No. 08-362

In The

Supreme Court of the United States

STATE OF ILLINOIS,

Petitioner,

v.

MARIANO LOPEZ,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Illinois

BRIEF IN OPPOSITION

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TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

Page

STATUTES AND OTHER AUTHORITIES

INTRODUCTION

Petitioner has presented three reasons for this Court to grant its Petition for a Writ of Certiorari. Respondent submits that petitioner has waived all of these reasons before this Court because none of these reasons were presented to any reviewing court below.

Respondent further submits to the Court, that even assuming, *arguendo,* that petitioner has not waived the reasons for the Court to grant its Petition for a Writ of Certiorari, its arguments do not provide this Court with compelling reasons for accepting the Petition for a Writ of Certiorari.

Supreme Court Rule 10 lays forth considerations governing review on writ of certiorari. Subsection (a) clearly does not apply to this case. Subsection (b) states that a consideration is whether "a state court of last resort has decided an important federal question in a way that conflicts with a decision of another state court of last resort or of a United States court of appeals." As will be demonstrated, *infra*, this consideration does not apply to this case. Finally, subsection (c) states a consideration is whether "a state court . . . has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court." Again, as will be demonstrated, *infra*, this consideration does not apply to this case.

Finally, Supreme Court Rule 10 states "[a] petition for writ of certiorari is rarely granted when the

asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." As will be demonstrated, *infra*, the best claim that petitioner can make, *arguendo*, is that the Illinois Supreme Court misapplied a properly stated rule of law. As such, this Petition for a Writ of Certiorari should not be granted. The unanimous decision of the Illinois Supreme Court does not merit review by this Court.

COUNTER-STATEMENT OF THE CASE

The *Statement of the Case* in the Petition for a Writ of Certiorari has a factual omission. It does not mention that Detective Keane testified that respondent would not been permitted to leave the police station after Leal's written confession was obtained and before respondent gave an oral confession without the benefit of having received *Miranda* warnings before he made the oral confession. (Pet. App. A, p. 50a)

REASONS FOR DENYING THE WRIT

I. PETITIONER HAS WAIVED EACH REASON IT CITES FOR THE GRANTING OF ITS PETITION FOR A WRIT OF CERTIORARI.

A. Petitioner has Waived the Issue of Whether this Court has Resolved the Issue of Whether the Objective "Reasonable Person" Test May Include Consideration of the Suspect's Particular Characteristics.

Petitioner argues that this case presents the Court with the opportunity to resolve the issue of "whether the 'reasonable person' test may include considerations of the suspect's personal characteristics, outside the shadow of the standard of review dictated by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA)." (Pet. p. 15)

Petitioner makes this argument by relying on the *dicta* contained in the Court's decision in *Yarborough v. Alvarado*, 541 U.S. 652, 668 (2004). (Pet. p. 15) This *dicta* will be discussed in *Reason II, infra.*

Petitioner never mentioned this argument in any filings in the reviewing courts below. *Yarborough* is never mentioned in any of petitioner's Briefs and Arguments below. A discussion of *Yarborough* is never mentioned in the Opinions attached to the Petition for a Writ of Certiorari. (Pet. App. A and B) The reason that *Yarborough* is never discussed in the Opinions below is that petitioner never once

mentioned *Yarborough* or the argument it now makes based upon *Yarborough* to the courts below. (Pet. App. A and B)

It should be emphasized that *Yarborough* was decided in 2004. The Briefs and Arguments that petitioner filed in the Illinois Appellate Court and Illinois Supreme Court were filed well after *Yarborough* had been decided. There is simply no reason that petitioner could not have raised this issue in the reviewing courts below. There is certainly no reason that petitioner could not have raised the *Yarborough* issue in a Petition for Rehearing before the Illinois Supreme Court, a Petition for Rehearing that was never filed.

As such, because petitioner failed to raise its first reason for granting this Petition for a Writ of Certiorari (the *Yarborough* issue) in any reviewing court below it should be barred from raising this issue for the first time in this Court. *See, Steagald v. United States*, 451 U.S. 204, 208-211 (1981). *See also, Giordenello v. United States,* 357 U.S. 480, 488 (1958). As stated in *Steagald* at page 209:

> The Government, however, may lose its right to raise factual issues of this sort before this Court when it has made contrary assertions in the courts below, when it has acquiesced in contrary findings by those courts, or when it has failed to raise such questions in a timely fashion during the litigation.

B. Petitioner has Waived the Issue of Whether the Illinois Supreme Court's Consideration of the Respondent's Age and Experience when Determining Whether he was Seized or in Custody Directly Conflicts with the Decisions of this Court.

Respondent references his discussion in *Reason I.A.* above. Not only did petitioner fail to mention *Yarborough* in any Brief and Argument that it filed in the reviewing courts below, petitioner also failed to make the wider argument that the Illinois Supreme Court's consideration of the respondent's age and experience when deciding when the respondent was seized or in custody directly conflicted with decisions of this Court. This argument could have been made in the petitioner's Brief and Argument before the Illinois Supreme Court. In its Briefs and Arguments below, petitioner distinguished the juvenile cases that respondent cited. This can be ascertained by examining the Opinions contained in the Appendices to petitioner's Petition for a Writ of Certiorari. (Pet. App. A and B) Petitioner never argued that these cases involving juveniles were irrelevant because there should be no consideration of a defendant's age or experience when deciding when a person should be considered seized or in custody; petitioner never argued that the cases involving juveniles cited by respondent had been decided in contravention to the precedents of this Court.

As such, petitioner has waived this issue and this Court should not grant this Petition for a Writ of Certiorari based upon an issue that has been waived below. The substantive issue raised by this reason will be discussed in *Reason III*, *infra.*

C. Petitioner has Waived the Issue of Whether this Court Should Adopt a *De Novo* or a "Clear Error" Standard When Reviewing Whether the Police have Deliberately Engaged in a "Question First, Warn Later" Scheme in Order to Circumvent *Miranda v. Arizona.*

Respondent again references the arguments made in *Reasons I.A. and I.B.* above. Once again, petitioner has raised an issue that it completely ignored in the reviewing courts below. Petitioner never suggested to the Illinois Supreme Court, one way or the other, what the correct standard of review was when reviewing a *Missouri v. Seibert,* 542 U.S. 600 (2004) claim. Petitioner never filed a Petition for Rehearing before the Illinois Supreme Court after its decision was issued, challenging the alleged incorrect standard of review that the Illinois Supreme Court had used with regard to the *Seibert* issue.

As such, petitioner has waived this issue and this Court should not grant this Petition for a Writ of Certiorari based upon an issue that has been waived below. The substantive issue raised by this reason will be discussed *Reason IV*, *infra.*

II. THE INSTANT CASE DOES NOT PROVIDE THIS COURT WITH THE PROPER VEHICLE TO CONSIDER WHETHER *DICTA* IN *YARBOROUGH* IS THE PROPER STANDARD OF REVIEW WHEN DETERMINING WHETHER A JUVENILE IS IN CUSTODY FOR *MIRANDA* PURPOSES. (RESPONDING SUBSTANTIVELY TO PETITIONER'S REASON I)

Petitioner claims that the Illinois Supreme Court made a "faulty determination that a minor's custodial status, for Fourth Amendment Purposes, requires consideration of characteristics personal to the individual, including age, educational background, and experience with the criminal justice system." (Pet. p. 15) Petitioner cites to *Yarborough v. Alvarado*, 541 U.S. 652, 668 (2004) to claim that the Illinois Supreme Court's decision in this case conflicts with this Court's holding in *Yarborough*. There are several problems with petitioner's analysis.

As petitioner itself makes clear, *Yarborough's* language concerning whether age, educational background and experience with the criminal justice system are to be considered when determining whether a reasonable person is in custody for *Miranda* purposes, is clearly *dicta*. (Pet. p. 17) Further, even the *dicta* in *Yarborough* does not state that a court may not consider age; rather *Yarborough* states it was not unreasonable for the trial judge not to consider it.

The Illinois Supreme Court ruled that respondent (who was 15 years old at the time) was not under arrest when he first left his home with Chicago Police Detectives on July 21, 1998. Respondent argued below that he had been arrested when he left his home with Chicago Police Detectives on July 21, 1998. (Pet. App. A, p. 26a-36a) The Illinois Supreme Court distinguished the cases involving juveniles that respondent presented when making its ruling. (Pet. App. A, p. 29a-36a)

However, the Illinois Supreme Court then ruled that while he was at the police station, respondent's voluntary appearance did turn into an illegal arrest. This determination did not turn on respondent's status as a juvenile. The Illinois Supreme Court makes this clear when it cites to *People v. Barlow*, 273 Ill.App.3d 943 (1995). (Pet. App. A, p. 36a) *Barlow* dealt with the issue of a defendant's initial voluntary presence at a police station turning into a subsequent illegal arrest. *Barlow* was not a juvenile. (Pet. App. A, p. 36a-38a)

Further, the Illinois Supreme Court used the following factors to rule that respondent's initial voluntary appearance at the police station later turned into an unlawful detention:

> In this case, the facts demonstrate that defendant arrived at the police station at 1 p.m. and was immediately placed in an interview room for questioning. He was interviewed by two detectives for approximately 20 minutes and was advised during the

> interview that he had been implicated in a crime. Defendant then provided information about the crime and was told to wait in the interview room while the detectives conducted further investigation. Defendant was not taken out of the interview room and escorted to an open area. He was not permitted to walk around the police station without an escort. Instead, he was left in an interview room with the door shut and told to knock if he needed to use the restroom or required other assistance. The detectives testified that the room was unlocked, but defendant believed that he was locked in. Defendant was not advised that he was free to leave even though the detectives testified that defendant would have been permitted to leave at this point if he desired. Defendant remained in the interview room for four hours without contact with his family or any other person interested in his well-being. Defendant's family was calling repeatedly to obtain information about defendant's status, but were never advised that he was free to leave; only that he was being questioned. (Pet. App. A, p. 36a-37a)

These are some of the very same factors cited in both numerous cases and commentary. For instance, in *United States v. Griffin*, 922 F.2d 1343, 1352 fn. 12 (8th Cir. 1990) the court listed the following factors in determining whether a reasonable person would have believed that he was under arrest:

> (1) whether the suspect was informed at the time of questioning that the questioning was voluntary, that the suspect was free to leave or request the officers to do so, or that the suspect was not considered under arrest; (2) whether the suspect possessed unrestrained freedom of movement during questioning; (3) whether the suspect initiated contact with authorities or voluntarily acquiesced to official requests to respond to questions; (4) whether strong-armed tactics or deceptive stratagems were employed during questioning; (5) whether the atmosphere of the questioning was police dominated, e.g., was questioning public or incommunicado, was suspect separated from those who would lend moral support, did authorities dictate the course of conduct of the suspect or other persons present, et cetera; or, (6) whether the suspect was placed under arrest at the termination of the questioning.

In the instant case, respondent was not advised at the time of the questioning that the questioning was voluntary. He was not advised that he was free to leave or request the officers to do so. He was not advised that he was not under arrest. He did not possess unrestrained freedom of movement during questioning. Respondent did not initiate contact with authorities. The atmosphere of the questioning was police dominated in that the questioning occurred incommunicado and not in public. The police dictated the course of conduct of the respondent. The

respondent was placed under arrest at the termination of the questioning.

Other factors looked at by the courts and commentators are whether the police deprived the suspect of means of departure and whether the suspect knew that the police had substantial evidence of his criminal involvement. 3 Wayne R. LaFave, *Search and Seizure*, § 5.1(a), p. 10-11 (4th ed. 2004) In the instant case, respondent was deprived of means of departure and the police told him that they had substantial evidence of his criminal involvement.

Analyzing the aforementioned factors, it is clear that the Illinois Supreme Court properly determined that the respondent's initial voluntary appearance at the police station later turned into an unlawful detention. Respondent's status as a 15-year-old juvenile had virtually nothing to do with this analysis. Regardless of the respondent's age, the decision of the Illinois Supreme Court regarding when respondent was in unlawful custody was correct. As such, this case is not a proper vehicle for this Court to determine the issue of whether or not the "reasonable person" test should incorporate a suspect's age, experience and contact with the criminal justice system as part of the inquiry.

III. THE ILLINOIS SUPREME COURT'S CONSIDERATION OF THE RESPONDENT'S AGE AND EXPERIENCE WHEN DETERMINING WHETHER HE WAS SEIZED OR IN CUSTODY DOES NOT DIRECTLY CONFLICT WITH THE DECISIONS OF THIS COURT. (RESPONDING SUBSTANTIVELY TO PETITIONER'S REASON II)

Respondent adopts the argument made above in *Reason II.* In particular, as argued above, respondent submits that the Illinois Supreme Court did not hinge its reasonableness inquiry on respondent's age and experience. (Pet. p. 25)

Further, as pointed out in *Yarborough* at p. 666, "[O]ur opinions applying the *Miranda* custody test have not mentioned the suspect's age, much less mandated its consideration." This is because none of the decisions cited by petitioner, except for *Yarborough,* involved minors. It should also be emphasized that the concurring Opinion by Justice O'Connor in *Yarborough* stated the following at p. 679:

> There may be cases in which a suspect's age will be relevant to the "custody" inquiry under *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). In this case, however, Alvarado was almost 18 years old at the time of his interview. It is difficult to expect police to recognize that a suspect is a juvenile when he is so close to the age of majority.

As such, petitioner's *Reason II* does not support the granting of its Petition for a Writ of Certiorari.

IV. THE CIRCUITS HAVE NOT SPLIT OVER WHETHER TO USE A *DE NOVO* OR A "CLEAR ERROR" STANDARD WHEN REVIEWING WHETHER THE POLICE HAVE DELIBERATELY ENGAGED IN A "QUESTION FIRST, WARN LATER" SCHEME IN ORDER TO CIRCUMVENT *MIRANDA V. ARIZONA*. (RESPONDING SUBSTANTIVELY TO PETITIONER'S REASON III)

Petitioner has set up a "straw man" by claiming that there is a significant split in the circuits regarding the proper standard of review for a *Seibert* claim. Petitioner cites to six cases at page 29 of its Petition for a Writ of Certiorari to stand for the proposition that the standard of review for a *Seibert* claim is "clear error." But this is not exactly what these cases state about the proper standard of review. As stated in *United States v. Mashburn,* 406 F.3d 303, 309 (4th Cir. 2005):

> In reviewing the denial of Mashburn's motion to suppress, we must accept the factual findings of the district court unless clearly erroneous, but we review de novo the conclusion of the district court that Mashburn's postwarning statements were voluntary. (citation omitted)

Thus, it is clear that there is both a "clearly erroneous" part of the standard of review and a *de*

novo part of the standard of review. This is the same standard that has been used by the courts for years when reviewing a *Miranda* voluntariness issue. *See, e.g.*, *United States v. Braxton*, 112 F.3d 777, 781 (4th Cir. 1997) (en banc). There have been no new developments in regard to a special or different test for evaluating *Seibert* issues. There is no split in the circuits regarding the proper standard of review, much less a "significant" split in the circuits regarding this issue.

Petitioner cites two cases at page 29 of its Petition for a Writ of Certiorari (*United States v. Carter,* 489 F.3d 528 (2nd Cir. 2007) and *United States v. Street*, 472 F.3d 1298 (11th Cir. 2006)), and alleges that these cases "appear" to have applied a *de novo* standard when reviewing a *Seibert* claim. Petitioner does not explain how these cases "appear" to have applied a *de novo* standard. These cases do not stand for the proposition that petitioner claims they stand for.

In *United States v. Carter,* 489 F.3d 528, 534 (2nd Cir. 2007) the court stated that:

> "We review a district court's determination regarding the constitutionality of a *Miranda* waiver *de novo* and a district court's underlying factual findings for clear error."

This language is almost identical to the language used in *Mashburn*.

In *United States v. Street*, 472 F.3d 1298 (11th Cir. 2006) the word *de novo* is not even used in the

decision. It is incomprehensible how petitioner can allege that either of these cases "appears" to establish a *de novo* standard for the review of a *Seibert* claim. Petitioner has clearly failed to demonstrate any split in the circuits regarding the proper standard of review for a *Seibert* claim.

Further, the Illinois Supreme Court did not adopt a *de novo* standard when evaluating the *Seibert* claim in this case. The Illinois Supreme Court certainly did not announce in its decision that it was using a *de novo* standard of review when evaluating the *Seibert* claim. There is absolutely nothing contained in the Opinion of the Illinois Supreme Court which would indicate that the Illinois Supreme Court adopted a *de novo* standard in evaluating the *Seibert* claim. (Pet. App. A)

This is demonstrated by the fact that the Illinois Supreme Court references *United States v. Williams*, 435 F.3d 1148 (9th Cir. 2006) when performing its analysis of the *Seibert* issue. *Williams* is cited with approval in one of the cases (*United States v. Navarez-Gomez,* 489 F.3d 970, 974 (9th Cir. 2007)) that petitioner cites for the proposition that some circuits have adopted a "clearly erroneous" standard of review when evaluating an alleged *Seibert* violation. (Pet. App. A p. 29a) It is illogical to presume that the Illinois Supreme Court used a *de novo* standard of review when it cited to *Williams* in its Opinion.

The following passage from the Opinion of the Illinois Supreme Court demonstrates what is at issue in this case:

> The objective and subjective evidence available to this court, when viewed in its totality, supports an inference that the detectives engaged in some form of the "question first, warn later" interrogation technique when they confronted defendant at 6 p.m. with Leal's statement and obtained defendant's oral confession. The uncontested facts demonstrate that Leal was taken into custody after implicating defendant and confessing to his own part in the crime. If Leal's statement was sufficient to elevate his status from that of a witness to a suspect, we presume it had the same effect on defendant's status. We acknowledge that Detective Keane testified otherwise, stating that defendant was still considered a witness after Leal's incriminating statement. We also acknowledge that the trial court found Detective Keane's testimony to be credible overall, and defendant does not challenge the trial court's credibility assessment as being against the manifest weight of the evidence.
>
> However, the record demonstrates a contradiction in Detective Keane's testimony which the trial court did not specifically address and we cannot ignore. Although Detective Keane claimed that defendant was not a suspect, he nevertheless testified that defendant would not have been free to leave the police station at 6 p.m. after Leal's

incriminating statement had been obtained. In light of these facts, we can think of no legitimate reason why the detectives failed to give defendant his *Miranda* warnings prior to the 6 p.m. confrontation, other than a deliberate decision to circumvent *Miranda* in hopes of obtaining a confession, which would ultimately lead to a handwritten statement.

In his concurrence in *Seibert*, Justice Kennedy discussed situations where an officer might mistakenly withhold *Miranda* warnings, and pointed out that mistakes of this sort could not be considered deliberate. "An officer may not realize that a suspect is in custody and warnings are required. The officer may not plan to question the suspect or may be waiting for a more appropriate time." *Seibert*, 542 U.S. at 620, 124 S.Ct. at 2615, 159 L.Ed.2d at 660 (Kennedy, J., concurring). We do not believe that the detectives in this case made such a mistake. The detectives were clearly interrogating defendant, as they confronted him with Leal's statement and pointedly asked him if he was involved in the crime. Moreover, it was plain that defendant was in custody, as Detective Keane testified that defendant would not have been free to leave the police station at that time. We find that the objective and subjective evidence present in the record supports an inference that detectives deliberately withheld *Miranda* warnings from defendant. (Pet. App. A, p. 50a-51a)

This passage indicates that the Illinois Supreme Court found that Detective Keane's testimony claiming that he considered respondent to still be a witness after Leal's written confession and arrest, was unworthy of belief and not credible in the light of human experience, regardless of whether the trial judge found Detective Keane to be generally credible. Contrary to petitioner's assertions, the Illinois Supreme Court could and did find that Detective Keane's testimony that respondent was still a witness, even after Leal's written confession implicating respondent, was "so inconsistent or improbable on its face that no reasonable factfinder could accept it." (citation omitted) (Pet. p. 32) This was because of Detective Keane's own admission that respondent would not have been free to leave the police station following Leal's written confession. This admission proved that Detective Keane did not believe that respondent was still a witness following Leal's written confession. If Detective Keane truly believed that respondent was still a witness following Leal's written confession, there was simply no reason that respondent would not have been permitted to leave the police station at that time.

No court is bound by a police officer's self-serving pronouncement regarding intent in this context. As stated in footnote 6 of *Seibert*, "because the intent of the officer will rarely be as candidly admitted as it was here (even as it is likely to determine the conduct of the interrogation), the focus is on facts apart from intent that show the question-first tactic at work."

Seibert, at 617. This is exactly what the Illinois Supreme Court did when it analyzed the facts of this case.

Petitioner's final claim is that this case provides this Court with an opportunity to "clarify *Seibert* regarding what is needed to show that a delay in giving *Miranda* warnings is not deliberate." (Pet. p. 32) This is a disingenuous assertion, at best.

Petitioner claims that respondent was not given *Miranda* warnings because he was still considered a witness when he was first confronted following Leal's written confession. This issue has already been dealt with above. Petitioner then attempts to distinguish respondent's later written statement from his first unwarned statement claiming that the first statement was not "exhaustive." Respondent does not understand what petitioner means by "exhaustive." In respondent's oral statement, given without the benefit of *Miranda* warnings, "[r]espondent admitted that he, Leal and William Andrade entered the victim's apartment, that the victim was tied up and stabbed, and that they left with some proceeds." (Pet. p. 10) Certainly, this confession would have been "exhaustive" enough for the respondent to have been convicted, had this confession been admitted into evidence. All the respondent did, when giving the written statement, was to confess, in slightly more detail, that he, Leal and William Andrade entered the victim's apartment, tied up and stabbed the victim and left with some proceeds. The notion that there is

no *Seibert* violation here because of the difference in the two statements is ridiculous on its face.

When looking at all of the factors discussed, it is clear that the Illinois Supreme Court ruled correctly in suppressing respondent's written confession because of the *Seibert* violation.

The Illinois Supreme Court ruled as follows when confronted with this issue:

> The facts of this case demonstrate that sometime after 8 p.m., about two hours after defendant's oral confession, defendant's father arrived at the police station. He was permitted to speak to defendant alone. Shortly thereafter, the assistant State's Attorney met with defendant, advised him of his *Miranda* rights, and obtained defendant's handwritten statement in the presence of defendant's father, Detective Keane, and Detective Velez, who acted as an interpreter. This meeting took place in the same interview room in which defendant had spent the day. Defendant was not advised that his oral statement could not be used against him.
>
> We recognize that defendant's handwritten statement was taken after defendant received *Miranda* warnings at least twice, that an assistant State's Attorney was doing the questioning rather than a detective, and that defendant's father was present. However, the unwarned and warned statements were taken close in time, in the same place, with Detective Keane present for both, and

> defendant was never advised that his oral statement would be inadmissible. Viewing all the relevant factors, we cannot conclude that a reasonable juvenile in defendant's position would have understood that he had a genuine choice about whether to continue talking to the police. We find that defendant's handwritten statement was involuntary for fifth amendment purposes pursuant to the United States Supreme Court's decision in *Seibert.* Defendant's handwritten statement should have been suppressed. (Pet. App. A, p. 53a-54a)

Respondent cannot state the issue any more clearly.

CONCLUSION

For all of the reasons discussed herein, petitioner has failed to show that the Illinois Supreme Court's unanimous Opinion is worthy of review by this Court. The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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Dated: December 10, 2008