No. 08-

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

PETITION FOR A WRIT OF CERTIORARI

RICHARD A. DEVINE
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*

610441

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

Whether a court may consider a defendant's age and experience with law enforcement when determining whether the defendant was seized for purposes of the Fourth Amendment or "in custody" for purposes of the Fifth Amendment;

Whether a person who voluntarily accompanies police to the station for questioning and is left in a closed interview room while the police attempt to verify the information provided is seized under the Fourth Amendment;

Whether a *de novo* or a "clear error" standard of review applies to a trial court's determination regarding whether the police have deliberately engaged in a "question first, warn later" scheme to circumvent *Miranda v. Arizona*.

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The State of Illinois respectfully petitions for a writ of certiorari to review the judgment of the Illinois Supreme Court in this case.

OPINIONS BELOW

The opinion of the Illinois Supreme Court (App. 1a-63a) is reported at __ N.E.2d __, No. 103768, 2008 Ill. LEXIS 630 (Ill. Sup. Ct. June 19, 2008). The opinion of the Illinois Appellate Court, First District (App. 64a-78a), is reported at 367 Ill. App. 3d 817, 856 N.E.2d 471 (2006). The transcript of the trial court's May 8, 2001, ruling on respondent's motion to suppress statements is unreported (App. 79a–82a), as is the trial court's July 16, 1999, ruling on respondent's motion to quash arrest and suppress evidence (App. 83a-88a).

STATEMENT OF JURISDICTION

The order and judgment of the Illinois Supreme Court was entered on June 19, 2008. The State did not file a petition for rehearing. This petition for a writ of certiorari is filed within ninety days of that court's order. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fifth Amendment to the United States Constitution provides, in relevant part: "No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law. . . ."

The Fourteenth Amendment to the United States Constitution provides, in relevant part:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

1. On July 14, 1998, Chicago police entered the apartment of the victim, Hector Andrade, in response to a report of a burglary. App. 2a. Inside the apartment, the police discovered the victim's dead body on the living room floor in a pool of blood. App. 2a. The victim had been stabbed many times, and his arms, legs, and head were bound with duct tape. App. 2a. The police found a large-blade knife and burned-out cigarettes near his body. App. 2a. The apartment smelled of gas and appeared to have been ransacked. App. 2a.

Respondent Mariano Lopez gave both oral and written statements in which he confessed to participating in the robbery and murder of the victim. App. 2a. Respondent's two co-defendants (Jose Leal and William Andrade, who was not related to the victim) also confessed. App. 2a. Prior to trial, respondent filed a motion to quash his arrest and suppress evidence pursuant to the Fourth Amendment and a motion to suppress his statements pursuant to the Fifth Amendment. App. 2a. The trial court conducted separate hearings on each motion. App. 2a. The trial court denied the motion to quash arrest, finding that respondent voluntarily accompanied the police to the police station. App. 15a, 83a-88a. The trial court granted the motion to suppress statements with respect to respondent's oral statement, based on its conclusion that the police had probable cause to arrest him at the time he gave that statement and should have advised him of his *Miranda* rights before questioning him. App. 23a, 81a-82a. The trial court, however, declined to suppress respondent's written statement, holding that it was given voluntarily and was sufficiently attenuated from the oral statement. App. 23a, 82a.

2. The trial court made these determinations based on the following evidence, which was adduced at the hearings of the motions to quash arrest and suppress statements.

Hearing regarding the motion to quash arrest

Respondent testified that on July 21, 1998, when he was 15 years old, two police officers came to his home while he was asleep. App. 2a. They entered his house and told him that he was going with them to the station. App. 3a. They said they wanted to talk to him about gangs and not about a murder. App. 3a. One of the officers pushed and grabbed respondent and said "come on." App. 3a. Respondent did not think he had any choice but to accompany them. App. 3a. Exiting his apartment, respondent noticed that a third officer standing outside had his gun drawn. App. 3a. Respondent acknowledged that the other officers never drew their guns and that he was not handcuffed. App. 3a.

Respondent rode with the police to the station and testified that no one told him that he could arrange for his own transportation. App. 30a. At the station, respondent was put in a room and repeatedly questioned between three and four hours. App. 4a. He was not handcuffed, and he was allowed to use the bathroom, and he was offered food. App. 4a. Respondent denied that he was ever left alone. App. 4a. Respondent admitted that he signed a written confession. App. 4a. According to respondent, he was allowed to see his father only after its completion. App. 4a. He admitted, however, that he did not ask to see his parents or to go home. App. 30a. Respondent's father also signed the handwritten statement. App. 4a.

Respondent's mother, Maria Luisa Garcia, testified that two men came to the house and asked, in Spanish, for respondent. App. 4a. One of the men identified himself as a detective and said he was taking respondent for questioning and that respondent had to cooperate. App. 4a. No one explained that it was a murder investigation or where they were taking respondent. App. 5a. When respondent entered the room, the detective told him that they were taking him. His mother then saw the detective "like push" respondent and tell him "let's go." App. 5a. Respondent's mother acknowledged that the detective gave her a card with his name and phone number on it. App. 6a. She denied, however, being told she could go to the station and stated that respondent was never told that he did not have to go. App. 5a. Respondent's mother also acknowledged that respondent was not handcuffed when he left. App. 5a. She stated that her neighbor Lydia called the number on the card many times that day but never got any information, and, in addition, when her husband found out what had happened he went looking for respondent. App. 6a. At approximately 10:00 p.m., the same officers came back and searched respondent's things. App. 7a. When they left, respondent's father went with them. App. 7a.

Respondent's father, Mariano Lopez, Sr., testified that after getting home from work, he went to several police stations looking for respondent, but no one knew where he was. App. 7a.

Respondent's neighbor, Lydia Villanueva, testified that she spoke to Detective Bautista twice on the phone and told him that respondent's mother was worried and

wanted to know what was going on. App. 8a. He told her that they were still questioning respondent and he would be home later, but he did not say where respondent was. App. 8a. Villanueva admitted that she never asked to speak with respondent and never asked if the parents could talk to respondent or if they could see him. App. 9a.

Detective Bautista testified that on July 28, 1998, while investigating Hector Andrade's murder, he and his partner, Detective Keane, learned that respondent might be a possible witness and went to his home at around noon. App. 9a. After respondent's mother answered the door, Detective Bautista, speaking Spanish, identified himself and his partner and asked if they could talk to respondent about a murder investigation in which his name had been mentioned. App. 9a-10a. Respondent's mother agreed, invited them in, and went to get respondent. App. 9a-10a.

When respondent came into the room, Detective Bautista introduced himself and his partner, told respondent his name had come up in a murder investigation, and said they would like to ask him some questions at the station. App. 10a. After respondent agreed to go with them, Detective Bautista asked his mother for permission to speak with him at the station. App. 10a. Detective Bautista said respondent would be at Kedzie and Harrison, and gave her a business card with his name and phone number. App. 10a.

When respondent's mother asked if she should go with them, Detective Bautista explained that it was unnecessary, but would be allowed. App. 10a-11a.

Respondent's mother gave no indication of wanting to go and said she would call later to check on her son. App. 11a. At the time the police drove respondent to the station, he was not a suspect. App. 35a. According to Detective Bautista, no one touched respondent, he was not handcuffed, and no one took out his gun. App. 11a.

Detective Bautista further explained that, once at the station, respondent was put in an interview room, which was normal procedure for witnesses. App. 11a. He was not handcuffed and the door was left unlocked. App. 11a. At approximately 1:00 p.m. Detectives Bautista and Keane spoke to respondent for between fifteen and twenty minutes, and respondent gave them the name of a certain individual. App. 11a. Because respondent was a witness, he was not given *Miranda* rights and no youth officer was present. App. 11a. Detective Bautista explained to respondent that they needed to verify the information he had given them and that they would leave him alone for a while. App. 11a. Detective Bautista asked respondent if he needed anything, offered him food, and told him to knock on the door if he wanted anything. App. 11a-12a. According to Detective Bautista, witnesses at police stations generally are not allowed to walk around freely and, accordingly, it was normal procedure to escort witnesses if they needed to use the bathroom or any services. App. 12a. Although respondent was not told that he was free to leave, he did not ask to leave, and, indeed, Detective Bautista believed that respondent was free to leave if he wanted because he was not under arrest. App. 12a. Even while alone in the room, respondent was not handcuffed and the door was closed, but not locked. App. 12a. Detectives Bautista and Keane left the station

for two hours and, upon returning, they checked in on respondent who indicated that he was okay and wanted no food. App. 12a. Shortly before 6:00 p.m. the detectives spoke with Jose Leal who implicated himself and respondent in the murder. App. 13a.

Detectives Bautista and Keane spoke again to respondent, who, upon being told of Leal's statements gave an inculpatory statement. App. 13a. The detectives then stopped the interview and arrested respondent and advised him of his constitutional rights, including his juvenile rights. App. 13a. Detective Bautista stated that he did not return to respondent's home that evening, he did receive a telephone call about respondent, and he told the caller that the police were still investigating, but neither hid respondent's location from the caller nor said respondent would be returned home. App. 12a.

Detective Keane corroborated Detective Bautista's testimony. He stated that when he and Detective Bautista went to respondent's house, they considered him a witness. App. 13a. They told him that they were investigating a murder and asked if he would go with them to the station to answer questions. App. 14a. They did not say that they wanted to talk about gangs. App. 14a. After respondent agreed to go with them, Detective Bautista spoke with his mother in Spanish and gave her a business card. App. 14a. Respondent did not ask for anyone to go with him, he was not handcuffed, no one touched him, no guns were drawn, and neither Detective Bautista nor Detective Keane returned to the home. App. 14a.

In denying respondent's motion to quash arrest, the trial court made factual findings that demonstrated that it found the testimony of the officers to be more credible than that of respondent and his witnesses. App. 15a.

Hearing regarding the motion to suppress statements

The parties stipulated that the trial court could consider the testimony from the hearing on respondent's motion to quash arrest. App. 15a. The People also presented the live testimony of Detective Keane, Detective Carlos Velez, and ASA Steven Fine. App. 15a-22a.

Detective Keane testified that on the morning of July 21, 1998, he learned that Leal had given a written statement to police in which he identified William Andrade and respondent as Hector Andrade's killers. App. 15a. Accompanied by Detective Bautista, Detective Keane went to respondent's home and brought him to the station. App. 15a. The detectives did not tell respondent or his mother about Leal's allegations. App. 15a. Because the detectives considered respondent a witness, they did not advise him of his constitutional rights. App. 15a.

At the station, the detectives spoke briefly with respondent and told him about Leal's allegations, which respondent denied. App. 15a-16a. Respondent directed the detectives to other people whom he claimed had information about the murder, and they told him they were going to continue their investigation based on this information. App. 15a-16a. Respondent said he was fine staying in the room and waiting for them. App. 16a.

The detectives then re-interviewed Leal, who for the first time implicated himself as well as respondent and William Andrade. App. 16a. According to Leal, he, William Andrade, and respondent went to the victim's apartment looking for money. App. 16a. After Andrade stabbed the victim, the three men ran out. App. 16a. Based on this statement, the detectives placed Leal under arrest. App. 16a.

Detectives Keane and Bautista then told respondent about Leal's most recent statement and asked whether he was involved in the murder. App. 16a-17a. They did not advise respondent of his rights prior to this conversation because respondent had merely supplied the detectives with information, and, moreover, Leal had given inconsistent statements, so they were not sure whether respondent "had anything to do with anything at that point" and were still conducting their investigation. App. 16a. Detective Keane expressly denied withholding *Miranda* warnings in order to get respondent to confess. App. 17a. Respondent 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." App. 17a. The detectives then stopped the interview, advised respondent of his juvenile and *Miranda* rights, and contacted respondent's parents and the State's Attorney's Office. App. 17a.

ASA Steven Fine arrived at the station at approximately 8:00 p.m., and respondent's father arrived about a half hour later. App. 17a-18a. Respondent's father spoke with respondent alone before ASA Fine spoke to him. App. 17a-18a. With respondent's father,

Detective Velez – who was acting as a Spanish interpreter for the father – and Detective Keane present, ASA Fine introduced himself to respondent and re-advised respondent of his juvenile and *Miranda* rights. App. 18a. After acknowledging and waiving his rights, respondent gave an oral statement in response to ASA Fine's questions. App. 18a. Each time ASA Fine asked respondent a question and respondent gave a response, Detective Velez translated the question and response for respondent's father. App. 18a.

Respondent then decided to give a written statement. App. 18a. No one told him he could leave if he gave a statement. App. 18a. After respondent's written statement was drafted, ASA Fine reviewed it with him and allowed him to make corrections. App. 18a. Detective Velez continued to translate for respondent's father during the preparation of the written statement, and after completion, it was signed by respondent, ASA Fine, Detective Keane, Detective Velez and respondent's father. App. 18a.

In the signed written statement, respondent admitted that on the day of the murder, he and co-defendants William Andrade and Leal executed a premeditated plan to rob and kill Hector Andrade. App. 24a. They forced their way into the victim's apartment, tackled him to the ground, and taped his arms and legs with duct tape. App. 24a. They then searched the apartment for drugs and money. App. 25a. Respondent saw Leal go into the kitchen and grab a knife from a drawer. App. 24a. Leal then walked back to the victim, who was face down and being restrained by Andrade. App. 24a. Leal kneeled down next to the victim

and stabbed the victim with the knife until he stopped moving. App. 24a. Leal then helped respondent search the bedroom and they found a wallet. App. 25a. Leal also found some jewelry and William Andrade found a camera. App. 25a. After Leal turned on the gas to the stove, the three men left the apartment together. App. 25a. They ran for a few blocks and then split up. App. 25a. Respondent gave Leal the victim's wallet and went home. App. 25a. A few days later, Leal called and invited respondent to the movies saying he would "treat" because he had $200 in cash. App. 25a.

Respondent also testified at the hearing on the motion to suppress statements. He stated that he was kept in a locked interview room and answered the detectives' questions only because they told him that if he gave a statement he could go home and, in addition, that the detectives told him what to say. App. 20a. Respondent acknowledged speaking to ASA Fine, but claimed not to know what an Assistant State's Attorney was and also claimed that his statement to ASA Fine was a lie. App. 20a. Respondent acknowledged that ASA Fine, but not Detective Keane, advised him of his *Miranda* and juvenile rights, but claimed not to have understood them. App. 20a. Respondent admitted, however, that he did not tell this to ASA Fine when specifically asked. App. 20a. Respondent further testified that he was present for the writing of his written statement, but stated that he signed it only so that he could go home. App. 20a. Respondent denied that he spoke with his father before signing the statement and claimed that his father was not present at the time of the statement but signed it only after its completion. App. 21a.

Respondent's father admitted signing the handwritten statement, but claimed that he signed it because he was told it was a burglary case. App. 21a. Respondent's father denied talking to respondent privately prior to the statement, denied that the statement was read to him in Spanish, and denied being present when it was given. App. 21a.

The Trial

3. After the trial court denied respondent's motion to suppress the written statement, that statement was admitted into evidence at respondent's trial, where it was corroborated by evidence recovered from the crime scene. App. 56a. Consistent with the statement, the victim was found lying face down in the living room, tied up with duct tape and stabbed numerous times with a knife. App. 23a-24a, 56a. William Andrade's fingerprint was found on the duct tape with which the victim was bound, and Leal's fingerprints were found on a beer bottle in the apartment. App. 23a-24a, 56a. There were obvious signs that the apartment had been searched. App. 2a. Finally, there was a strong odor of natural gas coming from the stove. App. 23a, 56a.

Following a bench trial, the court found respondent guilty of first degree murder. App. 25a. He was sentenced to twenty-three years in prison. App. 25a.

The Appeals

4. On appeal to the Illinois Appellate Court, respondent challenged the trial court's denial of his motions to quash arrest and to suppress the written statement. App. 25a, 65a. The appellate court affirmed the trial court's determination that respondent voluntarily accompanied the police to the station. App. 25a, 74a-75a. In addition, the appellate court rejected respondent's argument that the evidence supported a finding that the police employed a "question first, warn later" interrogation technique and, accordingly, affirmed the trial court's admission of the written statement. App. 25a, 77a-78a.

On appeal, the Illinois Supreme Court agreed that respondent had voluntarily come to the police station for questioning. App. 36a. That court nevertheless held that respondent's written statement should have been suppressed under *Missouri v. Seibert*, 542 U.S. 600 (2004), because, first, respondent's voluntary presence at the station became involuntary once he was left in an interview room with the door closed, App. 37a-38a, and second, because the police intentionally withheld *Miranda* warnings, a conclusion the court reached only by rejecting the factual findings of the trial court. App. 50a-54a.

REASONS FOR GRANTING THE PETITION

I.

THIS COURT HAS NOT SQUARELY RESOLVED THE IMPORTANT ISSUE OF WHETHER THE OBJECTIVE "REASONABLE PERSON" TEST MAY INCLUDE CONSIDERATION OF THE SUSPECT'S PARTICULAR CHARACTERISTICS.

This case presents this Court with the opportunity to decide on direct appeal whether the application of the "reasonable person" test may include consideration of the suspect's personal characteristics, outside of the shadow of the standard of review dictated by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). This case involves the Illinois Supreme Court's faulty determination that a minor's custodial status, for Fourth Amendment purposes, requires consideration of characteristics personal to the individual, including his age, educational background, and experience with the criminal justice system. Essentially, the Illinois Supreme Court discarded the established objective "reasonable person" standard and, in cases involving minors, replaced it with a subjective standard. Such action is properly regarded as conflicting with this Court's holding in *Yarborough v. Alvarado*, 541 U.S. 652, 668 (2004), and warrants further consideration by this Court. While this Court has repeatedly held that the "reasonable person" tests under the Fourth and Fifth Amendments are objective ones, and disagreed in *Yarborough* with the argument that this Court's prior cases allowed the consideration of a suspect's particular characteristics as part of the

"reasonable person" test, this Court did not squarely decide this issue on the merits in *Yarborough*.

This is because, in *Yarborough*, the Court addressed the question of whether a suspect's age and experience with the police should be considered as part of the "reasonable person" test in the context of the standard set forth by the AEDPA. Under the AEDPA,

> a federal court can grant an application for a writ of habeas corpus on behalf of a person held pursuant to a state-court judgment if the state-court adjudication 'resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.'

Yarborough, 541 U.S. at 655 (quoting 28 U.S.C. § 2254(d)). Thus, 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 when it failed to consider the defendant's age and experience. *Id.* at 668 ("For these reasons, the state court's failure to consider Alvarado's age does not provide a proper basis for finding that the state court's decision was an unreasonable application of clearly established law"). And Justice O'Connor, in her concurring opinion, stated that "[t]here may be cases in which a suspect's age will be relevant to the *Miranda* 'custody' inquiry." *Id.* at 669 (O'Connor, J., concurring).

Given the standard of review applied in *Yarborough*, this Court did not have the opportunity to decide this issue squarely. As one court has noted, "[a]s is apparent, *Alvarado* did not strictly decide whether an accused's juvenile status is irrelevant to the *Miranda* custody determination. That was unnecessary for its decision." *United States v. Little*, 851 A.2d 1280, 1286 (D.C. App. 2004). And as one set of commentators has observed, *Yarborough* "hardly settles the matter" for the following reasons:

> (i) *Yarborough* was a deferential-review habeas corpus case in which the issue was *only* whether the state court, in not taking those characteristics into account, had made an unreasonable application of clearly established law; (ii) when the majority hypothesized about what the outcome would be on de novo review, it only said that reliance on the suspect's prior history with law enforcement would be "improper" because in "most cases, police officers will not know a suspect's interrogation history"; (iii) the four dissenters concluded that Alvarado's age should have been considered on the custody issue, as it was "known to the police" and is "a widely shared characteristic that generates commonsense conclusions about behavior and perception" that consequently would "not complicate the 'in custody' inquiry"; and (iv) one member of the majority allowed that Alvarado's age might have been relevant had he not been "almost 18 years old at the time of his interview."

2 Wayne R. LaFave, Jerold H. Israel, Nancy J. King & Orin S. Kerr, *Criminal Procedure*, § 6.6(c) (3d ed. 2007) (emphasis in original).

In the absence of a clear ruling on the precise issue of whether the reasonable person standard must include consideration of a suspect's age and experience, lower courts and commentators have divided on the issue of whether such personal characteristics should be considered. By contrast, other courts have injected consideration of a suspect's age and experience into what is supposed to be an 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). A number of courts have expressly refused to consider personal characteristics such as a suspect's age when utilizing the objective reasonable person standard. *See, e.g., People v. Croom*, 883 N.E.2d 681, 689 (Ill. App. Ct. 2008) (declining to consider the defendant's age when determining whether he was in custody for *Miranda* purposes, citing *Yarborough*); *State v. Turner*, 838 A.2d 947, 963 (Conn. 2004). Some commentators have followed suit. About the Fourth Amendment, one has written that "[o]bviously, the youth or inexperience of the suspect must be taken into account." 3 Wayne R. LaFave, *Search and Seizure*, § 5.1(a) (4th ed. 2004) (citing *State v. Werner*, 9 S.W.3d 590 (Mo. 2000); *Seals v. United States*, 325 F.2d 1006 (D.C. Cir. 1963)). As for the Fifth Amendment, others have also speculated that "[t]he *Berkemer* 'reasonable person' test probably requires consideration of certain unique characteristics of the suspect (e.g., his youth), as several lower courts have

concluded, notwithstanding *Yarborough v. Alvarado*." 2 Wayne R. LaFave, *et al.*, *Criminal Procedure*, § 6.6(c).

This case squarely implicates this divergence in authority because the Illinois Supreme Court expressly considered respondent's age, educational background, and his experience with the criminal justice system when it determined that he was seized for purposes of the Fourth Amendment and in custody for purposes of the Fifth Amendment. App. 28a-29a. Indeed, consideration of these factors was crucial to the court's determination that respondent's voluntary presence at the police station at some point became involuntary. This is because the other factors that the court relied on – that respondent was told to wait in the interview room while the police continued their investigation, that he was not permitted to walk around the station without an escort, that the door to the interview room was shut (although he was told to knock if he needed to use the restroom or other assistance), and that he was not explicitly advised that he was free to leave (even though the police believed he was permitted to do so) (App. 37a) – cannot on their own support the court's holding that respondent was involuntarily detained. As Detective Bautista explained, witnesses are generally not allowed to walk around freely around the police station, and the police require that witnesses be escorted by police personnel if they need to use the bathroom or other services. App. 12a.

This approach makes sense. It would be unsafe to allow members of the general public to wander the back halls of a police station freely without an escort. Police

must be allowed to keep doors closed, and any rule that prevents such safety measures is nonsensical and unwarranted under the Constitution. Where potential witnesses are concerned, safety concerns are particularly pronounced. As a result, restricting the movement of witnesses in 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 for speaking to the police. Indeed, it bears noting that the movements of the public are often restricted when people visit places other than a police station. For instance, patients are not allowed to wander freely throughout the halls of a physician's office and the doors to each room are usually closed. Certainly, a reasonable person would not conclude that he or she was not free to leave a doctor's office.

The Illinois Supreme Court turned those safety measures upside down when it ruled that such safeguards turned respondent's voluntary presence at the station into a seizure. The court effectively held that the police must warn a person who has voluntarily agreed to answer questions that he or she is free to end the questioning and leave at any time – a rule that this Court has never endorsed. Additionally, the Illinois Supreme Court has required the police to not only divine the person's age (some people do lie about their age), but also their degree of experience with the criminal justice system. Such requirements have never been considered to be constitutional mandates and to require such would unduly impede the swift and effective resolution of crimes. (*See* Arg. II). The court reached these unlikely conclusions based on its view that implicit consent to remain at the station while the police

investigate is a "proposed fiction," "particularly . . . when the person in question is a minor." App. 37a-38a.

Thus, free from the strictures of the AEDPA, this case presents the Court with the opportunity to squarely decide whether the objective reasonable person test should incorporate a suspect's personal characteristics, such as a suspect's age and experience, as part of that inquiry.

II.

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.

The Illinois Supreme Court incorrectly altered the objective "reasonable person" test to include consideration of the suspect's age, educational background, and experience with the justice system when determining whether a suspect has been seized under the Fourth Amendment or is in custody under the Fifth Amendment and *Miranda v. Arizona*, 384 U.S. 436 (1965). As we explain above, in *Yarborough*, this Court has rejected the notion that the objective "reasonable person" test should include the consideration of the suspect's individual characteristics, including the suspect's age – albeit in the habeas context. *Yarborough*, 541 U.S. at 668. As a result, the decision of the Illinois Supreme Court on this important federal constitutional question is in tension with *Yarborough*.

In addition, by incorporating the suspect's particular characteristics, the Illinois ruling conflicts with this Court's consistent rule that the "reasonable person" standard under both the Fourth and Fifth Amendments is an objective, not a subjective, test.

The "reasonable person" standards under the Fourth and Fifth Amendments are substantially the same. "[A] person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *United States v. Mendenhall*, 446 U.S. 544, 554 (1980) (Stewart, J., plurality opinion); *see also Florida v. Royer*, 460 U.S. 491, 502 (1983) (adopting the *Mendenhall* standard).

> Examples of circumstances that might indicate a seizure, even where the person did not attempt to leave, would be the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled.

Mendenhall, 446 U.S. at 554 (Stewart, J.). "In the absence of some such evidence, otherwise inoffensive contact between a member of the public and the police cannot, as a matter of law, amount to a seizure of that person." *Id.* at 555. This Court has continued to adhere to the rule that, "in order to determine whether a particular encounter constitutes a seizure, a court must

consider all the circumstances surrounding the encounter to determine whether the police conduct would have communicated to a reasonable person that the person was not free to decline the officers' requests or otherwise terminate the encounter." *Florida v. Bostick*, 501 U.S. 429, 439 (1991). Moreover, "the 'reasonable person' test presupposes an *innocent* person." *Id.* at 438 (emphasis in original).

Thus, the Court's Fourth Amendment jurisprudence has not focused on the suspect's age or experience with law enforcement when determining whether a seizure has occurred. As for the Fifth Amendment, in *Yarborough*, this Court adhered to the objective "reasonable person" test, noting that "[o]ur opinions applying the *Miranda* custody test have not mentioned the suspect's age, much less mandated its consideration." *Yarborough*, 541 U.S. at 666. Thus, while the Ninth Circuit in *Yarborough*, like the Illinois Supreme Court here, attempted to equate the *Miranda* custody test with other inquiries – such as the voluntariness of a statement – that incorporate a person's individual characteristics, this Court explained that "[t]here is an important conceptual difference between the *Miranda* custody test and the line of cases from other contexts considering age and experience." *Id.* "The objective test furthers 'the clarity of [*Miranda*'s] rule,' . . . ensuring that the police do not need 'to make guesses as to [the circumstances] at issue before deciding how they may interrogate the suspect.'" *Id.* (*quoting Berkemer v. McCarty*, 468 U.S. 420, 430-31 (1984)).

The objective test necessarily focuses on the restrictive circumstances themselves rather than on the

suspect's perceptions because "the ultimate inquiry is simply whether there is a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest." *California v. Behler*, 463 U.S. 1121, 1125 (1983) (*quoting Oregon v. Mathiason*, 429 U.S. 492, 495 (1977)). This Court has observed that "[o]ur decisions make clear that the initial determination of custody depends on the *objective* circumstances of the interrogation, not on the subjective views harbored by either the interrogating officers or the persons being questioned." *Stansbury v. California*, 511 U.S. 318, 323 (1994) (emphasis added). To determine whether the circumstances surrounding the questioning are sufficiently restrictive to constitute custody, this Court has looked to "how a reasonable man in the suspect's position would have understood his situation." *Berkemer*, 468 U.S. at 442.

As the Court observed in *Yarborough*, "[i]t is possible to subsume a subjective factor into an objective test by making the latter more specific in its formulation." *Yarborough*, 541 U.S. at 667. In that case, the Ninth Circuit made just such an error when it "styled its inquiry as an objective test by considering what a 'reasonable 17-year-old, with no prior history of arrest or police interviews' would perceive." *Id.* The Illinois Supreme Court did the same when it stated that "[a]lthough defendant did not receive *Miranda* warnings, and no other indicia of formal arrest were present, we cannot conclude that a *reasonable juvenile* in defendant's position would have felt free to leave the police station." App. 37a. (emphasis added).

In short, the Illinois Supreme Court's decision disregards this Court's objective reasonable person standard for determining whether a person is under arrest for purposes of the Fourth Amendment or in custody for purposes of the Fifth Amendment and thus conflicts with this Court's decisions on this issue. In hinging the reasonableness inquiry on respondent's age and experience, the court "ignored the argument that the custody inquiry states an objective rule designed to give clear guidance to the police, while consideration of a suspect's individual characteristics . . . could be viewed as creating a subjective inquiry." *Yarborough*, 541 U.S. at 668. Accordingly, petitioner respectfully requests that this Court grant *certiorari*.

III.

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*.

Missouri v. Seibert, 542 U.S. 600 (2004), does not set forth a standard of review for courts to use when evaluating whether the police intentionally employed a two-step interrogation process in which warnings given pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1966), were deliberately withheld until after the suspect has confessed. In the wake of this silence, the federal courts of appeal have split on this issue. The Illinois Supreme Court applied a *de novo* standard of review, a standard that has been adopted by two circuits. By contrast, six

circuits have reviewed this issue only for clear error. This case presents the opportunity to resolve this mature circuit split and, in addition, clarify what constitutes warnings being deliberately withheld, as the Illinois Supreme Court believed that the delay in giving the warnings was itself conclusive evidence of deliberateness, despite the contrary factual findings by the trial court.

In *Oregon v. Elstad*, 470 U.S. 298 (1985), this Court addressed the question whether the failure of an interrogating officer to issue *Miranda* warnings rendered subsequent statements, made after *Miranda* warnings were given and a waiver of rights obtained, inadmissible. 470 U.S. at 300, 303. This Court ruled 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. Rather, where the initial unwarned statement was given voluntarily without "any coercion or improper tactics," 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.* By contrast, if a prior statement was actually coerced, "the time that passes between confessions, the change in place of interrogations, and the change in identity of the interrogators all bear on whether that coercion has carried over to the second confession." *Id.* at 310.

In *Seibert*, this Court addressed the "question first, warn later" interrogation technique used to sidestep *Miranda*. Pursuant to department policy, the interrogating officer in *Seibert* questioned the defendant at the police station about an arson murder without first advising her of her rights. 542 U.S. at 604-05. After the defendant incriminated herself, the police gave her a twenty-minute coffee break. *Id.* When the interrogation resumed, the police advised the defendant of her *Miranda* rights, which she waived. *Id.* The same initial interrogating officer then confronted the defendant with her earlier admission and elicited a confession, which the prosecution used to convict her. *Id.* The officer 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.

This Court's plurality opinion explained that this deliberate, two-round interrogation technique was unconstitutional because it "effectively threatens to thwart *Miranda*'s purpose of reducing the risk that a coerced confession would be admitted." *Id.* at 617. The plurality characterized the situation in *Elstad* as one involving an inadvertent violation of *Miranda* on the part of law enforcement. *Id.* at 615. The plurality contrasted *Elstad* by listing "a series of relevant facts that bear on whether *Miranda* warnings delivered midstream could be effective enough to accomplish their object: the completeness and detail of the questions and answers in the first round of interrogation, the overlapping content of the two statements, the timing and setting of the first and second, the continuity of

police personnel, and the degree to which the interrogator's questions treated the second round as continuous with the first." *Id.* at 615. Based on its application of these "relevant facts," the plurality concluded that the intentionally delayed warnings given in the case before it were ineffective and therefore, made the second statement inadmissible. *Id.* at 616-17.

Justice Kennedy, in his concurring opinion, viewed the plurality's "relevant facts" for inadmissibility as too broad. *Id.* at 621-22. Rather, Justice Kennedy opined that the plurality's "relevant facts" in determining the effectiveness of midstream warnings should be limited to situations in which the police set out deliberately to withhold *Miranda* warnings until after a confession has been secured. *Id.* Specifically, Justice Kennedy wrote, "[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.

Pursuant to the principle of *Marks v. United States*, 430 U.S. 188, 193 (1977), that "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds," several courts, including the Illinois Supreme Court in this case, have found Justice Kennedy's opinion to be controlling. *See United States v. Courtney*, 463 F.3d 333, 338-39 (5th Cir. 2006); *United States v. Ollie*, 442 F.3d 1135, 1142 (8th Cir. 2006); *United States v. Williams*, 435 F.3d 1148, 1157 (9th Cir. 2006); *United States v. Naranjo*, 426 F.3d 221, 231-32 (3d Cir.

2005); *United States v. Mashburn*, 406 F.3d 303, 308-09 (4th Cir. 2005); *United States v. Stewart*, 388 F.3d 1079, 1090 (7th Cir. 2004). Nevertheless, "[d]etermining the proper application of the *Marks* rule to *Seibert* is not easy, because arguably Justice Kennedy's proposed holding in his concurrence was rejected by a majority of the Court." *United States v. Carrizales-Toledo*, 454 F.3d 1142, 1151 (10th Cir. 2006).

As a result of the absence of a definitive holding, a significant split has developed over the proper standard of review for a *Seibert* claim. The majority of circuits that have addressed whether the police deliberately engaged in a deliberate two-step approach to circumvent *Miranda* have reviewed the trial court's decision for clear error. *See, e.g., United States v. Stewart*, No. 06-4323, slip op. at 8 (7th Cir., Aug. 8, 2008); *United States v. Torres-Lona*, 491 F.3d 750, 758 (8th Cir. 2007); *United States v. Narvaez-Gomez*, 489 F.3d 970, 974 (9th Cir. 2007); *United States v. Nunez-Sanchez*, 478 F.3d 663, 668-69 (5th Cir. 2007); *United States v. Naranjo*, 426 F.3d 221, 232 (3d Cir. 2005); *United States v. Mashburn*, 406 F.3d 303, 309 (4th Cir. 2005).

Unlike these six circuits, however, two circuits appear to apply a *de novo* standard when reviewing whether the police deliberately used a "question first, warn later" method to circumvent *Miranda*. *See United States v. Carter*, 489 F.3d 528, 536 (2d Cir. 2007); *United States v. Street*, 472 F.3d 1298, 1314 (11th Cir. 2006). With this case, the Illinois Supreme Court has joined this minority view by reviewing this issue *de novo* without deference to the trial court's factual findings. App. 53a-54a.

This Court should grant certiorari to resolve this circuit split and clarify that the appropriate standard of review for this issue is a review for clear error. As the Seventh Circuit recently explained, "[t]he question of whether the interrogating officer deliberately withheld *Miranda* warnings will invariably turn on the credibility of the officer's testimony in light of the totality of the circumstances surrounding the interrogation." *Stewart*, slip op. at 8. "This is a factual finding entitled to deference on appeal. . . ." *Id.* A trial judge's factual determinations are entitled to deference because a "trial judge views the facts of a particular case in light of the distinctive features and events of the community. . . ." *Ornelas v. United States*, 517 U.S. 690, 699 (1996). "The background facts provide a context for the historical facts, and when seen together yield inferences that deserve deference." *Id.* Under the "clear error" standard, a reviewing court will accept the trial court's credibility findings "unless it is contrary to the laws of nature, or is so inconsistent or improbable on its face that no reasonable factfinder could accept it." *United States v. Huebner*, 356 F.3d 807, 813 (7th Cir. 2004). In other words, "determinations of witness credibility can virtually never be clear error." *United States v. Biggs*, 491 F.3d 616, 621 (7th Cir. 2007).

Here, the Illinois Supreme Court did not apply this standard. Notwithstanding the testimony by Detectives Bautista and Keane that they did not give respondent *Miranda* warnings prior to his oral statement because they did not consider him a suspect, App. 13a, 16a, and the trial court's determination that the police testimony was credible, App. 15a, 23a, and specifically, that Detective Keane was credible when he testified that the

police did not deliberately withhold *Miranda* warnings in order to get a confession, the Illinois Supreme Court did not credit Detective Keane's testimony. App. 50a-51a. In so doing, the court expressly recognized that it was overturning the factual findings of the trial court:

> 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.

App. 50a. The Illinois Supreme Court could not have overturned the trial court's factual findings under a

"clear error" standard because the trial court's findings were not "contrary to the laws of nature, or [] so inconsistent or improbable on its face that no reasonable factfinder could accept it." *Huebner*, 356 F.3d at 813. A trial judge's factual determinations are entitled to deference because a "trial judge views the facts of a particular case in light of the distinctive features and events of the community. . . ." *Ornelas*, 517 U.S. at 699. In disregarding the testimony that the trial court had found to be credible, the Illinois Supreme Court effectively applied a *de novo* standard that failed to give appropriate deference to the trial court's findings of fact.

In short, the lower courts are in conflict over the appropriate standard of review to be applied when determining whether the police deliberately engaged in a "question first, warn later" scheme to circumvent *Miranda*. In light of the importance of this question, this mature conflict warrants the Court's resolution.

In concert with establishing the appropriate standard of review, this case also presents this Court with the opportunity to clarify *Seibert* regarding what is needed to show that a delay in giving *Miranda* warnings was not deliberate. Unlike in *Seibert*, where the police explained that they purposely withheld *Miranda* warnings until they got a confession, the police here did no such thing. Detective Keane expressly denied withholding the warnings to get a statement from respondent. The police did not initially warn respondent because they still considered him a witness, which was not true in *Seibert*. Moreover, in *Seibert*, the unwarned interrogation was "systematic, exhaustive, and managed with psychological skill," and "there was little, if

anything, of incriminating potential left unsaid." *Seibert*, 542 U.S. at 616. Here, however, the initial questioning was not exhaustive, and respondent's statement after the warnings was far more comprehensive and detailed than his initial unwarned statement. In his brief oral statement, respondent merely admitted that he entered the victim's apartment, that the victim was tied up and stabbed, and that he and his co-defendants took some proceeds. Respondent's handwritten statement to the prosecutor, on the other hand, was twelve pages long. In addition, the warned interrogation in *Seibert* came after a pause of just fifteen to twenty minutes *Id.*, while the delay in this case between the unwarned questioning and his later confession after being warned was over three hours. Another significant difference is that the same officer conducted both the unwarned and warned interrogations in *Seibert*, *Id.*, while here a prosecutor – not a police officer – conducted the warned questioning. Finally, unlike in *Seibert*, there was no evidence that respondent's unwarned statement was used to prompt his statements in his later, warned confession. The factual distinctions between the two cases will allow this Court to clarify the fractured decision in *Seibert*.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

RICHARD A. DEVINE
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*