To be submitted by

David Billingsley

New York Supreme Court

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Appellate Term — First Judicial Department

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

A.D. No. [AD-NO]

New York Ind. No.

**The People of the State of New York,**

*Respondent,*

*-against-*

J. E,

*Defendant-Appellant.*

**Brief for** **Defendant-Appellant**

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*Of Counsel*

[TERM] 2023

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# PRELIMINARY STATEMENT

This is an appeal from a judgment rendered on April 23, 2018, by Supreme Court, New York County. J. E was convicted after plea of one count of operating a motor vehicle while intoxicated, Vehicle and Traffic Law § 1192(3). Mr. E received a $500 fine and was ordered to complete a Stop DWI program, install an Ignition Interlock Device for 1 year, and attend a Victim Impact Panel program, and his driver's license was revoked for 1 year.

Justice Steven Statsinger presided over the suppression hearing, plea and sentencing. Timely notice of appeal was filed. No stay of execution has been sought.

# QUESTIONS PRESENTED

# INTRODUCTION

# STATEMENT OF FACTS

#### Introduction.

On March 28, 2017, Mr. E was charged with one count of operating a motor vehicle while intoxicated, VTL § 1192(3), and one count of operating a motor vehicle while impaired by alcohol, VTL § 1192(1). *See* Misdemeanor Complaint, N.Y. Cty. Docket No. .[[1]](#footnote-1)

#### Hearing.

Prior to trial, Mr. E moved in *Huntley*/*Dunaway/Mapp* hearing to preclude certain statements made to the police during the course of his arrest and an *in limine* hearing to preclude the results of a portable breath test conducted at Bellevue Hospital from being admitted into evidence.[[2]](#footnote-2)

##### Officers Corbett and Murphy arrest Mr. E for menacing and take him to the hospital.

On January 6, 2017, at 3:24 a.m., Officer Sean Corbett of the New York City Police Department (NYPD) received a radio transmission about a dispute involving a knife at East 11th Street and Third Avenue. H. []. Officer Corbett arrived on the scene a few minutes later, around 3:27 a.m., and was given a description of a gray four-door Chrysler 300 with one headlight out, snow on the vehicle, and a potentially intoxicated driver who had left the scene quickly. H. [].

Officer Murphy and Officer Lava located and pulled over the vehicle, which was driven by Mr. E. H. []. After instructing Mr. E to put the car in park, turn it off, and stick his hands out of the driver’s side window. H. []. In complying with this command, Mr. E leaned far enough out of the window that one officer was able to see a knife underneath Mr. E in the driver’s seat. H. []. Mr. E was then asked to step out of the car. H. []. Upon exiting the vehicle, Mr. E was placed under arrest for menacing and handcuffed. H. [].

According to Officer Murphy, Mr. E displayed “erratic” and “emotional” behavior, crying, appearing upset, and “expressing remorse.” H. []. He continued to do so upon arrival at the precinct during the arrest process, to the point that he appeared “hysterical” and “unstable.” H. []. During the arrest, according to the Voluntary Disclosure Form (VDF) another officer, Officer Taina Rivera-Giantasio heard Mr. E to say, “I don’t want to be arrested. I just want to work…I have to work hard for my family,” and “I’ve been arrested before for DWI. I just want to go home.” VDF at 1,3.

Notably, at no point during the arrest process did Officers Corbett or Murphy testify that they smelled alcohol, heard Mr. E slurring his words, or make the decision to administer field sobriety tests. H. []. Officer Murphy was specific in his testimony that he did not smell alcohol or observe Mr. E’s to have the bloodshot watery eyes that are typical of alcohol intoxication, even though he was in close physical contact with him as part of the arrest process. H. 48-49. Instead, it was only at the precinct that an NYPD sergeant ordered to officers to take Mr. E to the hospital “for an evaluation” not because he was intoxicated but because “it seemed like there might be something either emotionally or physically wrong with him.” H. []. Officer Murphy testified specifically that upon arrival to the hospital, Mr. E was under arrest not for driving while intoxicated but for “menacing and the possession of the knife.” H. 50.

##### At the hospital, Mr. E vomits and is asked by Officer Murphy without Miranda warnings what he has taken to make him vomit.

At around 4:15 a.m., when Mr. E arrived at the hospital with Officer Murphy, he continued to display erratic and emotional behavior. H. []. Officer Murphy testified that Mr. E apologized repeatedly and vomited twice in front of the officers, including Officer Rivera-Giantasio who testified that she had recently arrived from the precinct after the completion of paperwork relating to the arrest. H. []. After the first instance of vomiting, Officer Murphy asked Mr. E “if he had taken anything that could potentially make him vomit.” No officer had read Mr. E any *Miranda* warnings prior to this question.

In response to this question, Mr. E admitted to consuming alcohol before his arrest. H. []. Mr. E told Officer Murphy that after work, he had purchased a bottle of Hennessy to drink before having a few beers and shots with his friends at a bar. H. []. Finally, he ended up at another bar on 11th Street between Third and Fourth Avenue, where he had several more drinks before his encounter with the police. H. []. Only after this statement to Officer Murphy, at approximately 4:30 AM (“4:30 Statement”) was the decision made to give Mr. E a breath test.

##### A portable breath test is administered to Mr. E at 6:32 AM at the hospital after Mr. E had vomited, resulting in 0.218 BAC reading.

Officer Ronny Valdez testified arrived at Bellevue Hospital around 5:40 a.m. to administer a Portable Breath Test (PBT) on Mr. E. Before administering the test, Officer Valdez observed Mr. E for a 20-minute observation period to ensure he did not burp, vomit, or ingest anything, as mandated by state regulation, so that the alcohol detection would not be skewed or artificially inflated by the contents of Mr. E’s mouth. H. []. During this observation period, Officer Valdez testified that he did not witness Mr. E Mr. E vomit. H. []. However, Officer Valdez also admitted that he did not examine the contents of Mr. E's mouth, nor did he give Mr. E the opportunity to brush his teeth or use mouthwash during this time. H. []. After receiving consent to perform the test, at 6:32 AM, Officer Valdez administered the PBT, which reported a blood alcohol content of 0.218 % BAC. [Chemical Test Analysis and Draeger printout].

##### Officer Rivera-Giantasio reads Mr. E *Miranda* warnings and interrogates Mr. E further.

Immediately following the PBT Officer Rivera-Giantasio read Mr. E his Miranda rights. At this time, Officer Rivera-Giantasio claimed that Mr. E was unresponsive, slumped over in his chair, and smelled of alcohol. H. [] (go back and make sure this is correct). She stated that when speaking to Mr. E, both before and after reading Mr. E his rights, she frequently raised her voice and repeated her questions in order to elicit responses. Mr. E eventually responded that he was willing to answer questions, after which Officer Rivera-Giantasio interrogated Mr. E about what he had been doing prior to his arrest. She asked Mr. E if he had been drinking, to which Mr. E responded that he had drunk alcohol from about 8PM to 10PM earlier that evening. (“6:37 AM Statement”). H. []; VDF at 2; Intoxicated Driver Examination at 3.

Later, at about 11:30 AM, Officer Rivera-Giantasio brought Mr. E back to the precinct where she continued with interrogation and allowed him to eat some food, eliciting another statement from Mr. E (“11:30 AM Statement”). Mr. E admitted again to drinking alcohol prior to his arrest part of the 11:30 AM Statement, saying “I was drinking Hennessey.” VDF at 3. An inventory search later revealed a bottle of Hennessey in a cooler in the trunk of Mr. E’s car. H. [].

##### Neither Mr. E’s post-*Miranda* statements nor the results of the PBT are suppressed.

The prosecution sought to admit Mr. E’s 6:37 AM Statement to Officer Rivera-Giantasio, as well as the portion of his 11:30 Statement “I was drinking Hennessey.” While the prosecution argued that Mr. E had made a voluntary waiver of *Miranda* rights as to the 6:37 AM statement, it argued that Mr. E’s 11:30 AM statement should be admitted under a traditional voluntariness theory. The trial court agreed, holding that the 6:37 AM Statement was not tainted by the initial un-Mirandized statement at 4:30, and that 11:30 “I was drinking Hennessey” statement made at the precinct was voluntary.

The court also refused to preclude the results of the PBT. Defense counsel had argued that police did not have appropriate consent from Mr. E to conduct the test[[3]](#footnote-3), and that the test was insufficiently reliable, both because portable breath tests are not reliable in general, and because under the circumstances of the test, Mr. E’s result could not be trusted. H []. The court held that Mr. E had made expressly and voluntarily consented to the PBT, and that its results were presumed to be reliable because “It is on the list of [New York State Department of Health] approved devices [found in] NY-CRR 59.4” for conducting evidential breath tests; and because the device was properly administered in working order according to calibration documentation. H. 75-76. The court also held that the “equities weigh admitting the portable test results” because there was a need to preserve evidence by measuring blood alcohol content within a reasonable time after the person has been driving. H. 75-77. The court did not make mention of the fact that Mr. E had vomited recently prior to the test.

#### Mr. E pleads guilty.

Following the hearing decision, Mr. E pled guilty to one count of driving while intoxicated, VTL § 1192(3). He was sentenced to a conditional discharge, ordered to pay a $500 fine and ordered to complete a Stop DWI program, install an Ignition Interlock Device for 1 year, and attend a Victim Impact Panel program. His driver’s license was revoked for 1 year.

Citations to “H.” refer to hearing proceedings held on April 20 and April 23, 2013. Citations “VD.” refer to voir dire proceedings held on [VOIRDIRE-DATE]. Citations “P.” refer to plea proceedings held on April 23, 2018. Citations to “S.” refer to the sentencing on April 23, 2018.

Place Holder for footnote.[[4]](#footnote-4)

# ARGUMENT

## POINT I

### THE HEARING COURT SHOULD HAVE SUPPRESSED ALL OF MR. E’S STATEMENTS AND THE RESULTS OF THE PRELIMINARY BREATH TEST AS PART OF A SINGLE, CONTINUOUS, INVOLUNTARY TRANSCATION FLOWING FROM HIS INITIAL UN-MIRANDIZED STATEMENT.

Mr. E’s initial un-Mirandized statement, wherein he admitted to having consumed alcohol, directly led to the administration of the preliminary breath test (PBT) at Bellevue Hospital, which in turn led to further interrogation when Mr. E later returned to the precinct. Consequently, the PNT and subsequent statements obtained during this process were tainted by the initial involuntary statement and the hearing court should have been suppressed as a part of a single, continuous involuntary transaction. Without these statements or the PBT results, there was insufficient evidence to sustain Mr. E’s conviction at trial. Therefore, Mr. E’s conviction for driving operating a motor vehicle while intoxicated, VTL § 1192(2) should be reversed and dismissed.

#### Mr. E’s made involuntary, un-Mirandized statements incriminating statements at the precinct prior to being taken to the hospital.

Statements resulting from custodial interrogation made without *Miranda* warnings are presumptively involuntary and are inadmissible as a violation of a defendant’s right against self-incrimination. U.S. Const., Amend V; N.Y. Const., Art. I, § 6; *Miranda v. Arizona*, 384 U.S. 436, [] (1966); *People v. Paulman*, 5 N.Y.3d 122, 129 (2005) (custodial interrogation triggers *Miranda* requirements); *People v. Chase*, 85 N.Y.2d 493, 499 (1995) (“An involuntary statement includes one that has been … obtained by the failure to give Miranda warnings.”). Interrogation includes any express questioning by law enforcement. *Paulman*, 5 N.Y.3d at 129. Interrogation is “custodial” when a reasonable person innocent of any wrongdoing would have believed that he or she was not free to leave. *Id.*

Clearly, Mr. E was subjected to custodial interrogation when, after he vomited at the hospital, police officers asked him “if he had taken anything that could potentially make him vomit.” As an express question, this constituted interrogation. It was custodial because, at that point, Mr. E had been arrested, handcuffed, and transported to the precinct and placed in a holding cell (?). By the time Mr. E reached the hospital, accompanied by several officers, any reasonable person in his position would understand that he was being detained following his arrest and was not free to leave. *See, e.g.,* *People v. Perry*, 97 A.D.3d 447, 448 (1st Dep’t 2012) (“As defendant was handcuffed and surrounded by police at the time he gave the incriminating statement at the apartment, he was obviously in custody for *Miranda* purposes.”); *People v. Torres*, 172 A.D.3d 758 (2d Dep’t 2019) (defendant handcuffed in police car constituted custody); *People v. Nehma*, 101 A.D.3d 1170, 1171–72 (3d Dep’t 2012) (interrogation following removal of handcuffs while defendant was still detained was custodial); *U.S. v. Newton*, 369 F.3d 659, 676 (2d Cir. 2004) (“a reasonable person finding himself placed in handcuffs by the police would ordinarily conclude that his detention would not necessarily be temporary or brief and that his movements were now totally under the control of the police”). Perhaps recognizing that these statements would clearly be inadmissible, the prosecution did not seek to admit his un-Mirandized statements.

The prosecution sought to admit only the statements made by Mr. E following his *Miranda* waiver. However, even if a statement is later made after *Miranda* waiver, it can still be involuntary and inadmissible if it results from “a single continuous chain of events” beginning with the involuntary statement. *People v. Chapple*, 38 N.Y.2d 112, 114 (1975). *Paulman* has set forth the factors to consider in determining whether a subsequent admission is admissible despite a prior Miranda violation: the time differential between the Miranda violation and the subsequent admission; whether the same police personnel were involved in eliciting each statement; whether there was a change in the location or nature of the interrogation; the circumstances surrounding the Miranda violation, such as the extent of the improper questioning; and whether, prior to the Miranda violation, the defendant had indicated a willingness to speak to the police. 5 N.Y.3d at [].No one factor is determinative, and each case must be viewed on its unique facts. *Id.* The purpose of the inquiry is to determine whether there was a sufficiently ‘definite, pronounced break in the interrogation’ to dissipate the taint from the Miranda violation. *Id.* There must be “such a definite, pronounced break in the interrogation that the defendant may be said to have returned, in effect, to the status of one who is not under the influence of questioning.” *Chapple*, 38 N.Y.2d at 114-15. ;Here, there was no such break for any of the statements following Mr. E’s un-Mirandized statements to Officer Murphy.

##### Mr. E’s *Mirandized* statement at the hospital shortly after vomiting.

It is clear that the statements made to Officer Rivera-Giantasio were part of a single continuous transaction beginning with his un-Mirandized statement to Officer Murphy after he had vomited. His second statement was less than hour after the first and given in the same location to an officer who had been present for the un-Mirandized statement. Mr. E was also in the same physical and mental condition as the earlier statement and had not expressed any willingness to give information to the police.

The time differential was only about 30-45 minutes between Officer Murphy’s interrogation to Officer Rivera-Giantasio’s reading of *Miranda* rights and subsequent interrogation. This period of less than an hour is similar to other cases in which there the time differential was insufficient to establish a pronounced break. *See*, *e.g., People v. Perry*, 97 A.D.3d 447, 448 ([] Dep’t 2012) (20-30 minutes after travelling to precinct following arrest). It is also far shorter than several other cases in which no pronounced break has been found. *People v. Guilford*, 21 N.Y.3d 205, 213, (2013) (8-hour break was not sufficient “to attenuate the taint of wrongful interrogation”); *People v. Rodriguez*, 132 A.D.3d 781, 783 (2015) (“Therefore, during the two-hour break, the defendant was never returned to the status of one who was not under the influence of questioning.”). Moreover, where the purpose of the lapse was only that necessary to facilitate further interrogation or evidence gathering, the defendant is not returned to the status of one not under the influence of questioning. *See People v. Buxton*, 44 N.Y.2d 33, 38 (1978) (“the lapse of time was only the period necessary to transport defendant from his employment to police headquarters”); *People v. Jackson*, 41 N.Y.2d 146, 153 (1976), *abrogated on other grounds* *by Horton v. California*, 496 U.S. 128 (suppressing Mirandized statements because there was “no significant hiatus in [the] continuum of confrontation” where *Miranda* waiver was obtained “on the heels of an ongoing interrogation.”); *Perry*, 97 A.D.3d at 448 (purpose of break was only to move to precinct and book defendant, after which interrogation continued); Mr. E’s statement to Officer Rivera-Giantasio at the hospital was thus “close in time and essentially flowed from the un-Mirandized” statement he had made to Officer Murphy. *People v. Hall*, 41 A.D.3d 880, 883 (3d Dep’t 2007) (suppressing Mirandized statements where “[t]here was not a sufficient break to ensure that the *Miranda* warnings protected defendant's rights…”).

While Mr. E gave his two statements to different officers, the hearing testimony indicates that Officer Rivera-Giantasio was present for Mr. E’s statement to Officer Murphy. Both officers testified that they personally observed Mr. E vomit twice, after which Officer Murphy asked Mr. E whether he had taken anything to make him vomit. Her continued presence while she awaited the PBT results, followed by her own interrogation immediately thereafter, constituted a continuation of the circumstances under which Mr. E gave his original un-Mirandized statement. *See, e.g.,* *People v. Kollar*, 305 A.D.2d 295, 299 (1st Dep’t 2003) (suppressing where later Mirandized statement as part of continuous chain of events same detective who was present for initial un-Mirandized statement was present for both); *Perry*, 97 A.D.3d at 448 (same officer involved in eliciting pre- and post-*Miranda* statements); *Hall,* 41 A.D.3d at 883 (noting that “[t]he same two officers were involved with [both interrogations of] defendant”); *People v. Payne*, 41 A.D.3d 512, 513 (2d Dep’t 2007) (suppressing post-Miranda since “there was no definite, pronounced break” where post-Miranda statement was made to detective present for pre-*Miranda* statement); *People v. Moyer*, 292 A.D.2d 793, 794, (4th Dep’t 2002) (suppressing statements as part of a continuous chain of events where “defendant was questioned by an officer who was present during the pre-Miranda questioning”); *People v. Jordan*, 190 A.D.2d 990, 991 (4th Dep’t 1993) (continuous chain of events where an officer “who was aware of defendant’s prior admissions[] conducted the second interrogation”).

Both statements were made at the hospital. Thus, there was no change in location for Mr. E’s second statement, constituting a continuous chain of events. *See* *Jackson*, 41 N.Y.2d 146, 148-150 (multiple interrogations conducted in the same office of the same police precinct); *Hall*, 41 A.D.3d at 883 (noting that “defendant was in the same room” throughout interrogation and booking process); *Payne*, 41 A.D.3d 513 (defendant gave all statements at the same precinct); *Moyer*, 292 A.D.2d 793 at 794 ( “defendant was questioned post-Miranda in the same location as the pre-Miranda questioning…”).

The circumstances of Mr. E’s interrogation also make clear that Mr. E was not in a state necessarily conducive to make a knowing and voluntary waiver of his rights for either statement. Mr. E was brought to the hospital because he appeared to Officers Murphy and Corbett to be in a “physically or mentally” disturbed state. While at the hospital, he vomited twice and Officer Rivera-Giantasio stated that she had to yell at him in the process of questioning. Any questioning of Mr. E during this time was likely to result in involuntarily obtained answers, given Mr. E’s apparent discomfort and disorientation.

Prior to his statements at the hospital, Mr. E had spoken to the police during the course of his arrest for menacing, apologizing for his conduct and saying that he did not wish to be arrested again. *See* VDF at 2-3; H. 38 (Mr. seemed “remorseful” and “[k]ept saying he was sorry.”); H. 50 (Mr. E was under arrest for menacing prior to the point at which he vomited). Though he was “visibly upset”, H. 41, at the hospital, there is no indication that he wished to offer any information to the police. Thus, neither his statements or behavior can be interpreted as willingness to speak with police.

In sum, it is Mr. E clearly had not been returned to status of a person not under the influence of the improper questioning when he made his second statement to Officer Rivera-Giantasio. His second statement at the hospital must be deemed part of one continuous process, and therefore should have been suppressed.

##### Mr. E’s second statement to River-Giantasio was also part of a continuous chain of events.

The only portion of Mr. E’s statement at 11:30 AM [?] at the precinct that the prosecution sought to admit was that he had been drinking Hennessey, under a theory of traditional voluntariness. The prosecution had the burden to prove beyond a reasonable doubt that, under the totality of circumstances, Mr. E’s 11:30 statement was “given as a result of a ‘free and unconstrained choice[.]’” *People v. Thomas*, 22 N.Y.3d 629, 641 (2014), *quoting Culombe v. Connecticut*, 367 U.S. 568, 602 (1961); s*ee* *Dickerson v. U.S*., 530 U.S. 428, 434 (2000) (voluntariness is a totality of the circumstances inquiry); *People v. Anderson*, 42 N.Y.2d 35, 38-41 (1977). The prosecution failed to meet this burden in view of the circumstances of the 11:30 statement.

Courts have found statements to be involuntary where the defendant has not been afforded the opportunity to sleep during a detention spanning many hours, or to contact friends or family. *See* Anderson, 22 N.Y.2d at 39; Guilford, 21 N.Y.3d at 210-14. Since the record does not indicate whether Mr. E was allowed the opportunity to sleep or contact friends or family during his overnight detention, the prosecution did not meet its burden to prove the absence of these factors.

“[T]he time, place and length of interrogation; … the presence or absence of a request for or a warning of the defendant’s right to counsel; and ignorance of the right to remain silent[ are] among the relevant factors to be considered on the question of voluntariness[.]” *People v. Boone*, 22 N.Y.2d 476, 483 (1968); *see also Anderson*, 22 N.Y.2d at 41 (statement involuntary where, *inter alia*, defendant was not advised of his Miranda rights). Though several hours had passed by the 11:30 statement, it was still shorter than the time span in *Guilford*, and Mr. E at that point had been taken from the hospital to the precinct – i.e., returned to a custodial detention setting. This not only continued but arguably escalated the coercive circumstances under which Mr. E made his statements at the hospital. Moreover, by the time the 11:30 statement was made, a reasonable person would have perceived no point in refusing to answer questions, since he had already made incriminating statements and given a breath test resulting in 0.218 BAC. This rendered any previous *Miranda* warnings ineffectual. *See Guilford* (“his options would have seemed so constricted, by what he had already divulged during the earlier portion of the interrogation, as to render the intervening temporal buffer practically irrelevant.”).

In view of the circumstances indicating a continuation of this coercive atmosphere, despite the *Miranda* warnings, Mr. E’s 11:30 statement cannot be considered the result of “free and unconstrained choice.” *Thomas*, 22 N.Y.3d at 641.

#### Conclusion

The initial [TIME] statement immediately after his PBT and *Miranda* warnings was tainted by the initial illegality of his statement to Officer Murphy. The statement at 11:30 at the precinct that Mr. E had been drinking Hennessey was made as part of a continuation of the coercive atmosphere under which the statements at the hospital were made, and the prosecution did not meets it burden to prove that the statement was voluntary. It was error not to suppress both statements. Since Mr. E’s chances at trial would have been severely diminished with the admission of either of the un-suppressed statements, it is clear that his guilty plea ensued from the court’s error, entitling Mr. E to vacatur of his guilty plea. *People v Holtz*, 35 N.Y.3d 55 (2020); *People v. Wells*, 21 N.Y.3d 716 (2013).

# CONCLUSION

Dated: New York, New York  
[MONTH] \_\_\_\_, 2023

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by: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

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| Supreme Court of the State of New York  Appellate Term: First Judicial Department | |
| The People of the State of New York,  Respondent,  — against —  J. E,  Defendant-Appellant. | New York Cty. Dkt. No. |

# ADDENDA

## Statement Pursuant to Rule 5531

1. The indictment number in the court below was .
2. The full names of the original parties were “The People of the State of New York” against “J. E.”
3. This action was commenced in Supreme Court, New York County.
4. This action was commenced by the filing of an indictment.
5. This is an appeal from a judgment rendered on December 16, 2016, by Supreme Court, New York County. J. E was convicted after plea of one count of operating a motor vehicle while intoxicated, Vehicle and Traffic Law § 1192(3). Mr. E received a $500 fine and was ordered to complete a Stop DWI program,install an Ignition Interlock Device for 1 year, and his driver's license was revoked for 1 year. Justice Steven Statsinger presided over the suppression hearing, plea and sentencing.
6. Mr. E has been granted leave to appeal as a poor person on the original record and typewritten briefs.

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| Supreme Court of the State of New York  Appellate Term: First Judicial Department | |
| The People of the State of New York,  Respondent,  — against —  J. E,  Defendant-Appellant. | New York Cty. Dkt. No. |

## Printing Specification Statement

1. The following statement is made in accordance with First Department Rule 600.10.
2. Mr. E’s brief was prepared with Microsoft Word 2010 with Times New Roman typeface 14 point in the body and 12 point in the footnotes.
3. The text of the brief has a word count of [WC], as calculated by the processing system and is [#] pages.

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| Supreme Court of the State of New York  Appellate Term: First Judicial Department | |
| The People of the State of New York,  Respondent,  — against —  J. E,  Defendant-Appellant. | Note of Issue  New York Cty. Dkt. No. |

For the [TERM] 2023 Term

This is an appeal from a SORA judgment rendered on December 16, 2016, by Supreme Court, New York County. J. E was convicted after plea of one count of operating a motor vehicle while intoxicated, Vehicle and Traffic Law § 1192(3). Mr. E received a $500 fine and was ordered to complete a Stop DWI program,install an Ignition Interlock Device for 1 year, and his driver's license was revoked for 1 year. . Justice Steven Statsinger presided over the suppression hearing, plea and sentencing.

Notice of appeal filed: January 12, 2017

Record filed with Appellate Division: ---/--/----

Note of issue filed by attorney for Defendant-Appellant.

Twyla Carter

Attorney for Defendant-Appellant

by: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

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| Supreme Court of the State of New York  Appellate Term: First Judicial Department | |
| The People of the State of New York,  Respondent,  — against —  J. E,  Defendant-Appellant. | Affirmation of Service  New York Cty. Dkt. No. |

David Billingsley, Esq., an attorney duly admitted to practice in the State of New York, hereby affirms the following under penalties of perjury:

1. I am associated with the Office of the Appellate Defender, which has been assigned to represent the defendant-appellant in the above-captioned case.
2. On [MONTH] \_\_\_\_, 2023, I served a Note of Issue and Brief on the attorney for the respondent, the People of the State of New York, at the Office of District Attorney, , by mailing said copies in a depository designated by the United States Postal Service. Respondent has consented to service by mail on the date of filing.

Dated: New York, New York  
 [MONTH] \_\_\_\_, 2023

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

David Billingsley

|  |  |
| --- | --- |
| Supreme Court of the State of New York  Appellate Term: First Judicial Department | |
| The People of the State of New York,  Respondent,  — against —  J. E,  Defendant-Appellant. | Stipulation  New York Dkt. No. |

It is hereby stipulated and agreed, by and between the attorneys for Defendant-Appellant and Respondent, the People of the State of New York, that subject to the approval of the Court, that Defendant-Appellant’s time to file a Brief in the above-captioned case be extended to [TERM] \_\_\_, 2023 for the [TERM] 2023 Term of the Court.

Dated: New York, New York

[MONTH] \_\_\_\_, 2023

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| \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_  Twyla Carter, Esq.  Attorney for Defendant-Appellant The Legal Aid Society 199 Water Street New York, NY 10038 | \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_  Nancy Killian, Esq. Attorney for Respondent District Attorney Bronx County Appeals Bureau 198 E. 161st. Street, 10th Floor Bronx, New York 10451 718.838.7494 |

April 6, 2018

Clerk

Supreme Court of the State of New York

Appellate Division: First Department

27 Madison Avenue

New York, New York 10010

Re: People v. J. E

Ind. No.

Dear Madam:

I am submitting the following documents as part of the record on appeal:

1. [SEPARATE COVER MATERIALS]

These materials were not included with the record on appeal given to my office and are now being provided to this Court and the District Attorney under separate cover as part of the record in this case.

Sincerely,

David Billingsley

Staff Attorney

cc: District Attorney

New York County

[MONTH] \_\_\_\_, 2023

Clerk

Supreme Court of the State of New York

Appellate Division: First Department

27 Madison Avenue

New York, New York 10010

Re: People v. J. E

Ind. No.

Dear Madam:

Please accept this letter as an application for permission, pursuant to New York Rules of Court § 600.10( d)(l )(i), to file an oversized brief in the above-captioned case. The proposed brief, which is currently [65 pages and 15,496 words, is enclosed with this letter. We respectfully request permission to file a brief of approximately that length for the **Error! Reference source not found.** Term of the Court.

**Error! Reference source not found.** was convicted after **Error! Reference source not found.**, of **Error! Reference source not found.**. He was sentenced to **Error! Reference source not found.**.

The proposed brief — in addition to recounting the pertinent events of the factual history, which involves over 500 pages of financial and other commercial exhibits — raises four independent and complex legal issues: an issue involving errors in voir dire; an evidentiary issue of improper use of prior bad acts by the prosecution; a jury instruction issue about a missing witness charge; and a *People v. O’Rama*, 78 N.Y.2d 270 (1991), issue in how a jury note was handled. Each of these legal issues relies on a distinct part of the record below with very little overlap between them.

We have closely edited the proposed brief to be submitted on behalf of **Error! Reference source not found.** to be concise and non-repetitive. Nevertheless, because this case raises significant legal issues and requires a full recitation of the factual history, we will be unable to comply with the 14,000 word limit. We do note, however, that, despite exceeding the word count, the proposed brief is within the page limit set forth by this Court’s Rules. We therefore respectfully request the Court’s permission to file an oversized brief.

Thank you in advance for your consideration of this matter.

Sincerely,

David Billingsley

Staff Attorney

cc: District Attorney

New York County

[MONTH] \_\_\_\_, 2023

Clerk

Supreme Court of the State of New York

Appellate Division: First Department

27 Madison Avenue

New York, New York 10010

Re: People v. J. E

Ind. No.

Dear Madam:

I represent appellant J. E in the above-referenced appeal, which is scheduled for argument during the Court’s [TERM] 2023 Term. By letter dated Error! Reference source not found., I previously requested that the above-captioned case be set for oral argument, and that Appellant be allocated 15 minutes.

I will be unavailable [UNAVAILABLE DATES] and therefore request that the argument in this case be calendared for any other date during the Term.

If the case is adjourned to the [NEXT TERM] term, I will be unavailable on [NEXT TERM UNAVAILABLE DATES]

Sincerely,

David Billingsley

Staff Attorney

cc: District Attorney

New York County

April 18, 2023

Hon. Janet DiFiore

Chief Judge

Court of Appeals of the State of New York

20 Eagle Street

Albany, New York 12207

Re: *People v.* ***Error! Reference source not found.***

Ind. No. **Error! Reference source not found.** (**Error! Reference source not found.** County)

Application for Leave to Appeal

Your Honor:

**Error! Reference source not found.** respectfully asks for the issuance of a certificate pursuant to N.Y. Crim. Proc. Law § 460.20, granting permission to appeal, and certifying that there is a question of law in the above-captioned case as stated in appellant’s brief, which ought to be reviewed by the Court of Appeals. Counsel makes this application in accordance with his obligations pursuant to Rule 606.5(b)(2) of the Rules of the Appellate Division, First Department.

**Error! Reference source not found.** requests that an appeal be allowed to this Court from an order of the Supreme Court, Appellate Division, First Department, entered on March 10, 2016, which was served upon appellant by mail on March 14, 2016, affirming the order of the Supreme Court, **Error! Reference source not found.** County (Carruthers, J.), entered on **Error! Reference source not found.**. **Error! Reference source not found.** was convicted after **Error! Reference source not found.** of **Error! Reference source not found.**. **Error! Reference source not found.** received **Error! Reference source not found.**.

There were no co-defendants. No application has been made to a Justice of the Appellate Division.

Appellant respectfully requests the opportunity to file a supplemental letter with the judge to whom this matter is assigned, addressing in greater detail the reasons why the Court should review his case and how the issues are preserved for this Court’s review.

Copies of the Appellate Division’s order and all briefs submitted below are enclosed.

Respectfully yours,

Rosemary Herbert

Attorney for Defendant-Appellant

by: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

**Error! Reference source not found.**  
**Error! Reference source not found.**

cc without enclosure: John T. Hughes, Esq.

Assistant District Attorney

**Error! Reference source not found.** County

<<USE THIS LEAVE APP FOR EXCESSIVE SENTENCE CASES>>

April 18, 2023

Hon. Janet DiFiore

Chief Judge

Court of Appeals of the State of New York

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Counsel makes this application in accordance with his obligations pursuant to Rule 606.5(b)(2) of the Rules of the Appellate Division, First Department. Copies of the Appellate Division’s order and all briefs submitted below are enclosed.

Respectfully yours,

Rosemary Herbert

Attorney for Defendant-Appellant

by: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

**Error! Reference source not found.**  
**Error! Reference source not found.**

cc without enclosure: John T. Hughes, Esq.

Assistant District Attorney

**Error! Reference source not found.** County

1. Mr. E was originally charged several additional counts, but only the VTL § 1192(1) and (3) counts were included in a superseding charging instrument. [↑](#footnote-ref-1)
2. At the hearing, Mr. E moved to suppress his statements as the product of an unlawful arrest (*Dunaway*) and as involuntary (*Huntley*), as well as physical evidence recovered from an inventory search (*Mapp*). On appeal, Mr. E challenges only the *Huntley* rulings. [↑](#footnote-ref-2)
3. *See* [Hearing submission]. [↑](#footnote-ref-3)
4. [↑](#footnote-ref-4)