No. 08-362

IN THE
# Supreme Court of the United States

THE STATE OF ILLINOIS,

*Petitioner*,

*v.*

MARIANO LOPEZ,

*Respondent.*

**ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS**

## REPLY BRIEF


ANITA ALVAREZ
*State's Attorney*
*Cook County, Illinois*
JAMES E. FITZGERALD
ALAN J. SPELLBERG*
HAREENA MEGHANI-WAKELY
JOHN E. NOWAK
*Assistant State's Attorneys*
309 Richard J. Daley Center
Chicago, Illinois 60602
(312) 603-5496

LISA MADIGAN
*Attorney General of Illinois*
100 West Randolph Street
12th Floor
Chicago, Illinois 60601
(312) 814-3000

*Attorneys for Petitioner*

* *Counsel of Record*



610819

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## TABLE OF CONTENTS

## TABLE OF CITED AUTHORITIES

*Page*

**Cases:**

*Cited Authorities*

*Cited Authorities*

## ARGUMENT

### I. Petitioner Has Not Waived Any Of The Reasons For Granting The Petition Because The Illinois Supreme Court Raised Those Issues *Sua Sponte* In Its Decision.

Respondent's contention that petitioner's arguments have been waived is without merit because the Illinois Supreme Court raised these issues *sua sponte*. "It is irrelevant to this Court's jurisdiction whether a party raised below and argued a federal-law issue that the state supreme court actually considered and decided." *Cohen v. Cowles Media Co.*, 501 U.S. 663, 667 (1991). This Court applied this principle in *Cohen* to a Minnesota Supreme Court decision that was based on an estoppel theory first raised by one of the justices during oral argument. *Id.* at 666-67. Although the estoppel issue had not been briefed or argued at any point in the state courts, including in a petition for rehearing, the Court nevertheless held that it was appropriate for review because it had been considered and decided by the state supreme court. *Id.* As in *Cohen*, here the Illinois Supreme Court expressly addressed the issues upon which certiorari is sought. In addition, it would be inequitable to, as respondent urges, limit petitioner to arguments forwarded in the state courts because petitioner had no cause to argue these issues until the court raised them *sua sponte*.

In particular, neither the trial court nor the appellate court considered respondent's age when determining whether he was seized for Fourth Amendment purposes. (Compare Pet. App. B, C, and

D). Thus, the issue did not arise until the Illinois Supreme Court declared: "When assessing whether a juvenile was seized for purposes of the fourth amendment, we modify the reasonable person standard to consider whether a reasonable juvenile would have thought that his freedom of movement was restricted." (Pet. App. 28a). Similarly, the standard for reviewing whether the police deliberately engaged in a "question first, warn later" scheme was never in dispute until the court issued its opinion assessing the witnesses' credibility on this issue *de novo*.

Respondent's reliance on *Steagald v. United States*, 451 U.S. 204 (1981), to support his claim that petitioner is "barred" from raising certain arguments in this Court (Resp. Br. at 4), is sorely misplaced. In *Steagald*, the government never challenged the magistrate's finding that the building searched was Steagald's home. *Id*. at 209-210. To the contrary, the government acquiesced in the finding by arguing that Steagald's "connection with the searched home was sufficient to establish his constructive possession of the cocaine found in a suitcase in the closet of the house." *Id.* Moreover, although the government could have filed a cross-petition for certiorari seeking a remand to determine whether the building was Steagald's residence, it instead argued that further review was unnecessary, conceding that the searched home was Steagald's residence. *Id.* at 210. Accordingly, this Court held "that the Government, through its assertions, concessions, and acquiescence, has lost its right to challenge petitioner's assertion that he possessed a legitimate expectation of privacy in the searched home." *Id.* at 211.

Unlike *Steagald*, here petitioner never asserted, conceded, or acquiesced in modifying the objective "reasonable person" test to include consideration of respondent's age, or in a *de novo* review of the witnesses' credibility regarding whether the police deliberately engaged in a "question first, warn later" scheme. The first time that either issue was raised was when the Illinois Supreme Court issued its opinion. In addition, as *Cohen* demonstrates, petitioner was not obligated to file a petition for rehearing in order to preserve the issues for this Court's review.

## II. This Case Gives This Court The Opportunity To Rule Squarely On The Issue Of Whether The "Reasonable Person" Test May Include Consideration Of The Suspect's Personal Characteristics.

Respondent makes two arguments in opposition to certiorari, but neither has merit. First, respondent argues that the discussion in *Yarborough v. Alvarado*, 541 U.S. 652 (2004), about whether the "reasonable person" standard should include consideration of a suspect's age was merely *dicta*. (Resp. Br. at 7-8). But the fact *Yarborough* did not rule on this issue directly actually favors granting the petition.

In *Yarborough*, the Court addressed the question of whether age and experience with the police can be part of the "reasonable person" test in the context of the standard set forth by the AEDPA. *Id*. at 668. Although the Court appeared to reject consideration of a suspect's individual characteristics, its reasoning was limited to whether the state court had unreasonably

applied clearly established federal law. *Id.* The fact that *Yarborough* was so limited is a significant reason why the Court should grant the petition, as this case squarely presents the issue of whether the objective reasonable person test should incorporate a suspect's particular characteristics.

Respondent's second argument in opposition to granting certiorari is that the Illinois Supreme Court's ruling "did not turn on respondent's status as a juvenile." (Resp. Br. at 8) This claim is simply false. The court's entire analysis was based on its consideration of respondent's age. Indeed, the court made clear at the outset that respondent's age was essential to its analysis, stating: "[w]hen assessing whether a juvenile was seized for purposes of the fourth amendment, we modify the reasonable person standard to consider whether a reasonable juvenile would have thought that his freedom of movement was restricted." (Pet. App. 28a). In fact, the court articulated the question before it as "whether a *reasonable juvenile*, in defendant's situation, would have believed that he was compelled to accompany detectives to the police station for questioning and whether he would not have felt free to leave once there." (Pet. App. 29a) (emphasis added). This modified approach to the reasonable person standard infected the court's entire analysis of the Fourth Amendment issue. For example, the court emphasized "facts show[ing] that [respondent] *was 15 years old with no criminal record* when two detectives came to his apartment and asked him to accompany them to the police station for questioning in regard to a murder investigation." (Pet. App. 29a) (emphasis added). In addition, in finding that the passage of time caused respondent's presence at the station to become an illegal

arrest, the court stressed that its holding "is particularly true when the person in question is a minor." (Pet. App. 38a).

The significance of the court's focus on a "reasonable juvenile" is also evident from its conclusion that respondent was held involuntarily, because no reasonable person in respondent's position would have felt that he was seized. Importantly, respondent came to the police station voluntarily, a fact he has not challenged. (Pet. App. 34a-36a). And respondent's voluntary presence at the station was not transformed into an illegal seizure at some later time. At the station, respondent was neither fingerprinted nor photographed; instead, he went into an interview room. (Pet. App. 11a). As explained by Detective Bautista, this was consistent with police protocol, which recognizes that it is not safe to allow the general public to wander the back halls of a police station unescorted. (Pet. App. 11a-12a). These safety concerns are particularly pronounced where potential witnesses are concerned, because restricting their movement within the police station and keeping interview room doors closed protects them from being seen by others at the station, such as arrestees who may seek to retaliate against them.

Similarly, while respondent was not advised of his *Miranda* rights, that was because he was a witness, not a suspect. (Pet. App. 11a). Respondent was not handcuffed, and the door to the room was unlocked. (Pet. App. 11a). After the initial 15 to 20 minute conversation, the detectives left respondent alone while they continued their investigation. (Pet. App. 11a).

As before, respondent was neither handcuffed nor restrained in any manner, and the door to the room was left unlocked. (Pet. App. 12a).

There also was no evidence that the police had indicated to respondent that he was not free to leave. According to Bautista, it was only after Leal's inculpatory statement shortly before 6:00 p.m. that respondent would no longer have been allowed to go. (Pet. App. 13a). Even then, however, no officer told respondent, directly or indirectly, that he was not free to leave.

In sum, respondent's assertion that his "status as a 15-year-old juvenile had virtually nothing to do with this analysis" (Resp. Br. at 11) is belied by the record. The Illinois Supreme Court expressly modified the objective reasonable person standard to consider his age and experience. But for the consideration that respondent was 15 years old with no criminal justice experience, the court would have had to find that an objectively reasonable person in his position would not have felt that he was under arrest, as the trial and appellate courts did.

## III. The Illinois Supreme Court's Consideration Of The Respondent's Age And Experience When Determining Whether He Was Seized Or In Custody Conflicts With The Decisions Of This Court.

Respondent also argues that certiorari should be denied because this Court in *Yarborough* stated that "our opinions applying the *Miranda* custody test have not mentioned the suspect's age, much less mandated its consideration" (*Yarborough*, 541 U.S. at 666) and none of the cases cited by petitioner, except *Yarborough*, involved minors. (Resp. Br. at 12). Again, this simply bolsters the reasons why this Court should grant the petition. Without guidance from this Court, several lower courts have incorporated such subjective characteristics into the objective reasonable person test. *See*, *e.g.*, *Evans v. Montana Eleventh Judicial District Court*, 995 P.2d 455, 459 (Mont. 2002); *Ramirez v. State*, 739 So.2d 568, 574 (Fla. 1999); *State v. Werner*, 9 S.W.3d 590, 598 (Mo. 2000); *United States v. Erving L.*, 147 F.3d 1240, 1247-48 (10th Cir. 1998); *People v. T.C.*, 898 P.2d 20, 25 (Colo. 1995) (en banc); *Commonwealth v. A Juvenile*, 521 N.E.2d 1368, 1370 (Mass. 1988); *United States v. Wauneka*, 770 F.2d 1434, 1438-39 (9th Cir. 1985). In contrast, other courts have refused to consider personal characteristics when utilizing the objective reasonable person standard. *See*, *e.g. State v. Turner*, 838 A.2d 947, 963 (Conn. 2004); *People v. Croom*, 883 N.E.2d 681, 689 (Ill. App. Ct. 2008).

For its part, although this Court has never incorporated subjective characteristics into this objective standard, it has emphasized that the test for

determining whether a suspect has been seized under the Fourth Amendment or is in custody for *Miranda* purposes, is an objective one. *See*, *e.g.*, *Florida v. Bostick*, 501 U.S. 429, 437-39 (1991) and *Stansbury v. California*, 511 U.S. 318, 323 (1994). That certain lower courts have departed from this principle is precisely why certiorari is appropriate here.

## IV. The Circuits Have 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*, And The Illinois Supreme Court's Decision Finding Such A Scheme In This Case Demonstrates Confusion About The Viability Of *Oregon v. Elstad*.

Respondent argues that "[p]etitioner has clearly failed to demonstrate any split in the circuits regarding the proper standard of review for a *Seibert* claim." (Resp. Br. at 15). But the Seventh Circuit's recognition of the split (s*ee United States v. Stewart*, 536 F.3d 714, 719 (7th Cir. 2008)), demonstrates otherwise. In particular, when discussing the proper standard for reviewing whether the police have deliberately engaged in a "question first, warn later" scheme like that in *Missouri v. Seibert*, 542 U.S. 600 (2004), *Stewart* observed that "[t]here is not yet a general consensus among the circuits about the standard of review that applies to *Seibert*-deliberateness determinations, but the trend appears to be in the direction of review for clear error." *Id*. Moreover, *Stewart* also belies respondent's claim that "[i]t is incomprehensible how petitioner can allege that either of these cases

[*United States v. Carter*, 489 F.3d 528, 536 (2d Cir. 2007), and *United States v. Street*, 472 F.3d 1298, 1314 (11th Cir. 2006)] 'appears' to establish a *de novo* standard of review of a *Seibert* claim." (Resp. Br. at 14-15). Far from being "incomprehensible," *Stewart* noted that both *Carter* and *Street* "appear[ed] implicitly to apply *de novo* review." 536 F.3d at 719.

Respondent also argues that "the Illinois Supreme Court did not adopt a *de novo* standard when evaluating the *Seibert* claim in this case." (Resp. Br. at 15). However, as explained in the petition (at pp. 30-32), the supreme court showed no deference to the trial court's credibility determinations. Despite acknowledging that the trial court found Detective Keane credible, while at the same time explicitly noting that "defendant does not challenge the trial court's credibility assessment as being against the manifest weight of the evidence" (Pet. App. 50a), the supreme court nevertheless determined that Keane was not telling the truth when he stated that he did not deliberately withhold *Miranda*. (Pet. App. 50a). Certainly, the court's rejection of the trial court's factual findings demonstrates that it applied a *de novo* rather than a "clear error" standard, because "when a trial judge's finding is based on his decision to credit the testimony of one of two or more witnesses, each of whom has told a coherent and facially plausible story that is not contradicted by extrinsic evidence, that finding, if not internally inconsistent, *can virtually never be clear error*." *Anderson v. Bessemer City*, 470 U.S. 564, 575 (1985) (emphasis added).

Finally, respondent asserts that his written statement after receiving *Miranda* warnings provided

only "slightly more detail" than his initial, unwarned oral statement. (Resp. Br. at 19). However, his oral statement to the police was, as the supreme court itself acknowledged, "brief," and provided only that respondent had entered the victim's apartment, that the victim was tied up and stabbed, and that he and his co-defendants took some "proceeds." (Pet. App. 17a). In contrast, respondent's handwritten statement to the prosecutor was extensive and detailed, totaling twelve pages in length. Respondent also ignores several other factors. For instance, unlike in *Seibert*, where just 15 to 20 minutes separated the unwarned interrogation from the warned interrogation (542 U.S. at 616), the delay between the unwarned questioning and respondent's confession was over three hours. (Pet. App. 16a-18a). Another significant difference is that the same officer conducted both the unwarned and warned interrogations in *Seibert* (*id.*), while here a prosecutor conducted the warned questioning, and not the detective who conducted the initial, unwarned interrogation (Pet. App. 16a-18a). Also unlike in *Seibert* (*id.* at 616-17), there was no evidence that respondent's unwarned statement was used to prompt his later, warned confession. Most significantly, the officer in *Seibert* testified that "he made a 'conscious decision' to withhold *Miranda* warnings, thus resorting to an interrogation technique he had been taught: question first, then give the warnings, and then repeat the questions 'until I get the answers she's already provided once.'" *Id.* at 605-06. There is no evidence of any such institutional policy here. To the contrary, Detective Keane expressly denied that he made a decision not to arrest respondent in order to question him without warnings; testimony which the trial court deemed credible. (Pet. App. 17a).

In addition to deepening the split of authority regarding the standard of review for a *Seibert* claim, the Illinois Supreme Court's decision also creates confusion about the continued viability of *Oregon v. Elstad*, 470 U.S. 298 (1985). In *Elstad*, this Court held that the failure to administer *Miranda* warnings prior to the defendant's initial inculpatory statement did not automatically require suppression of his subsequent *Mirandized* confession. *Id.* at 300, 308, 318. The Court explained that, where the initial unwarned statement was given voluntarily, the admissibility of the second statement depended only on whether it, too, was voluntary and obtained in compliance with *Miranda*. *Id.* at 318. Thus, this Court articulated the principle that "a suspect who has once responded to unwarned yet uncoercive questioning is not thereby disabled from waiving his rights and confessing after he has been given the requisite *Miranda* warnings." *Id.*

In contrast, in *Seibert*, this Court's plurality opinion explained that the deliberate, two-round interrogation technique at issue was unconstitutional because it "effectively threatens to thwart *Miranda*'s purpose of reducing the risk that a coerced confession would be admitted." 542 U.S. at 617. The plurality contrasted *Elstad* by characterizing the situation there as one involving an inadvertent violation of *Miranda* and listed "a series of relevant facts that bear on whether *Miranda* warnings delivered midstream could be effective enough to accomplish their object." *Id.* at 615. Based on these "relevant facts," the plurality concluded that the intentionally delayed warnings were ineffective and therefore, the second statement was inadmissible. *Id.* at 616-17.

Concurring, Justice Kennedy, considered the plurality's "relevant facts" for inadmissibility as too broad. *Id.* at 621-22. In his view, the pertinent question was whether the police set out to withhold *Miranda* warnings deliberately until after a confession has been secured. *Id.* Specifically, "[t]he admissibility of postwarning statements should continue to be governed by the principles of *Elstad* unless the deliberate two-step strategy was employed." *Id.* at 622.

The trial court in this case followed *Elstad* because it found that the police did not employ a deliberate two-step strategy to circumvent *Miranda*. The Illinois Supreme Court, however, disregarded the trial court's factual findings and failed to consider Justice Kennedy's admonition about the continued viability of *Elstad*. Accordingly, this case presents this Court with the opportunity to clarify its holding in *Seibert*.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

ANITA ALVAREZ
*State's Attorney*
*Cook County, Illinois*
JAMES E. FITZGERALD
ALAN J. SPELLBERG*
HAREENA MEGHANI-WAKELY
JOHN E. NOWAK
*Assistant State's Attorneys*
309 Richard J. Daley Center
Chicago, Illinois 60602
(312) 603-5496

*Attorneys for Petitioner*

LISA MADIGAN
*Attorney General of Illinois*
100 West Randolph Street
12th Floor
Chicago, Illinois 60601
(312) 814-3000

* *Counsel of Record*