancing down at Neal's baggy jeans, asked what he had in his pocket, Neal was honest.
>
> "I told him, 'It's a knife,' " Neal says today.
>
> There was no use in hiding it. It was clipped to the side of his jeans, for anyone to see. He'd been using the knife earlier that day, he said, at one of the odd maintenance jobs he'd been working in the years since he'd left prison.
>
> ****
>
> Neal says he didn't start worrying that night until the officer used the term "gravity knife." He'd never heard that phrase before. And he really started to worry when the officer explained that his little Sheffield could land him in prison -- for years.

Jon Campbell, *How a '50's Era New York Knife Law Has Landed Thousands In Jail*, Village Voice, October 7, 2014.

Neal was arrested and prosecuted for the Sheffield folding knife that was clipped to the side of his jeans. The knife could be purchased at local stores and on Amazon.com.

Richard Neal Sheffield Knife[7]

Appalachian Trail Knife Sold at Lowes Brooklyn, N.Y.[8]

With his prior criminal record, Neal faced the full brunt of the gravity knife statute. The offer was a misdemeanor plea and six month sentence, which Neal declined. Trial Tr., 5, Feb. 17, 2009. [9] He was tried and convicted. At sentencing, DANY

[7] This brief provides images of clients' knives where defense counsel preserved them.
[8] This picture was taken by amicus counsel at Lowes Home Improvement 118 2nd Avenue Brooklyn, N.Y. on September 6, 2015.
[9] Amicus can provide trial transcripts, DANY motion papers and court filings upon this Court's request.

congratulated itself for not seeking to have Neal adjudicated a "discretionary persistent" felon and sentenced to fifteen years to *life* in prison. It used Neal's prior record to frame its recommendation of a 3.5 – 7 year prison term as generous:

> Judge, as you know, based on this defendant's history, he is – he certainly would be a discretionary persistent. I'm not asking that you find him that at this time, but I'm just indicating to you the history that this defendant has of numerous felony convictions including for robbery in which he used a knife. In this case as you know, he had a knife on him. There is no allegations (sic) that he was actually using it, but he did have a knife on him, and with his multiple felony convictions, we are recommending three and a half to seven years in jail.
>
> Trial Tr. 4, February 17, 2009.

On the date of his arrest, Richard Neal was not brandishing the folding knife, much less using it unlawfully against another. It was in his pocket. The robbery in which Neal used a knife occurred 22 years prior, in 1986. His criminal act on June 11, 2008 was no different than the simple folding knife possession committed by thousands of defendants that DANY offers ACD's and disorderly conduct violations. It turned on the flick of an athletic officer's wrist. But Neal had an extensive criminal history, declined a six-month offer and exercised his Constitutional right to a trial. The court sentenced him to three to six years in state prison. *People v. Neal*, 79 A.D.3d 523, 524 (1st Dept. 2010), lv denied 16 N.Y.3d 799 (2011).

Richard Gonzalez

Richard Gonzalez swore at police. He swore at judges. He swore at prosecutors. And he had an extensive record including convictions for robbery and grand larceny. His last felony conviction, for violating an order of protection, came in 2003. He was clearly

"undesirable in the eyes of police and prosecution." *Papachristou v. City of Jacksonville*, 405 U.S. 156, 166 (1972). But on April 14, 2011, he had been out of prison for five years and was going to work. *See LAS Amicus Video*. For all that time he was working as a handyman for Lewis Newkirk, who reported that he was a responsible employee.

At 10:30 that April morning Gonzalez was headed to a work site in New Jersey. He had several work items with him including door locks, door knobs and a Husky folding knife that he purchased at Home Depot. *Gonzalez* Hearing Tr. 70, April 18, 2012:

Gonzalez was switching from a local to express train at the 125th St. and Lexington Ave subway station when he encountered police on the stairway. *Gonzalez* Hearing Tr. 8, March 1, 2012. He believed that they were blocking the stairs. According to police Gonzalez shouted at them:

> Fuck you guys. This is bullshit. You're not doing anything at all. Stop blocking the stairs. Get out of my way.

DANY Voluntary Disclosure Form.

The officers detained him, searched him and found the Home Depot folding knife in his pocket, just below his wallet. They seized the folding knife and arrested him. After his arrest, DANY indicted Mr. Gonzalez for felony gravity knife possession.

At his suppression hearing, officers testified that Gonzalez's disorderly behavior justified stopping him. The court credited police testimony and ruled that the folding knife was legally seized. Gonzalez communicated his displeasure with the court's ruling:

> 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.

Gonzalez Hearing Tr., 9, March 1, 2012.

At trial, the arresting officer demonstrated that he was able to open the folding knife with the flick of a wrist. He conceded that he had practiced opening folding knives in that manner 200 to 300 times prior. *Gonzalez* Trial Tr., 22, April 18, 2012. The jury convicted Gonzalez. The prosecutor argued for the maximum sentence permitted by 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.

Gonzalez Trial Tr., 3, May 24, 2012.

The trial court sentenced Gonzalez to the maximum. He spent four years in prison while his conviction was on appeal. The New York State Court of Appeals ultimately found for Gonzalez on Fourth amendment grounds, suppressing the knife and dismissing the indictment. At oral argument several members of the Court voiced sharp criticism of DANY's gravity knife policy. Judge Pigott posed a hypothetical, comparing what DANY

would do if he were found with a similar knife, purchased at Home Depot and used for work, as opposed to an indigent person with a criminal record who swore at the arresting officer:

> JUDGE PIGOTT: What I'm saying is that if you choose not to exercise that discretion because the guy's swearing at you and you tell the DA he's a bad guy, he's doing a year where I'm walking.

Oral Argument, 27, *People v. Gonzalez*, 25 N.Y.3d 1100 (2015)

Judge Fahey also criticized DANY's decision to prosecute Gonzalez for a felony and demand prison time:

> JUDGE FAHEY: The guy - - - the guy got a knife that Home Depot had sold - - - sold, and he swore at a policeman, and now he's doing three and a half to seven. That's the sequence of events here. And - - - and he had the same bad record when he was going to work that day and he wasn't doing three and a half to seven.

Oral Argument, 28, *People v. Gonzalez*, 25 N.Y.3d 1100 (2015)

DANY did not dispute that Gonzalez had door knobs and handles with him at the time of his arrest. They did not dispute that he purchased his Husky folding knife from Home Depot. Nor did they dispute that he was going to work on the date of his arrest. But precisely because he swore at all the parties to his prosecution—the police, the prosecutor and the judges—DANY used the vague gravity knife statute as a bludgeon to punish him severely. *Papachristou v. City of Jacksonville*, 405 U.S. 156, 170 (1972); *Thornhill v. Alabama*, 310 U.S. 88, 97-98 (1940).

III. NEW YORK STATE COURTS HOLD DEFENDANTS STRICTLY LIABLE FOR SO CALLED "GRAVITY KNIFE" POSSESSION

P.L. § 265.01(1) prohibits possession of per se weapons including, but not limited to, the firearm, switchblade knife, pilum ballistic knife, metal knuckle knife and gravity knife. *See LAS Amicus Video*. Although the original gravity knife operated in an obvious way, just like the other per se weapons in P.L. § 265.01(1), common folding knives are not designed to open with centrifugal force, much less drop open. *See LAS Amicus Video*. People who possess common folding knives have no reason to know that their knives may open with the trained flick of a wrist. Moreover, unlike the other items listed in P.L. § 265.01(1), common folding knives are not obviously weapons. A person cannot cut dry wall with a pilum ballistic knife nor use a firearm to splice electrical wire. *See LAS Amicus Video*. Nevertheless, New York State courts permit the absurd: defendants are held strictly liable for the athletic prowess of the officer they encounter, even when that officer attempts to flick open a common folding knife that was never designed to be used as a weapon. DANY's prosecution of Jesus Rodriguez reveals that absurdity.

Jesus Rodriguez

On August 24, 2011 a police officer stopped Jesus Rodriguez in the 1st floor stairwell of a public housing complex during a routine patrol. *Rodriguez* Trial Tr. 21. The officer searched him and found a black carabiner key chain with two miniature screwdrivers, a bottle opener and a fold-out knife. *Rodriguez* Trial Tr. 35. Rodriguez's brother had purchased the key chain at a hardware store in Manhattan. *Rodriguez* Trial Tr. 121.

Rodriguez's Carabiner Keychain Knife

Open Carabiner Keychain Knife

Rodriguez had felony drug and forged instrument convictions, but DANY initially charged him with misdemeanor gravity knife possession. Later, when faced with a speedy trial problem, DANY extended its speedy trial clock by charging Mr. Rodriguez with a felony.[10]

At trial the arresting officer demonstrated the so called "wrist-flick test" in front of the jury. He attempted to open the knife on the side of the key chain by flicking his wrist four to five times, failing to open it twice. *Rodriguez* Trial Tr. 60.

During deliberations the jury repeatedly asked whether the police were required to prove that the defendant knew that the knife met the statutory definition of a gravity knife or simply that it did so operate when opened by a skilled officer. The court followed prevailing New York law and told them that there was no requirement that they find

[10] Under New York Criminal Procedure Law (C.P.L.) § 30.30 prosecutors must answer ready for trial within 90 days of commencement of a criminal action where the defendant is charged with a Class A misdemeanor. Prosecutors must answer ready for trial within 6 months where the defendant is charged with a felony. For the small number of penal law statutes that can be prosecuted as either misdemeanors or felonies, such as the gravity knife statute, there is an obvious danger that prosecutors will abuse their discretion by upgrading charges in an effort to avoid dismissal.

Rodriguez knew that the knife operated as a gravity knife. *Rodriguez* Trial Tr. 192. The jury convicted Rodriguez an hour later.

The trial court imposed the minimum sentence of two to four years in state prison. At sentencing, the trial court commented that he "c[ould]n't find anything to be particularly proud of" in the People's handling of the case and concluded "I regard this case as largely unfortunate." *Rodriguez* Sentencing Tr. 9, 10. The Appellate Division ultimately dismissed Mr. Rodriguez's conviction on speedy trial grounds, but only after he had spent two years in state prison. *People v. Rodriguez*, 135 A.D.3d 587 (1st Dept. 2016).

The jury's struggle in *Rodriguez* is common. In gravity knife cases that go to trial, juries frequently ask courts for instruction as to whether they must convict when a prosecutor has not established that a defendant knew all the facts that made his conduct unlawful. *People v. Neal*, 79 A.D.3d 523, 524 (1st Dept. 2010), lv denied 16 N.Y.3d 799 (2011) (jury requested whether prosecution must prove that defendant knew his knife could by force of gravity or centrifugal force); *People v. Gonzalez*, 25 N.Y.3d 1100 (2015) (same); *People v. Parrilla*, 2016 N.Y. Slip Op 03417 (decided May 3, 2016) (same). But the primary fact in *Rodriguez*, that he possessed a carabiner keychain with a fold-out knife, sets the statute's mens rea problem in stark relief. *Rodriguez* had no reason to know that his carabiner key chain could be considered a weapon, much less that a police officer could open it with the flick of a wrist, particularly because the trained

officer was only able to do so 50%-60% of the time. Nevertheless DANY barreled forward with a felony prosecution and secured a mandatory state prison sentence.

IV. DANY DISCRIMINATES AGAINST INDIGENT DEFENDANTS

In June of 2010 DANY entered into a deferred prosecution agreement with 14 New York City retailers that it accused of selling gravity knives. John Eligon, *14 Stores Accused of Selling Illegal Knives*, N.Y. Times, June 17, 2010. Although those stores were selling common folding knives, understood throughout their industry to be lawful at both state and federal levels, the retailers turned over their knife inventories and paid a total of approximately $1.9 million dollars to defer DANY prosecution. At the same time, DANY asserted that it would commit itself to "monitoring" local retailers, initiating a buy-back program, conducting a community education campaign and targeting out-of-state sales of the knives it deemed unlawful.

For retailers like Carol Walsh at Native Leather, the deferred prosecution agreements were an extraordinary display of prosecutorial intimidation. The retailers were not selling anything that resembled the gravity knives that the Legislature banned in 1958 or commonly understood in the industry to be a gravity knife. They were selling common folding knives that could not be opened by gravity and could only be opened in some cases, by some people, with a trained, skilled flick of the wrist. Nevertheless, the retailers chose to avoid prosecution and paid what DANY demanded.

As unfair as DANY's threat was to retailers, it was even less fair to New Yorkers who were buying the knives for legitimate purposes and not offered the same opportunity

to avoid jail by the payment of money to DANY. One New York State Supreme Court Judge sharply criticized DANY for its discriminatory policy:

> It would be an injustice to allow defendant to be tried for possessing an item that was sold as a tool to contractors and people doing home repairs for years by legitimate retail chains when the chains are getting away unscathed…The Court is troubled by the fact since 2006, over 1.9 million knives have been sold by retailers like Home Depot for construction work and the retailers face no prosecution but the people to whom the knives were sold do. 'When the law lays an unequal hand on those who have committed intrinsically the same quality of offense and (penalizes) one and not the other equal protection has been violated.' (*Skinner v. Oklahoma ex rel Williamson*, 316 U.S. 535, 541 [1942]) This is basically what has occurred here. The sellers are not being prosecuted but the buyers, who have no reason to believe that what they are buying for repair work is an illegal gravity knife are being prosecuted for criminal weapon possession. People going into stores like Home Depot and Loewes (sic) should not have to have an attorney accompany them to warn that the tool they are buying is in reality an illegal gravity knife and if they purchase it, they may be criminally liable. This appears to be an absurd result to this Court.

People v. Castro, IND 4820/09, November 24, 2010.

At oral argument in *People v. Gonzalez*, Judge Rivera questioned whether defendants had reason to believe that knives sold at major retailers were unlawful:

> JUDGE RIVERA: And in this case it's hard to - - - to deal with your argument about the onus when he bought it lawfully, right? He went to Home Depot of all places, right?
>
> MS. CHANDA: Um-hum.
>
> JUDGE RIVERA: I mean it's not something he went underground, went behind the truck, and bought this thing. And he's - - - he uses it publicly when he's at work. Everyone knows he's got this knife.
>
> Oral Argument, 23, *People v. Gonzalez*, 25 N.Y.3d 1100 (2015)

Contrary to DANY's claims that it would enforce a consistent regime throughout the City, today, major retailers continue to sell common folding knives in every borough of New York City, knives that LAS clients are arrested, prosecuted, convicted and sentenced for possessing. DANY pledged to spend $900,000 of the money paid out by retailers to conduct a "knife education campaign" but as of 2015 $807,533.03 remained in that account. Jon Campbell, *Did Authorities Lose More Than 1,300 Confiscated Knives*, Village Voice, May 21, 2015. DANY's promises to target out of state sales, initiate a knife buy-back program, and educate innocent construction workers, stagehands and others that common folding knives purchased legally could be considered illegal weapons, have had little impact on the presence of common folding knives throughout NYC. Id. Amicus counsel photographed the folding knives pictured below at major retailers throughout New York City, knives just like those that DANY jails poor New Yorkers for.[11] Whether *some* police officer can open the following knives with the flick of a wrist is impossible for an innocent buyer to know:

Paragon Sports 867 Broadway N.Y., N.Y.

[11] Amicus counsel photographed the pictured knives at local retailers from August 2015 through April 2016.

Eastern Mountain Sports 530 Broadway N.Y., N.Y.

Sports Authority 5130 Northern Blvd. Queens, N.Y.

Lowes Home Improvement Brooklyn 118 2nd Ave Brooklyn, N.Y.

Sports Authority 171 W. 230th St. Bronx, N.Y.

Home Depot 7605 Tonnelle Ave North Bergen N.J.

Retailers are not the villain in this absurd story. DANY is. Retailers cannot be expected to anticipate the athletic prowess of police officers any more than construction workers and stagehands who carry their knives to work. Nor should retailers anticipate how their knives may wear and loosen over time, becoming much easier for some police officers to flick them open. Nevertheless the presence of knives in New York City creates an outrageous trap: unwitting buyers expect that the knives they purchase at Sports Authority are legal, not a per se weapon that can land them in court and prison.

Victor

Victor's case reveals just how discriminatory DANY policy is. Victor was living in Texas in 2014, but moved back to New York City to care for his sister because her cancer had spread and metastasized on her brain. Although Victor had a felony record in his past, he was doing well in Texas. When he learned of his sister's deteriorating health, he returned to NYC to care for her.

Victor worked at a demolition company owned by his brother-in-law in New York. Shortly after Victor started, a co-worker gave him a Gerber folding knife so that he could break down dry-wall, cut drapes and remove carpet. On April 3, 2015, police stopped Victor at Ft. Tryon park for smoking marijuana. They had him empty his pockets which held his keys, wallet, phone and the Gerber knife that his co-worker had given him. It was only after the police began to opening the knife by attempting to flick it open that Victor understood there was something problematic about it. The police arrested him and then DANY indicted Victor on May 19, 2015. It recommended that the Court sentence Victor to two years to four years in state prison on a plea to P.L. § 265.02(1).[12]

Victor's defense attorney moved to dismiss the indictment in the interest of justice, a motion that courts may only grant in the rarest of cases "that cr(y) out for fundamental justice beyond the confines of conventional considerations of legal or factual merits of the charge or even the guilt or innocence of the defendant." *People v. Belge*, 41 N.Y.2d 60, 62-63 (1976); *People v. Clayton*, 41 A.D.2d 204 (2nd Dept. 1973).

[12] Under New York Law, a defendant is not permitted to plead guilty to anything except the full indictment without the prosecutor's consent. If a defendant does plead guilty to the indictment, the court has the discretion to impose any lawful sentence. C.P.L § 220.10(2)-(4). As noted above, where the defendant has a predicate felony conviction, the mandatory minimum sentence for P.L. § 265.02(1) is 2 to 4 years in prison.

The defense attorney provided the court and DANY with his sister's medical records, letters from her oncologist, pay stubs, and submitted video showing Victor performing construction work, interviews with his sister describing Victor's support, and his brother-in-law attesting to Victor's responsible work.[13] It also provided DANY and the court with proof that the same model knife was sold at Paragon Sports:

Victor's Gerber Knife

Gerber Knives Currently Sold at Paragon Sports

Despite the overwhelming mitigating evidence and proof that the same model knife was being openly sold at Paragon, DANY opposed the motion to dismiss:

> While no one was hurt during this specific incident, there is still potential for harm. The defendant had a dangerous, illegal knife in his pocket while smoking marijuana in a public park.

Memo. of Law in Opposition to Defendant's Motion to Dismiss, 10, January 20, 2016

As outrageous as it was for DANY to recommend that Victor receive two to four years in state prison, it was even more outrageous that they did nothing to rid Paragon of

[13] Victor's case remains open in State Supreme Court. Amicus counsel has not provided Victor's full name because his case may be sealed if the motion to dismiss is granted. All documents referenced in this section are on file in State Supreme Court and can be provided to this Court.

the *exact* knives that it deemed "dangerous" and "illegal." As of this filing, those knives continue to be sold at Paragon Sports in the heart of Union Square.

But the story does not end with DANY's cruel prosecution of Victor and other poor New Yorkers like him.

In 2010, DANY affirmatively *authorized* Paragon Sports to sell to the rich, by carving out an exception for high-end custom knives. *See LAS Amicus Video*. When it did so, it authorized the sale of knives that it would have otherwise deemed dangerous, illegal, per se weapons. It did so on the basis that the weapons were expensive, explicitly stating that rich and poor purchasers of knives should be treated differently under the law. The prosecutor overseeing the deferred prosecution agreements explained the Paragon exemption as follows:

> Q. At the end of this paragraph 4A there's a statement, "However, this agreement exempts Paragon's sale of custom knives, defined as individual, one of a kind handcrafted knives, separately marketed and sold to collectors."
>
> A. I see that.
>
> Q. And why was this provision included?
>
> A. It was a negotiated provision in order to reach an agreement. Paragon uniquely based on our investigation – or almost uniquely – had an inventory and displayed as merchandise very high end kind of one of a kind knives for – for collectors, real high end stuff. And it was negotiated that the agreement would not – that those knives if they did constitute a prohibited knife would be excluded from the DPA. Both as an incentive to enter into the agreement, but also to reflect that we were just not seeing a thousand, or $2,000 or $5,000 knives being plunged into people's temples and cutting people up. And so that the risk comparatively of those knives was less than other knives.

Rather Read In, Exhibit A-C.

The Paragon exemption would be unthinkable in any other context. DANY could not fairly authorize a drug kingpin to sell the purest cocaine while committing a drug user to prison. It could not ethically give its blessing to the sale of a gold-plated machine gun to a collector, while demanding that a hunter receive a prison sentence for the same gun made of cheap steel. But with folding knives the hypocrisy is deliberate policy. Common folding knives that DANY characterizes as dangerous and illegal continue to be sold throughout New York City. DANY authorizes their sale when they are high-end and it inflicts unsparing cruelty on poor New Yorkers who use the knives for work.

V: DANY PROSECUTION POLICY RENDERS PENAL LAW §§ 265.01 (1) AND 265.02 (1) VOID FOR VAGUENESS

Due process requires that laws provide fair notice to all persons and explicit standards of enforcement. *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972). Vague laws invite arbitrary enforcement, eliminate ascertainable standards of guilt and force women and men "of common intelligence [to] necessarily guess at [their] meaning and differ as to [their] application." *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). DANY's prosecution policy renders the gravity knife statute void for vagueness because it leaves New Yorkers speculating as to what the law commands and eliminates standards to cabin enforcement. *See Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939).

A person cannot steer between lawful and unlawful conduct under DANY policy because they have no reason to believe the folding knife that they purchased in the Tool World section of Lowes to cut drywall is a banned weapon. *See Grayned v. City of Rockford*, 408 U.S. at 108; *LAS Amicus Video*. And they should not anticipate that their folding knife is unlawful when they open it with two hands, yet some officer may be able to force it open with one. *See Grayned v. City of Rockford*, 408 U.S. at 108; *LAS Amicus Video*. Nor does DANY's gravity knife policy have objective standards of enforcement: it subjects a person's liberty to the dexterity of a police officer's wrist. A person faces prison if they encounter a skilled police officer, but cannot be arrested if they are stopped by an unskilled officer.

Judge Pigott exposed the absurdity of the wrist-flick test in *Gonzalez*:

> JUDGE PIGOTT: So I get stopped and - - - and - - - and the officer says ah, you've got a knife. You - - - you just committed criminal possession of a weapon in the fourth. No, I didn't. I said this - - - I use this to cut drywall, and he says watch. (wrist-flick motion) And I have never seen that in my life. I couldn't do it myself. He says too bad. Put your hands behind your back. You're going downtown. (emphasis added)
>
> Oral Argument, 20, *People v. Gonzalez*, 25 N.Y.3d 1100 (2015)

The wrist-flick test gives DANY an intolerable level of discretion in every case. *See City of Chicago v. Morales*, 527 U.S. 41, 44 (1999). The stories of indigent defendants in this brief demonstrate the harms associated with such discretion, discretion that so undermines principles of fairness that "even-handed administration of the law is not possible." *Papachristou v. City of Jacksonville*, 405 U.S. at 171.

The cases of Walt and Richard Gonzalez expose just how uneven DANY's gravity

knife prosecutions are. The two defendants committed virtually identical acts. They possessed folding knives for work. Walt purchased his online; Gonzalez at Home Depot. Walt used his knife to splice wire and cut boxes as an electrician. Gonzalez used his to cut sheetrock and bags of cement as a handyman. There was no evidence that either knew his knife could open with the flick of a trained officer's wrist, much less notice that criminal liability turned on such a subjective standard. Walt had never been arrested. Gonzalez had an extensive criminal history. Walt cooperated with police when he was arrested. Gonzalez swore at every agent of the state that he encountered. DANY dismissed Walt's case. It asked for, and secured, three and one half to seven years in prison for Gonzalez.

Gonzalez's criminal record did not justify such a savagely unequal outcome. Just as Richard Gonzalez was working to "form the enduring attachments of normal life" after his release from prison 5 years prior, the state had an obligation to not use his status as a basis to subject him to perpetual criminal sanctioning when he had violated no precise code. *See Morrissey v. Brewer*, 408 U.S. 471, 482 (1972). Nor did his in-court outbursts justify such severity. As vulgar as they were, his expletives were the howls of a powerless accused gasping from the blows of a merciless prosecutorial bludgeon. And they contained a crude, but simple truth that eludes DANY in so many of its gravity knife prosecutions:

"People fucking work and you cannot see that[.]"

Gonzalez Hearing Tr., 9, March 1, 2012.

CONCLUSION

In *Papachristou v. City of Jacksonville*, the Supreme Court said that: "[t]he rule of law, evenly applied to minorities as well as majorities, to the poor as well as the rich, is the great mucilage that holds society together." 405 U.S. at 171. DANY gravity knife policy destroys the rule of law and replaces it with the flick of a police officer's wrist. The wrist-flick test gives rise to a litany of harms suffered by thousands of indigent defendants, grave harms that the New York State Legislature never intended and the United States Constitution does not permit. Amicus asks this Court to end those harms, as the plaintiffs argue, and find that the statute as DANY currently enforces it, is unconstitutionally vague.

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