

THE PEOPLE OF THE STATE OF NEW YORK

v.

**MEMORANDUM  
OF LAW**

[REDACTED]

[REDACTED]

Defendant

**INTRODUCTION**

[REDACTED] was indicted on one count of Murder in the First Degree under Penal Law §125.27(1)(a)(vii), one count of Murder in the Second degree under Penal Law § 125.25(1), and Aggravated Criminal Contempt under Penal Law § 215.52(1). This motion concerns the legality of the statements made by [REDACTED] to law enforcement as well as the legality of the arrest.

A Huntley/Dunaway hearing was held on Monday, June 6, 2022, where the People called five witnesses, Depew Lieutenant [REDACTED] Amherst K9 Officer [REDACTED] Amherst Patrol Officer [REDACTED] Depew Captain [REDACTED] and Depew Lieutenant Detective [REDACTED] [REDACTED] did not call any witnesses.

**FACTS OF THE CASE**

On November 20<sup>th</sup>, 2021, at approximately 4:37 p.m., Lt. [REDACTED] C [REDACTED] NY (Transcript 7 [hereinafter "T"]). After speaking with a Mr. [REDACTED] Lt. [REDACTED] sent out an "ATL" (attempt to locate) for [REDACTED] to the county-wide chat (T 11).

Amherst K9 Officer [REDACTED] at or about 5:45 p.m., located [REDACTED] and effectuated a stop with the help of Amherst Patrol Officer [REDACTED] (T 28 and 35). Shortly thereafter, Officers [REDACTED] and Conrad delivered [REDACTED] to the Depew Police Station (T 41).

At approximately 8:52 p.m., Lt. Det. ██████ took control of the Defendant and brought him to the detective interview room (T 63, 64). Lt. Det. ██████ and Detective ██████ then interrogated Mr. ██████ until around 11:00 p.m. (T 82).

### LEGAL ANALYSIS

Lt. Det. ██████ interview of Mr. ██████ was involuntary. A confession, admission, or other statement is involuntary when, in relevant part, it is obtained “by means of \*\*\* improper conduct or undue pressure which impaired the defendant’s physical or mental condition to the extent of undermining his ability to make a choice whether or not to make a statement” or “by a public servant engaged in law enforcement activity \*\*\* in violation of such rights as the defendant may derive from the constitution of this state or of the United States” (CPL 60.45[2][a], [b][ii]).

“Is the confession the product of an essentially free and unconstrained choice by its maker? ... If it is not, if his will has been overborne and his capacity for self-determination critically impaired, the use of his confession offends due process” (*Culombe v. Connecticut*, 367 US 568, 602 [1961], Frankfurter, J.).

Involuntarily made statements must be suppressed (CPL 710.20[3]). “[O]n a motion to suppress inculpatory statements, the defendant bears the burden of persuasion, but the People must first establish the legality of the police conduct and the defendant's waiver” of his or her Miranda rights (*People v Kemp*, 131 AD2d 265, 267 [1987]; see *People v Jenkins*, 34 AD3d 833, 834-835 [2006]; *People v Leftwich*, 134 AD2d 371, 372-373 [1987]). Whether a defendant knowingly and intelligently waived his or her rights to remain silent and to an attorney is determined “upon an inquiry into the totality of the circumstances surrounding the interrogation,” including an evaluation of the defendant's “age, experience, education, background, and intelligence” (*People v Dunbar*, 104 AD3d 198, 210 [2013], *affirmed* 24 NY3d 304, quoting *Fare v Michael C.*, 442 US 707, 725 [1979]; see *People v Reed*, 75 AD2d 650 [1980]). “The failure to adequately advise a suspect of his or her rights as required by Miranda requires suppression of even voluntary statements” (*Dunbar* at 213).

Here, the proof showed that the Police failed to adequately advise ██████ of his rights as required by Miranda. The following issues were present: invocation,

understanding/comprehension and fatigue. While we will explore invocation first, it is important to note that the fatigue and understanding are important elements of invocation as well, for as the Court will see, given the fatigue and understanding issues, [REDACTED] clearly invoked his right to Counsel as soon as he had understood that he *could*.

### Invocation

In most cases, Law Enforcement reads Miranda Rights in their entirety during an interview, ask if the suspect understands their rights, then wait for a response regarding their understanding. When the person indicates understanding, Officers routinely ask if the person would like to continue speaking with Law Enforcement. If the suspect agrees to speak, Law Enforcement then have the suspect sign their name on the Miranda Warnings form. Based on this response, the interview either continues or ends.

In this case, Lt. Det. [REDACTED] and Det. [REDACTED] read the Miranda Warnings to [REDACTED] six different times in attempts to get Mr. [REDACTED] to indicate he understood.

On the first attempt at advising Mr. [REDACTED] of his Miranda Warnings, the Officers went through the warnings and asked him if he understood. He responded: "I can't understand, you are speaking so fast" (Interview at 1:48).

Their second attempt was unsuccessful as well (Interview at 1:53). After reading through the rights, M [REDACTED] indicated only that: "I know about attorney for me, I think I don't know... I can't understand... I confusing" (Interview at 2:12). The detective then asks [REDACTED] if he would like the other Detective to read it to him (Interview at 2:30).

Rather than acquire an interpreter, the Detectives then decided that maybe the third time's the charm (Interview at 2:36). They tried going into more detail, elaborating in other words what Miranda Warnings mean to simplify it for [REDACTED]. When asked if he understood, [REDACTED] did not respond for several seconds before stating that he was really tired. (Interview at 3:28).

The Officers then engaged in questioning as to whether he could read and write in English, to which no clear response was given. They were persistent though, despite numerous declarations stating "I'm confused," "I'm tired," and "I don't understand" from [REDACTED]

Their fourth attempt was also not successful (Interview at 3:40), [REDACTED] can be seen in the video struggling to read the Miranda rights himself for over a minute. The Detectives ask if he understands, he says yes. They ask if he is willing to answer questions and he responds yes. They ask him to sign the form, but before he signs, the Detectives try a fifth time. They decide to have [REDACTED] go line by line and initial each warning (Interview at 5:03). [REDACTED] responds with “I not sleeping alot” (Interview at 5:13). When [REDACTED] does not respond with a clear indication of understanding, the Detectives make a sixth attempt immediately.

On their **sixth** and final failed attempt (Interview at 6:00), at Mirandizing [REDACTED] the Detectives were determined to get through this pesky process. The Officers now read out each line explaining what certain terms, like “court” mean to [REDACTED] (Interview at 6:22). When the Officers got to the last warning, they read aloud: “The last one is if you want an attorney but cannot afford one, one will be appointed to you by the Court.” (Interview at 6:50)

[REDACTED] immediately says: “**I want the Court to.**”

“The right to counsel indelibly attaches when a defendant unequivocally requests an attorney, and he or she may not be questioned further in the absence of an attorney” (*People v. Dallas*, 119 AD3d 1362 [4<sup>th</sup> Dept. 2014]). [REDACTED] had invoked his right to counsel. Questioning must end.

Instead, the Officers tell him to initial and continue on as if this invocation did not just happen. Detective Lieutenant Thomson then nonsensically came on the stand and testified under oath that [REDACTED] stated “I’m going to Court to.”

For the sake of argument, had [REDACTED] actually said “I am going to Court to,” this would be non-responsive to that particular Miranda warning and the Officer would have a duty to clarify, which they made no effort to do.

After [REDACTED] invoked, the Detectives responded with “OK,” but did not end their interview.

Even after being confronted with the audio that contradicted his testimony on Monday, Lt. Det. [REDACTED] dug in his heels and continued in his assertion that the client stated: “I am going to court to.” Justice Alexander, in *People v. Garafolo* wrote: “We refuse to credit

testimony which has all appearances of having been patently tailored to nullify constitutional objections” 44 A.d.2d, 86 (2nd Dept. 1974). I ask this Court to listen to the relevant portions of the interview and to do the same.

### Confusion/Non-native Speaker

The prosecution must establish that the defendant comprehended “the immediate import” of the Miranda warnings (*People v. Santos*, 112 AD3d 757 [2d Dept. 2013], quoting *People v. Williams*, 62 NY2d 285, 289 [1984]). In *Santos*, where the defendant knew enough English “at least to have a basic conversation,” the 2d Dept. held that the People failed to establish that he comprehended the immediate import of the warnings (*id.*).

In this case, although the defendant can comprehend simple English, he clearly did not understand the Miranda Warnings.

This Court has determined that [REDACTED] was in need of an interpreter, as [REDACTED] is a native Farsi speaker from Afghanistan.

The Officers made no effort whatsoever to contact an Interpreter, the International Institute, another Law Enforcement Agency, or the District Attorney’s Office – despite their desperate attempts to force this foreign born, non-native speaking, sleep deprived suspect to “understand.”

[REDACTED] indicated in his interview that he was confused or did not understand several times (T 82), (Interview, including but not limited to: 1:50, 2:10, 2:28, 3:26).

Rather than making any effort at acquiring an interpreter to assist in these efforts, the Officers attempted to Mirandize [REDACTED] no less than six times. (Interview at 1:30, 1:53, 2:36, 3:40, 5:00, 6:00).

They made their initial three attempts at this by reading the warnings in their entirety (T 84). This was unsuccessful.

They then abandoned this method and decided to go line by line through the warnings (T 85).

After abandoning reading his Miranda rights in their entirety and while they were making attempts line by line, they gave him the Miranda Warnings to review for himself (T 85).

██████████ can be seen and heard struggling to read out loud the legalese contained in these Miranda warnings, slowing down at almost every word with more than two syllables. (Interview at 3:30)

██████████ at multiple occasions clearly did not understand much of what was going on as evidenced at or around 9:15 in the Interview, where the Officers ask:

LE: Do you have a vehicle?  
Mr. ██████████ No  
LE: What do you drive?  
Mr. ██████████ I can't understand.  
LE: You own a car?  
Mr. ██████████ Yes.

A similar exchange occurs at around 10:30 in the Interview when the Officer asks Mr. ██████████ what time did you work until? ██████████ clearly misunderstanding, gives the non-responsive answer: "for 6 months."

On top of these few examples, many of which occurred throughout the interview, at 12:30, ██████████ states: "I'm confused" and the Officer responds at 12:36 "I'm Confused."

### Fatigue

The "slowly mounting fatigue" of a continuous interrogation can break down a person's judgment and will (*People v. Guilford*, 21 NY3d 205, 208 [2013]).

Evidence that the defendant was tired at the time of the questioning is one factor to consider in evaluating the voluntariness of the statement (*People v. Ashline*, 124 AD3d 1258 [4th Dept. 2015]; *People v. Pearce*, 1283 AD2d 1007 [4th Dept. 2001]; *People v. Orso*, 270 AD2d 947 [4th Dept. 2000]).

Twice in the first ten minutes of the interview, the defendant told the detectives that he was tired (T 82). He told them that he woke up at 2:40 a.m. and worked from 4:00 a.m. to 12:35 p.m., and the interview concluded at around 11:00 p.m. (T 82). Multiple times, he said that he was confused and didn't understand (T 82), which no doubt added to the stress. Nevertheless,

the police pushed on with the interview, making no effort to let him rest or get an interpreter (T 82-83).

Mr. ██████ indicated to Lt. Det. ██████ that he woke up at 2:40 a.m., that he worked from 4:00 a.m., until 12:35 p.m. (T 82).

Shortly after 5:45 p.m., Officer Conrad testified that he assisted in the removal and apprehension of Mr. ██████ (T 38, 39). At approximately 8:52 p.m., Lieutenant Detective ██████ took control of Mr. ██████. (T 63).

The interview with Mr. ██████ finished at around 11:00 p.m. (T 82).

By the time the interview began, Mr. ██████ had been up since 2:40 a.m., and had worked two shifts (Interview at 8:44). By the time the interview had ended, Mr. ██████ had been awake for over 20 hours.

### CONCLUSION

Mr. ██████ clearly invoked his right to counsel despite fatigue and confusion. Mr. ██████ had worked two shifts and had been up for over 20 hours. Mr. ██████ an Afghani native who only understands simple English, is a non-native speaker raised with ██████ as his original language. His fatigue contributed to his confusion and this was then compounded with his inability to understand what was being repeated to him over and over and over and over and over and over again.

Even with all of the difficulties present, Mr. ██████, upon finally seeming to comprehend a bit of what was being spoken at him – if you want a lawyer, a court will appoint one - immediately declared **“I want the Court to.”** The interview is in evidence, we ask that the Court listen to the section pertinent to this motion and hearing, specifically the first 10 or so minutes, focusing on the times highlighted in this memorandum.

The Prosecutors failed to establish the legality of the police conduct and the defendant’s waiver of his Miranda Rights. This is especially true when the Court views the totality of the circumstances surrounding the interrogation, specifically, Mr. ██████ condition and background.

This statement was made involuntarily and was taken in violation of his right to counsel and right against self-incrimination. It must be suppressed.

