

## Cracco Practice Advisory

On Wednesday SDNY Judge Crotty ruled that NY's gravity knife statute is unconstitutionally vague as applied to Joseph Cracco, a person who sought to possess a folding knife with a locking blade that was not capable of being opened with the flick of a wrist after "the first or second attempt." Judge Crotty's decision did not strike the gravity knife law itself, but for people like Mr. Cracco, he found that the law is too vague as applied to his future intended use of a knife that doesn't open with one or two attempts. The decision provides powerful persuasive authority that the law does not apply to folding knives incapable of opening after multiple attempts. Please click on the video links below to understand Crotty's distinction between when knives violate the gravity knife law and when they do not.

### Legislative History

In 1958 New York State Legislature enacted Penal Law § 265.00(5), criminalizing possession of "any knife which has a blade which is released from the handle or sheath thereof by the force of gravity or the application of centrifugal force which, when released, is locked in place by means of a button, spring, lever or other device." Penal Law § 265.00(5). At the time of the original ban, the Legislature sought to prohibit a WWII era German weapon that opened effortlessly by either force of gravity or centrifugal force.

The original gravity knife can be seen opening by force of gravity here: <https://vimeo.com/305117662>

The original gravity knife can be seen opening by centrifugal force here: <https://vimeo.com/305117672>

The Legislature's intended interpretation of P.L. § 265.00(5) did not pose notice problems because the WWII era weapon was easy to identify and effortless to use. No person in possession of the original weapon could reasonably claim they did not know how it worked or whether it qualified as a prohibited gravity knife because its operation was so obvious. The original knife worked the same way for every person, every time it was opened, regardless of strength, skill or effort.

The intended interpretation did not create enforcement problems either. After New York banned the gravity knife in 1958, the federal government banned the weapon as well, leading to its virtual extinction. 15 U.S.C.A. §§ 1241, 1242; Jon Campbell, *How a 50s Era New York Knife Law Has Landed Thousands In Jail*, Village Voice, Oct. 7, 2014. As

the original gravity knife disappeared from the market, most prosecutors in New York State stopped bringing gravity knife prosecutions under the statute.

### Recent Vagueness Challenges

With the rise of CompStat and quota-based policing, NYPD began arresting individuals for gravity knife possession whenever that person possessed a folding knife that could be opened with one, several, or sometimes many flicks of the wrist. Applying the wrist-flick test to folding knives transformed what was a clear standard for criminal liability into an amorphous one, making it impossible for people of “ordinary intelligence” to “steer between lawful and unlawful conduct.” See *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972).

Watch an officer struggle to flick open our client's folding knife here:

<https://vimeo.com/279715241>

But watch an officer easily flick open our client’s folding knife here:

<https://vimeo.com/327309967>

Defense attorneys and advocacy groups have long attacked the wrist-flick test as an absurd standard for criminal liability—regardless of how many flicks a person must attempt—because a person can never really know whether their folding knife is unlawful under the test. In 2010 the 2nd Amendment group Knife Rights brought *Copeland v. Vance*, a void for vagueness challenge to NYPD and DANY’s enforcement of the gravity knife statute. The *Copeland* plaintiffs asked SDNY Judge Forrest to declare that the wrist-flick test rendered the gravity knife statute void for vagueness as applied to common folding knives with locking blades. They argued that the wrist-flick test created a subjective, variable standard for criminal liability, making it impossible for people of ordinary intelligence to follow. Judge Forrest rejected the plaintiffs’ arguments and her decision was affirmed by the 2nd Circuit last year. *Copeland v. Vance*, 893 F.3d 101 (2nd Circ. 2018). The 2nd Circuit upheld NYPD’s use of the wrist-flick test, concluded that the statute was not invalid in all of its applications, but noted that it may be subject to as-applied challenges that sought more narrow relief. Judge Katzmann said:

*We are aware of no state court decision that has imposed a limiting construction on the gravity knife law of the sort imposed in Powell. That is to say, no state court has held that, for example, a knife is a gravity knife only if a person of average skill or practice can open it. And the state courts have held that a knife can be a gravity knife even if it does not always respond positively to the wrist-flick test. See Cabrera, 22 N.Y.S.3d at 420 (“The fact that the officer needed to make several attempts before the knife opened did not undermine a finding of operability.”); Smith, 765 N.Y.S.2d 777 (similar).*

*Given this statutory framework, we think that there are circumstances in which an as-applied challenge to a gravity knife conviction might succeed. For example, a gravity knife conviction might be constitutionally infirm if the knife could be flicked open to a locked position only with great difficulty or by a person with highly unusual abilities. A knife that responds inconsistently to the wrist-flick test might also provide grounds to challenge the law on an as-applied basis. To take an extreme case, an ordinary person would lack “sufficient notice ... or the opportunity to understand” that the gravity knife law bans a knife that can only be successfully flicked open once in twenty attempts. Dickerson, 604 F.3d at 746.*

In *Cracco*, Judge Crotty seized on this language in *Copeland*. *Cracco* was arrested for possessing a folding knife that he claimed an officer could only open after 4-5 attempts. He resolved his case with a discon, but he sought to continue to carry his knife for work purposes as a sous chef. He asked Judge Crotty to rule that the gravity knife statute did not apply in his case where a folding knife with a locking blade failed to open after "one or two attempts." Although it's enticing to read *Cracco* broadly, Judge Crotty held that “under such circumstances, and within the lens of *Cracco*’s past prosecution and intended future conduct, the gravity knife statute is unconstitutionally vague.” Judge Crotty could not strike down the law in its entirety because he was bound by *Copeland*.

### Practice Tips

After *Cracco* the original gravity knife remains unlawful: <https://vimeo.com/305117662> and in any case where an officer can force a knife open after one or two attempts, the knife remains unlawful: <https://vimeo.com/327309967> But in any case where a folding knife does not open after one or two attempts, we should argue that the knife does not qualify as an illegal under *Cracco*: <https://vimeo.com/279715241>

In all pending and future gravity knife cases attorneys should inspect their client’s knife, preferably with a witness. During the inspection attorneys should ask the arresting officer or assigned prosecutor to attempt to flick the knife open. Consider videotaping the attempts. **If an officer or ADA is unable to open a knife after two attempts, we should argue that *Cracco* applies and that the case must be dismissed.** We should rely on Judge Crotty’s decision in bail apps, *Clayton* motions, motions to dismiss for as-applied vagueness and we should preserve facial void for vagueness arguments for appellate review.

### Ongoing Legal Battles

*Cracco* leaves many important questions unanswered. Whose flicks count—a police officer’s, our client’s or a person’s of average strength? When do the flicks count—at the time of the stop, the time of purchase, or at the time of trial? What if one person

cannot open a folding knife, as an officer could not here: <https://vimeo.com/316864880> but another person could open the same knife as a prosecutor could here: <https://vimeo.com/316864123.4>? What if a person can open a knife after two attempts as here: <https://vimeo.com/279715177> but seconds later cannot open the knife after many more attempts: <https://vimeo.com/279715241>?

The plaintiffs in *Copeland* have filed a cert petition in the Supreme Court: <https://bit.ly/2U3b4S0>. We filed an amicus in support of their petition earlier this year: <https://bit.ly/2U66G4G>. It's unlikely that the Supreme Court will grant cert, but if it does, it should take up the questions that *Cracco* leaves unanswered.

The Center for Appellate Litigation has also requested that the New York Court of Appeals grant leave in *People v. Lonnie Knight*. Knight was convicted of felony gravity knife possession for possessing a folding knife that he bought at a store in Harlem. He never threatened anyone with the knife, used it for work and claimed to also use it for protection. The arresting officer was not able to force the folding knife open each time that he tried. Judge Mandelbaum sentenced him to 3-6 years in prison. *Knight* is challenging his conviction on void for vagueness and 2nd amendment grounds. We filed an amicus with the 1st Dept. and will file if the COA grants leave.

### Legislative Change

The Legislature may also intervene. They have twice voted to repeal the gravity knife statute, as state courts have interpreted it. In 2017, the Legislature passed reform by margins of 131-1 in the Assembly and 61-1 in the Senate: <https://bit.ly/2YB5d4H>. But Governor Cuomo sided with NYPD and DA Vance and vetoed. This year Assemblyman Dan Quart has introduced legislation that strikes the term "gravity knife" from the penal law entirely: <https://bit.ly/2WycT6g>. The Legislature will likely vote on the bill in April. If passed, Governor Cuomo maybe more inclined to sign the bill into law because Democrats control the Senate and pose a greater override threat than in past years.

This is all to say that *Cracco* is an excellent decision, but we all still have a lot more litigating to do. *Cracco* finally acknowledges what we all have argued for years, that the gravity knife statute "presents a high risk of arbitrary and discriminatory enforcement" and "provides police and prosecutors 'virtually unlimited' or 'unfettered' discretion" to ensnare our clients, particularly those clients with previous criminal convictions.