No. 128609

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, -vs- FRANCISCO LOZANO, Defendant-Appellant.	)))))))))))	Appeal from the Appellate Court of Illinois, No. 1-18-2170. There on appeal from the Circuit Court of Cook County, Illinois , No. 18 CR 3154. Honorable James B. Linn, Judge Presiding.

REPLY BRIEF FOR DEFENDANT-APPELLANT

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ARGUMENT

I. Police violated Francisco Lozano's fourth amendment right against unlawful search and seizure when they seized him for the sole reason that he was running in the rain with his hands in his pocket.

"In the end, all we are left with is a man running in a cold Chicago rain, with a bulge in his pocket, up a stoop, and toward shelter. I cannot find that this amounts to a reasonable suspicion of criminal activity, nor should anyone." *People v. Lozano*, 2022 IL App (1st) 182170, ¶ 114 (Gordon, J., dissenting).

No reasonable suspicion justified the officers' seizure of Lozano.

(1) The police seized Lozano when they blocked his way down the stairs and led him to the police car.

The parties agree that Officer Rodriguez seized Lozano when Rodriguez followed him up the stairs of an apartment building, blocked his egress, and ordered him down the stairs. (St. Br. 16, fn. 3; Def. Br. 14-16) Thus, the question is whether Rodriguez's actions were justified at that time. They were not.

(2) The seizure of Lozano was not a valid Terry stop because there was no reasonable, articulable suspicion that he had committed, was committing, or was about to commit a crime.

From the very first sentence of its argument, the State misrepresents Lozano's conduct, stating that his actions were an "attempt to flee from officers and enter an abandoned building while concealing a bulky object in his sweatshirt." (St. Br. 11) The State argues that the officers "could have reasonably concluded that Lozano was either carrying and concealing contraband or trying to break into an abandoned building, or both" because (1) he was "running at a fast pace in jeans and holding the front pocket of his sweatshirt;" (2) "when he spotted the officers, [he] changed course and attempted to enter what looked like an abandoned building;" and (3) he was "visibly hiding a large, bulky object underneath his sweatshirt." (St. Br. 13) The State's assertions are wrong for several reasons.

First, Lozano was not "fleeing" from the officers. Rodriguez confirmed that Lozano was already running when the police saw him; he did not see the police and then start running. (Sup. R. 17) "Flight in criminal law is defined as the evading of the course of justice by voluntarily withdrawing oneself in order to avoid arrest or detention ***. The term signifies in legal parlance, not merely a leaving, but a leaving or concealment under a consciousness of guilt and for the purpose of evading arrest." *People v. Herbert*, 361 Ill. 64, 73 (1935). Thus, by definition, Lozano's behavior was not flight, but rather, he was already running on a cold, rainy day.

Second, there is no evidence that the building that Lozano ran towards was "abandoned"[1] or that the police believed it to be at the time of Lozano's seizure. It was only *after* Lozano was seized, and only after Officer Soto tried to enter the building, that she opined that the building might have been abandoned because it lacked a doorknob. (Sup. R. 16) In fact, the police had already decided to seize Lozano before they saw him try to enter the building, and they had no idea whether Lozano was a rightful owner or occupant.

The State contends that it would have been reasonable for the officers to believe the building was not Lozano's home because a piece of plywood served as the building's door, the front lawn was flooded, the windows were dark, and trash had accumulated along the fencing and in the abandoned lot next door. (St. Br. 15) While the building may have been run-down, there is nothing to suggest that it was actually abandoned. In fact, there was a deadbolt lock on the makeshift plywood door keeping it closed, and the window panes were intact and not boarded up, but curtains hung in the windows. (St. Exh. No. 1) A Chicago-issued garbage can stood upright in the yard, and no condemned or abandoned signs were posted.

Also, many surrounding buildings on this street in the East Humboldt Park/ East Garfield

[1] Abandoned property is defined as "any real estate *** in which the taxes have not been paid for a period of at least 2 years[,] and *** which has been left unoccupied and abandoned for a period of at least one year." 720 ILCS 5/21-3(d).

Park neighborhood of Chicago – which has a significant poverty rate – were also in disrepair, and had more debris in their front yards than the building in question. See https://censusreporter.org/profiles/79500US1703523-chicago-city-west-north-south-lawndale-humboldt-park-east-west-garfield-park-puma-il/ (last visited April 18, 2023) (poverty rate in East Humboldt/East Garfield Park more than double rate in Illinois and U.S.).[2] Further, the police never testified about their familiarity with the neighborhood or the buildings on that block. *Compare to People v. Spain*, 2019 IL App (1st) 163184, ¶ 7 (officer who responded to anonymous call regarding "a man with a gun" testified that he was familiar with local gang activity and buildings on street, including an abandoned building).

The State characterizes Lozano's behavior as evasive, likening this case to *People v. Thompson*, 198 Ill. 2d 103, 113 (2001), *Florida v. Rodriguez*, 469 U.S. 1, 6 (1984), *Illinois v. Wardlow*, 528 U.S. 119, 124 (2000), *People v. Timmsen*, 2016 IL 118181, *United States v. Wilson*, 963 F.3d 701 (7th Cir. 2020), and *United States v. Richmond*, 924 F.3d 404 (7th Cir. 2019). Each of these cases are distinguishable.

In almost all of these cases, the circumstances involved either a report of recent criminal activity or high-crime area. In *Thompson*, the officer testified that he received a tip that the defendant – whom the officer had previously arrested for drug offenses – was using his bicycle at night to deliver drugs, and he saw the defendant on a bicycle at night in possession of a police scanner, at which time the defendant fled. 198 Ill. 2d at 106. Here, the officers had not received any calls about suspicious behavior, they did they know Lozano, and it was daytime.

In *Wardlow*, the Court concluded that the officer was justified in suspecting that the

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[2] This Court may take judicial notice of these facts which are commonly known. *See People v. Henderson*, 171 Ill. 2d 124, 134 (1996) (well established that courts may take judicial notice of matters which are commonly known); *U.S. Bank Nat. Ass'n v. Luckett*, 2013 IL App (1st) 113678, ¶21 (taking judicial notice that courts across nation adjudicating high number of foreclosure cases).

defendant was involved in criminal activity because he was present in an "area known for heavy narcotics trafficking," to which the police went specifically "in order to investigate drug transactions," he was holding an "opaque bag," and he began to flee *after* he looked in the officers' direction. 528 U.S. at 121-24. The Court commented, "Flight, by its nature, is not 'going about one's business' [but] it is just the opposite." *Id.* at 125. Here, Lozano was already running before the police saw him, so he *was* going about his business as he continued to run. And, there was no mention that the area was known for narcotics sales.

In *Wilson*, the police received a dispatch about men with guns selling drugs in a high-crime area, where they saw the defendant grab a bulge in his pants pocket and turn away when they approached. 963 F.3d at 702. He "sprinted away instantly" when the police neared. The court held that "establishing reasonable suspicion might have been a close call," but the defendant's "unprovoked, headlong flight from police in a high-crime area put any lingering doubt to rest." *Wilson*, 963 F.3d at 704. Here, we have neither unprovoked flight nor a high-crime area.

Richmond also involved a high-crime area known for drug trafficking, armed robberies, and gun violence. 924 F.3d at 408-09. It was midnight and the police suspected that a bulge in the defendant's pocket was a gun because he made eye contact with them before changing pace and direction, and then pulled the gun out of his pocket and placed it behind a screen door. *Id.* at 408-09. Here, the officers did not testify that Lozano made eye contact with them or acknowledge their presence, he did not change pace, and no weapon was in plain sight.

Finally, *Timmsen* and *Rodriguez* are both distinguishable. In *Timmsen*, the defendant's behavior was evasive because he made a U-turn about 50 feet away from a readily identifiable police roadblock at night, and completely changed his course of direction. 2016 IL 118181, ¶¶ 12-17. Here, Lozano was already running and did not make an about-turn. In *Rodriguez*, the defendant was seized at a Miami airport, a place with less privacy expectations in a "source

city" for narcotics, after he and his cohorts engaged in "unusual behavior" at the counter, and then gave evasive and contradictory answers to simple identification questions. 469 U.S. at 2-3. Here, the events occurred on a public street, the police did not testify about the area's crime rate, and Lozano was not engaging in any unusual or reasonably suspicious behavior.

The State argues that Lozano's "visible efforts to conceal a large, bulky object beneath his sweatshirt would have given Rodriguez and Soto reasonable suspicion to believe that he was carrying a weapon or other contraband." (St. Br. 15) The State ignores that Rodriguez did not see the bulge in Lozano's pocket until *after* he had already seized him. (Sup. R. 15-18) Rodriguez wanted to conduct a field interview only because Lozano was running and he had his hands in his front hoodie pocket. (Sup. R. 10, 13-14, 17-18) Then, once Rodriguez stopped Lozano and saw the bulge, he wanted "to see what was the bulge, what bulged." (Sup. R. 18)

The State's characterization of Lozano's actions as an "effort[ ]to conceal" the bulky object ignores that the object was already in Lozano's pocket before the police saw him. (St. Br. 15) There was no evidence that Lozano saw the police and then tried to conceal the item by stuffing it in his pocket; rather, Rodriguez testified that Lozano's hands were already in his pocket. There is nothing suspicious about a person holding an object in his pocket for safekeeping, especially while running on a public sidewalk on a cold, rainy day.

(3) The officers' conduct cannot be justified by hypothesized reasons for Lozano's seizure.

Like the majority of the appellate court, the State relies on "objective factors" not testified to or referenced by the officers as a basis for Lozano's seizure. The State argues that the officers "*could have* reasonably concluded that [Lozano] was either carrying and concealing contraband or trying to break into an abandoned building, or both." (St. Br. 13) (Emphasis added.) It also claims that "several facts, when taken together, *would have* contributed to that reasonable belief," and that it "*would have been* reasonable for the officers to believe [Lozano] was engaged in

criminal activity." (St. Br. 13) (Emphases added.)

As Justice Gordon noted in his dissent, "Our courts are required to decide cases based on the evidence presented and the existing law ***." *Lozano*, 2022 IL App (1st) 182170, ¶ 98 (Gordon, J., dissenting). Justice Gordon correctly pointed out that "we do not have to guess why the officer, who effected the stop, believed that he had a reasonable, articulable suspicion justifying a stop," because the officer explicitly testified at the suppression hearing that he effected the stop for two reasons: the officer observed (1) Lozano running (2) with a bulge or his hands in his pocket. *Id.* ¶ 99. Neither officer testified that Lozano changed direction upon observing the police or that they initiated the seizure because they believed that Lozano was attempting to break into an abandoned building.

The State relies on the fact that an objective standard applies when assessing the reasonableness of a *Terry* stop to justify its – and the lead opinion's – use of *possible* reasons for the officers' conduct. (St. Br. 17) Assessing the officers' conduct using an objective standard is not the same as conjuring up reasons to explain the officer's conduct. *Terry* itself states that in assessing reasonableness, courts should ask "would the facts available to the officer at the moment of the seizure or the search 'warrant a man of reasonable caution in the belief' that the action taken was appropriate?" 392 U.S. at 21-22. Thus, it is the *reviewer's* objectivity that is at play while judging the actual facts presented.

Even the standard of review is premised on assessing the reasonableness of the explanations provided by the police for their conduct. In reviewing a ruling on a motion to suppress, "findings of fact and credibility determinations made by the trial court are accorded great deference." *People v. Slater*, 228 Ill. 2d 137, 149 (2008). (St. Br. 10) This deferential standard applies because it is "a fact-specific inquiry" and the trial court "had the opportunity to listen to testimony and observe the witnesses at the suppression hearing." *Richmond*, 924

F.3d at 411. With this standard in mind, courts "examine the facts on which the officers formed their suspicions, and whether the [circuit] court erred in its reasonableness assessment." *Id.*

The State's citation to a litany of cases setting forth the objective standard of reasonableness does not change this analysis, because in each of these cases, the objective evidence – presented by the State and not merely hypothesized by the reviewing court – was overwhelming to show either probable cause or the reasonableness of the *Terry* stop. An objective review of the evidence in this case does not result in a similar finding.

For example, in *Brigham City, Utah v. Stuart*, 547 U.S. 398, 401-04 (2006), the Court stated that the officers' subjective motivation is irrelevant, but still looked to the totality of the circumstances as testified to by the officers, including: that the officers responded to a call regarding a loud party at a residence at 3 a.m., heard shouting from inside, observed two juveniles drinking beer in the backyard, and then saw an altercation taking place in the kitchen. Based on these observations, the Court held that the police could enter the home without a warrant in accordance with the emergency doctrine. *Id.* at 406. While the Court found that it did not matter whether the police had ulterior motives to enter the home to gather evidence, it still looked objectively to the evidence known to and described by the officers at the time of the seizure, rather than retrospectively trying to concoct a lawful motivation for the officers. See also *Bond v. United States*, 120 S. Ct. 1462, 338-39, fn. 2 (while parties agreed that officer's subjective intent was irrelevant, Court concluded that physical manipulation of defendant's bag violated fourth amendment, without conjuring up reasons why the officer *might* have believed defendant had committed a crime); *Timmsen*, 2016 IL 118181, ¶ 9 (police must have "reasonable articulable suspicion" and "officer *must be able to point to specific and articulable facts*"); and *People v. McDonough*, 239 Ill. 2d 260, 273 (2010) ("based on *** *objective and specific facts*" that defendant's vehicle was pulled over on shoulder of busy four-lane highway at night,

officer's approach to offer aid permitted under community caretaking exception) (Emphases added.)

Finally, in *Kentucky v. King*, 563 U.S. 452, 464 (2011), and *Whren v. United States*, 517 U.S. 806, 811, 813 (1996), the Court held that any subjective bad faith of the police is irrelevant when the objective evidence shows probable cause. The Court clarified in *King* that this is "so long as the prerequisite" of not violating the fourth amendment has been met. 563 U.S. at 463. In *Whren*, the Court explained that *if* probable cause exists, it need not look further at what the officers' ulterior motives might have been. 517 U.S. at 811. In both *King* and *Whren*, the Court looked to the officers' testimony about what they did and why; the Court did not provide new reasons for the search to which the police did not testify. Here, there was no reasonable suspicion to begin with based on the officers' given reasons.

Rodriguez specifically testified that he seized Lozano because he was running and he had his hands in his pocket. Then, after Rodriguez saw the bulge, he wanted "to see what was the bulge, what bulged." (Sup. R. 18) The State argues that "the officers could reasonably have believed that [Lozano] was attempting to break into an abandoned building and that he had changed direction to evade them," even though the officers did not so testify, because they are "objective observations either testified to or seen in Soto's body camera footage." (St. Br. 18) However, Soto testified that she did not suspect the building was abandoned until *after* the officers had seized Lozano, and the police had already made up their minds to seize Lozano before he turned toward the staircase. (Sup. R. 15-18) See *People v. Dumire*, 2019 IL App (4th) 190316, ¶¶ 42-45 ("What happens after a stop has been made is irrelevant to the question of whether it was justified at its inception.")

The State cites *Wardlow*, *People v. Close*, 238 Ill. 2d 497 (2010), and *United States v. Sokolow*, 490 U.S. 1 (1989), to point out that conduct that may be susceptible to innocent explanation may also be suspicious. (St. Br. 18-19) These cases are all distinguishable. As

Justice Gordon noted, "*Wardlow* is as different from this case as a pea from an elephant." *Lozano*, 2022 IL App (1st) 182170, ¶ 107 (Gordon, J., dissenting). In *Wardlow*, the Court held that reasonable suspicion existed where the officers testified (1) that the defendant was in a high crime neighborhood "known for heavy narcotics trafficking" and (2) that the defendant started running immediately upon noticing a "four-car caravan" of police vehicles suddenly enter the area. 528 U.S. at 124. By contrast, here, (1) there was no testimony that this was a high crime area, and (2) Lozano was already running when the police first observed him, and there is no evidence that he was running because he observed the police. In fact, the officers were in an unmarked SUV, and did not activate the sirens or lights. (Sup. R. 13)

The facts of *Close* are not close at all. In *Close*, the officer knew that the registered owner of the vehicle had a revoked license and the defendant strongly resembled the photograph of the owner, *before* the officer pulled the defendant over. 238 Ill. 2d at 500. Thus, suspicion existed and the officer need not consider all possible legal explanations for that suspicious behavior. Here, no suspicion exists, and this Court should not consider all possible *illegal* explanations to invent suspicion. Just as all suspicious conduct might have potentially innocent explanations, all innocent conduct might have potentially criminal explanations. However, the fourth amendment only allows a *Terry* stop for a reasonably articulable suspicion of criminal activity. *Terry v. Ohio*, 392 U.S. 1, 21 (1968).

Sokolow, cited by the State, supports this conclusion. In *Sokolow*, DEA agents stopped the defendant upon his arrival at a Hawaii airport and found 1,063 grams of cocaine in his carry-on luggage. 490 U.S. at 3. When the defendant was stopped, the agents knew: (1) he paid $2,100 for two round-trip plane tickets from a roll of $20 bills; (2) he traveled under a name that did not match his phone number; (3) his original destination was Miami, a drug source city; (4) he stayed in Miami for only 48 hours, even though the flight took 20 hours; (5) he appeared nervous; and (6) he did not check any luggage. The Court held that while "[a]ny

one of these factors is not by itself proof of any illegal conduct *** taken together they amount to reasonable suspicion." *Id.* at 9. The Court commented that "the relevant inquiry is not whether particular conduct is 'innocent' or 'guilty,' but the degree of suspicion that attaches to particular types of noncriminal acts." *Id.* at 10. Here, Lozano's noncriminal acts of running in the rain with his hands in his pocket does not reflect ongoing criminal activity warranting any degree of suspicion where no other facts existed from which criminality could be inferred, like a recently reported crime, a description of a suspect that Lozano matched, or knowledge about the area.

Finally, the State cites the recent case of *United States v. Vaughn*, No. 22-2427, 2023 WL 2522728 (7th Cir. Mar. 15, 2023), to suggest that it directly rebuts Lozano's argument that, "While innocent explanations for individual factors could constitute reasonable suspicion when viewed in combination, that is not the case here, because even when considered in totality, zero plus zero plus zero does not equal one." (Def. Br. 27) *Vaughn* is about compassionate release and has nothing to do with the fourth amendment. While the Court has refused to utilize a "divide-and-conquer analysis" (See *United States v. Arvizu*, 534 U.S. 266, 274 (2002)), or view each fact "in isolation" (See *District of Columbia v. Wesby*, 138 S. Ct. 577, 588 (2018)), Lozano is not asking this Court to do that. His argument is that, unlike in *Arvizu* and *Wesby*, the facts of this case, even "when viewed in combination [and] considered in totality," do not amount to reasonable suspicion to justify a *Terry* stop. (Def. Br. 27)

II. The State violated Francisco Lozano's fifth amendment right against self-incrimination when it utilized – as incriminating evidence against Lozano at trial – his responses to investigatory questions posed without *Miranda* warnings during his arrest.

(1) Lozano was subjected to restraints comparable to those associated with a formal arrest triggering Miranda warnings.

After Lozano was illegally arrested, he was handcuffed, searched and then questioned in an interrogatory fashion; two justices of the appellate court agreed that this seizure was akin to a formal arrest. *Lozano*, 2022 IL App (1st) 182170, ¶ 119 (Gordon, J., dissenting), ¶ 91 (Ellis, J., concurring in judgment). The State contends that Lozano's "detention did not have characteristics akin to the coercive custodial restraints of a formal arrest and interrogation, such as at a station house." (St. Br. 25) The State's argument is premised on the "location in public, short duration of questioning, and relaxed atmosphere." (St. Br. 25) The State's depiction of Lozano's arrest and interrogation as a brief, peaceful occasion during which he was only "directed off" some property is belied by the video. (St. Br. 29) As described by Justice Gordon, "After the officer stopped [Lozano], the officer, who was physically much larger than [Lozano], immediately grabbed [Lozano] by the back of his sweatshirt, while simultaneously yelling "show me your f*** hands" and pulling [Lozano] toward the police vehicle, where [Lozano] was shoved against the back hood of the police vehicle, handcuffed, searched, interrogated, and asked processing questions, such as his full name, date of birth, and address." *Lozano*, 2022 IL App (1st) 182170, ¶ 124 (Gordon, J., dissenting).

The State cites to *People v. Jeffers*, 365 Ill. App. 3d 422, 430 (2nd Dist. 2006), and *People v. Briseno*, 343 Ill. App. 3d 953, 958-59 (1st Dist. 2003), to argue that Lozano's detention was not custodial because it did not include "coercive" actions from the officers and instead showed a "calm" atmosphere. (St. Br. 25) The video shows anything but a "calm" atmosphere, and regardless, Lozano's argument is not that his statements were involuntary, but that *Miranda* warnings were required because his seizure was akin to a formal arrest. In *Jeffers*, the court

held that the defendant was not in custody akin to a formal arrest because he was not "physically restrained in any way" and was "free to walk about on his own." 365 Ill. App. 3d at 430. In *Briseno*, the defendant's car was one of many stopped during a brief public roadside stop on a major street, and the defendant was only asked a routine safety question if he had smoked marijuana that night. 343 Ill. App. 3d at 958-59.

By contrast, the video establishes that Lozano was the only target of Rodriguez's seizure, who grabbed the back of Lozano's sweatshirt as he directed him toward the police SUV, forcibly handcuffed him, and then thoroughly searched under Lozano's clothing and inside his pockets. Throughout this incident both officers were shouting profanities at Lozano and peppering him with questions that had nothing to do with public safety, but were investigatory questions meant to produce incriminating information about a crime that the police believed already occurred.

The State characterizes Lozano's argument as "suggest[ing] that whenever an individual is handcuffed and patted down, [t]he[y] are in custody for *Miranda* purposes." (St. Br. 25) The State also asserts that "handcuffs and pat downs are often used in *Terry* stops to ensure officer safety," and that the officers here "could reasonably have believed they were in danger when [Lozano] refused to remove his hand from the unidentified bulge, which could have been a gun or other dangerous weapon." (St. Br. 26-27) This argument is a red herring, because whether an individual has been unreasonably seized for fourth amendment purposes and whether that individual is in custody for *Miranda* purposes are two different issues. *United States v. Kim*, 292 F.3d 969, 976 (9th Cir. 2002).

To resolve a detention issue, courts look to the reasonableness of the officer's actions to determine whether handcuffing exceeded the scope of the detention and transformed it into a *de facto* arrest. In contrast, fifth amendment *Miranda* custody claims do not examine the reasonableness of the officer's conduct, but whether a reasonable person would conclude the restraints used were tantamount to a formal arrest. *United States v. Newton*, 369 F.3d 659,

675 (2nd Cir. 2004). These distinct analytical concepts may produce different outcomes. *Id.*

In any event, Lozano has not argued that handcuffing alone constitutes a seizure akin to a formal arrest. (Def. Br. 31-33) Rather, the use of handcuffs is one of several factors supporting a finding that a reasonable person would have understood the situation to be comparable to a formal arrest for *Miranda* purposes. Other factors include: (1) the language and method used by the officers to summon him (yelling "show me your f*** hands"); (2) the extent to which he was confronted with evidence of guilt (asking him who lives in the house, what he had on him, what the officer was going to find, why his hands were bleeding, and where he took "the radio from"); (3) the physical surroundings of the altercation (following and cornering him at the top of the staircase and physically guiding him toward the police SUV where he was handcuffed and thoroughly searched); (4) the duration of the detention (questioning him *after* the police had already confirmed their suspicions that at least one of the items in his pocket – the wallet – was not his); and (5) the degree of pressure applied to detain him (again, physically manhandling and cuffing him). See *United States v. Beraun-Panez*, 812 F.2d 578, 580 (9th Cir. 1987), *cited by People v. Bolden*, 197 Ill. 2d 166, 181 (2001). Under these circumstances, any reasonable person would feel at the mercy of the police and that the stop would not be temporary and brief. See *Berkemer v. McCarty*, 468 U.S. 420, 437-38 (1984) (two ultimate factors that render a situation custodial are: whether the suspect can anticipate that the stop is temporary and brief (like a traffic stop), and whether the suspect feels completely at the mercy of the police).

This case is unlike the State's cited case *People v. Patterson*, 146 Ill. 2d 445 (1992). (St. Br. 26) The defendant in *Patterson* was a prisoner questioned for the purpose of determining whether he was in need of protection, rather than to prosecute him. *Id.* at 456. This Court held that the defendant's handcuffing during the interview did not place "any greater burden on his freedom" than was typical for him in prison. *Id.* at 455. Here, in contrast, the officers' actions

placed a significant burden on Lozano's freedom of movement as a free United States citizen.

The State also cites *State v. Coulter*, 41 F.4th 451 (5th Cir. 2022), *United States v. Rabbia*, 699 F.3d 85, 92 (1st Cir. 2012), *United States v. Leshuk*, 65 F.3d 1105, 1109-10 (4th Cir. 1995), and *United States v. Bautista*, 684 F.2d 1286, 1292 (9th Cir. 1982), in support of its argument that Lozano's seizure was not akin to a formal arrest since he was not forced to the ground or placed in a vehicle. (St. Br. 27-28) These cases are each distinguishable.

In *Coulter*, the court held that the defendant was not in custody akin to a formal arrest for *Miranda* purposes where the "factors holistically evince the non-threatening, non-aggressive" actions the officer took for his safety when he handcuffed the defendant but told him that he was only being "detained" and the defendant understood he was not in custody. 41 F.4th at 461. In *Rabbia*, the defendant's vehicle was stopped in connection with an observed drug transaction and because the officers could not see the lower half of the defendant's body, there was good reason for the police to fear that he was armed and dangerous. The "prophylatic measures" of cuffing and frisking him did not transform the stop into an arrest, especially because the officers explicitly told the defendant he was not under arrest and removed the cuffs before asking him questions. 699 F.3d at 88-92.

In *Leshuk*, deputy sheriffs investigating a marijuana cultivation site heard a commotion and found the defendants with two backpacks and a garbage bag, as well as a threatening dog. 65 F.3d 1105, 1109-10. The deputies frisked the defendants, informed them that they were investigating a nearby marijuana site, and asked their purpose for being there. After the officers discovered marijuana in the bags, they told the defendants they were under arrest. Finally, in *Bautista*, the defendant himself approached the police who were canvassing the area for bank robbers and volunteered information about his whereabouts. 684 F.2d at 1287-88. The officers suspected the defendant and his cohort in the robbery so frisked them for weapons and cuffed them for officers' safety. The reviewing court held that the defendants were not

in custody while separately questioned because they were not confronted with any evidence of guilt; the officers' language, the physical surroundings, and the duration of the detention was not coercive; and the cuffing of the defendants was for protective measures. *Id.* at 1292.

In each of these cases, the defendants would not have reasonably felt completely at the mercy of the officers or that they had to answer the officers' questions. And, in those cases, the defendants were either told that they were not under arrest, they were uncuffed by the time the officers asked them any questions, or the police did not confront the suspects with evidence of guilt. Here, the officers' actions were more akin to a formal arrest, since they physically manhandled Lozano on the police car, cuffed him, conducted a full-blown search over and *under* his clothing, demanded to know what was in his pockets and confronted him with evidence of his alleged guilt, *after* any potential danger had already been dispelled.

(2) The questioning was interrogatory in nature.

The State does not directly address the interrogatory nature of the officers' questioning of Lozano. Instead, it focuses on whether Lozano's detention was custody for *Miranda* purposes. (St. Br. 23-25) With respect to the interrogation itself, the State merely asserts that it was a "short duration of questioning." (St. Br. 25) The length of questioning is not dispositive; rather, the test is whether the officers should have known that their questions were "reasonably likely to elicit an incriminating response." *Rhode Island v. Innis*, 446 U.S. 291, 301 (1980).

As Justice Ellis noted in his concurrence, "the questions put to [Lozano] about how he came to be in possession of the car stereo and wallet obviously constituted an interrogation" because they were questions reasonably likely to elicit an incriminating response. *Lozano*, 2022 IL App (1st) 182170, ¶ 89 (Ellis, J., concurring). By this time, there was no safety risk to the officers, and they had already gleaned information confirming their suspicion that Lozano had committed a crime. Unlike the cases cited by the State, no matter what Lozano said, he was not going to be released. In fact, his explanation for his possession of the items did not

result in his release, which confirms the purpose of the continued questioning: to gather further incriminating evidence against Lozano.

(3) The State failed to prove that the introduction of the illegally obtained statements was harmless beyond a reasonable doubt.

The State does not dispute that it has the burden of proving that this error was harmless beyond a reasonable doubt. (St. Br. 29-31) The State argues that any error in admitting Lozano's statements was harmless because the "other evidence of [his] guilt was overwhelming." (St. Br. 30-31) The State's argument is unpersuasive.

There are three approaches for assessing whether an error was harmless beyond a reasonable doubt: (1) focusing on the error to determine whether it might have contributed to the conviction; (2) examining whether the other evidence overwhelmingly supports the conviction; and (3) determining whether the evidence is cumulative or merely duplicates properly admitted evidence. *People v. Wilkerson*, 87 Ill. 2d 151, 157 (1981), cited by *People v. Patterson*, 217 Ill. 2d 407, 428, 435 (2005). All three of these approaches lead to the conclusion that the error in this case was not harmless beyond a reasonable doubt.

First, as Lozano pointed out in his opening brief but the State fails to address, the prosecutor utilized his unconstitutionally procured statements as evidence of guilt during closing argument, and the trier of fact explicitly relied on the statements as part of its finding of guilt. (Def. Br. 37, citing R. 28, 33) Second, the evidence against Lozano was not overwhelming, where aside from Lozano's statements, the State's case was entirely circumstantial. There were: no witnesses to the break-in; no forensic evidence tying Lozano to the car; no video surveillance depicting the break-in; no calls of a burglary of a vehicle in progress or description of a suspect; and not even a time frame for the burglary in the six hours between when the complainant parked her car and when Lozano was arrested. Third, Lozano's statements were not cumulative or duplicative of any other trial evidence as there was no other evidence from

which the trier of fact could have concluded that Lozano was being evasive or that his "stories *** were unreasonable." (R. 33) Accordingly, the admission of his illegally obtained statements is not harmless beyond a reasonable doubt.

(4) This issue is properly preserved.

The State claims that Lozano forfeited this argument because "he failed to pursue [it] before trial," where he "knew he was questioned at the scene before he was provided the *Miranda* warnings," and he received Officer Soto's body camera footage showing that he was questioned without *Miranda* warnings. (St. Br. 20-21) The State ignores the fact that Lozano may not have known that he was entitled to such warnings, and importantly, that the defense did not know until mid-trial that the State would utilize Lozano's statements as evidence against him.

Similarly, the State fails to respond to Lozano's argument that, despite his motion for discovery requesting any written or recorded statements and a list of witnesses to that statement, the State's answers to discovery did not identify any statements it intended to introduce against Lozano, as required. (C. 15, 22, Sec. C. 19); 725 ILCS 5/114-10(a) (2018). Rather, it merely argues that the trial court did not make a "merits ruling" on the mid-trial motion to suppress Lozano's statement and quotes the trial court as stating it was "not sure he hasn't [sic] been Mirandized at this particular point. . . . Let's move on." (St. Br. 21-22, citing R. 13-14) This is inaccurate, for what the court actually said was:

> I'm not sure he hasn't [been] *Mirandized* at this particular point **of the investigation. Police officer stopped him, thought he had weapons, he's got a bulge. Trying to elude the officer. Finds a radio. Just asks him simply what is this. I'm not sure that Miranda attaches at this point.** Let's move on." (R. 13-14) (Emphasis added.)

Thus, as recognized by concurring Justice Ellis, "the trial court considered [the motion] on the merits, and thus [the court] should review it on the merits." *Lozano,* 2022 IL App (1st) 182170, ¶ 87 (Ellis, J., concurring).

Finally, the State, citing *People v. Hillier,* 237 Ill. 2d 539 (2010), and *People v. Nieves,*

192 Ill. 2d 487 (2000), claims that Lozano has forfeited the opportunity to argue plain error because he did not sufficiently argue how plain error applies. (St. Br.22-23) In *Hillier*, plain error was never argued by the defendant before the appellate court or this Court, 237 Ill. 2d at 545-46, whereas in *Nieves*, the defendant wrote a single conclusory sentence alleging plain error in any of his briefs before this Court. 192 Ill. 2d at 503.

The State misrepresents that Lozano's plain error argument "amounts to a single sentence asserting that 'either prong of plain error review applies where evidence of Lozano's guilt was closely balanced, and this issue affects Lozano's substantial constitutional right to remain silent.'" (St. Br. 22) In fact, Lozano's plain error argument consisted of two full paragraphs, including citation to applicable caselaw and Illinois Supreme Court Rule 615. (Def. Br. 40-41), citing *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007), *People v. Matute*, 2020 IL 170786, ¶ 63, and *People v. Ahmad*, 206 Ill. App. 3d 927, 938 (1st Dist. 1990).

Even if this Court deems the plain error argument in Lozano's opening brief deficient, this Court was clear in *People v. Williams*, 193 Ill. 2d 306, 347-48 (2000), that plain error need not be included in a defendant's opening brief. Thus, while a defendant may forfeit plain error review by failing to raise the issue throughout the entire briefing process or by failing to sufficiently support his plain error argument, the law is well-settled that plain error may be properly raised for the first time in a reply brief. *See also People v. Ramsey*, 239 Ill. 2d 342, 412 (2010) (when defendant fails to argue plain error in his opening brief, a court of review may still review the issue for plain error if argued in his reply brief).

As Lozano argued in his opening brief (even though he was not required to), if this Court finds this issue forfeited, it should review under either prong of plain error. (Def. Br. 40-41) With respect to the first prong, the evidence was closely balanced where: a significant amount of time passed between when the complainant parked the car at 7:45 a.m., and when Lozano was arrested at around 2 p.m.; the State presented no witnesses to the burglary and

no physical evidence connecting Lozano to the car like fingerprints or DNA; and Lozano's statements provided reasonable explanations as to why he possessed the car radio and wallet nearly six hours after the complainant had last seen the car. *Cf. People v. Barnes*, 219 Ill. App. 3d 278, 279-81 (4th Dist. 1991) (because evidence was closely balanced and defendant's credibility was crucial, court reviewed defendant's argument under plain error doctrine that prosecutor elicited testimony that defendant remained silent after his arrest and after given *Miranda* warnings).

And with respect to the second prong of plain error, as Lozano argued in his opening brief, this issue affects his constitutional right to remain silent. (Def. Br. 41) See *People v. Mulero*, 176 Ill. 2d 444, 466 (1997) (improper comment on defendant's exercise of his right to remain silent is "plain error affecting defendant's substantial rights."); and *People v. Ahmad*, 206 Ill. App. 3d 927, 938 (1st Dist. 1990) (a violation of a defendant's right to remain silent is plain error). Therefore, this Court should review this issue under either prong of plain error.

In sum, the State violated Lozano's fifth amendment right to remain silent when it introduced statements he made in response to a custodial interrogation lacking in *Miranda* warnings. If this Court does not find that Lozano's seizure was illegal pursuant to Argument I, it should reverse his convictions and remand for a new trial without the illegally obtained statements.

CONCLUSION

For the foregoing reasons, Francisco Lozano, defendant-appellant, respectfully requests that this Court reverse his convictions for burglary and possession of burglary tools pursuant to Argument I, or alternatively, remand the cause for a new trial with the exclusion of his illegally obtained statements pursuant to Argument II.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this reply brief conforms to the requirements of Rules 341(a) and (b). The length of this reply brief, excluding pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, and the certificate of service, is 20 pages.

/s/Pamela Rubeo
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No. 128609

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, -vs- FRANCISCO LOZANO, Defendant-Appellant.	)))))))))))	Appeal from the Appellate Court of Illinois, No. 1-18-2170. There on appeal from the Circuit Court of Cook County, Illinois , No. 18 CR 3154. Honorable James B. Linn, Judge Presiding.

NOTICE AND PROOF OF SERVICE

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Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct. On April 19, 2023, the Reply Brief was filed with the Clerk of the Supreme Court of Illinois using the court's electronic filing system in the above-entitled cause. Upon acceptance of the filing from this Court, persons named above with identified email addresses will be served using the court's electronic filing system and one copy is being mailed to the defendant-appellant in an envelope deposited in a U.S. mail box in Chicago, Illinois, with proper postage prepaid. Additionally, upon its acceptance by the court's electronic filing system, the undersigned will send 13 copies of the Reply Brief to the Clerk of the above Court.

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