STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Case No. 2018AP858-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

BRIAN L. HALVERSON,

Defendant-Respondent.

ON APPEAL FROM FINAL ORDERS ENTERED IN THE CHIPPEWA COUNTY CIRCUIT COURT, THE HONORABLE STEVEN R. CRAY, PRESIDING

PLAINTIFF-APPELLANT'S SUPPLEMENTAL BRIEF

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ISSUES PRESENTED

1. Is a jail inmate who voluntarily answers law enforcement's questions over the telephone per se in custody for *Miranda* purposes under the Fifth Amendment?

The circuit court answered, "Yes."

The parties agree that the answer is, "No." This Court should answer, "No."

2. Was Brian Halverson—a jail inmate who voluntarily answered questions with police over the phone regarding crimes unrelated to his hold—in custody for *Miranda* purposes?

The circuit court did not answer that question because it held that Halverson, as an inmate, was per se in custody.

This Court should answer, "No."

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The attorney general[1] agrees that oral argument is unnecessary. Publication is warranted to clarify that *Howes v. Fields*, 565 U.S. 499 (2012), abrogates the conflicting rule in *State v. Armstrong*, 223 Wis. 2d 331, 588 N.W.2d 606 (1999), and related state cases.

INTRODUCTION

When Halverson was an inmate on a probation hold, he participated in a telephone call to a law enforcement officer

[1] Because the district attorney has filed briefs on behalf of the State (Dist. Att'y Br., Dist. Att'y Reply), counsel uses "the attorney general" for self-reference in this brief and "the State" to refer to the State collectively as the Plaintiff-Appellant in this appeal to avoid confusion. That said, the attorney general wholly joins the district attorney's briefs and reasoning, including any points omitted in this brief.

who was investigating allegations that Halverson had committed crimes unrelated to his hold. During the three-to-four-minute call, Halverson admitted committing the crimes.

Halverson sought suppression of his statements from the phone call because the officer never provided *Miranda* warnings. The circuit court granted Halverson's motion, holding that Halverson, as a jail inmate, was per se in custody for *Miranda* purposes during the phone call.

The State appeals and requests reversal. The circuit court wrongly applied the law: incarceration is not per se custody for *Miranda* purposes. Moreover, the State satisfied its burden of demonstrating that the phone call and its circumstances were not custody for *Miranda* purposes.

SUPPLEMENTAL STATEMENT OF THE CASE

E.M., an inmate at Stanley Correctional Institution, wrote to an officer with the Stanley police department claiming that another then-inmate, Halverson, had stolen and destroyed several "valuable" documents that belonged to E.M. (R. 1:1–2.) That officer, Matthew Danielson, followed up with E.M., who reiterated the information from his letter, further explaining that Halverson destroyed 35 to 40 certificates and 7 diplomas, "all of a religious nature," and said that Halverson had also taken and destroyed a watchband. (R. 1:2.) E.M. told Danielson that he had two letters in which Halverson admitted to the theft and destruction of his property. (R. 1:2.)

At the time, September 27, 2016, Halverson was no longer an inmate at Stanley; Danielson found him housed in the Vernon County Jail, where he was serving a 30-day hold for "other rule violations" of his extended supervision in an unrelated matter. (R. 1:2; 41:3.) Danielson called the jail and asked to speak to Halverson; the jail returned Danielson's call seven minutes later and put Halverson on the phone. (R. 1:2.)

Danielson explained who he was and asked Halverson about E.M.'s stolen belongings. (R. 1:2.) Halverson initially indicated that he helped E.M. clean his cell and that perhaps the documents were accidentally thrown away. (R. 1:2.) When Danielson referenced the two letters in which Halverson confessed to taking and stealing E.M.'s property, Halverson admitted committing the crimes. (R. 1:2.) Danielson noted that Halverson "made reference to having issue with the offense [E.M.] was incarcerated for committing" and "sounded almost boastful when admitting to the offense." (R. 1:2.)

The State charged Halverson with misdemeanor counts of criminal damage to property and misdemeanor theft, both as a repeater. (R. 1:1.) Halverson filed a motion to suppress the statements he made to Danielson, arguing that Danielson questioned him without informing him of his *Miranda* rights. (R. 18:1–2.)

There were two hearings on the motion. At the first hearing, the State presented testimony from Danielson regarding his call with Halverson. (R. 51:3–20.) The court made an initial ruling at the end of that hearing, holding that under *Armstrong*, 223 Wis. 2d 331, and *Schimmel v. State*, 84 Wis. 2d 287, 267 N.W.2d 271 (1978), *overruled on other grounds by Steele v. State,* 97 Wis. 2d. 72, 294 N.W.2d 2 (1980), Halverson was in *Miranda* custody due to his incarceration. (R. 51:22–24.) It further concluded that the Supreme Court's decision in *Fields* did not change the incarceration-as-per-se-*Miranda*-custody rule in *Armstrong* and *Schimmel*. (R. 51:24–26.) Due to the absence of one of the State's planned witnesses that day, however, the court told the State that it could file a motion for reconsideration and present additional testimony on the matter. (R. 51:26–27.)

The State filed a motion for reconsideration (R. 38), which led to the second hearing, at which Matthew Hoff, a corporal with the Vernon County Sheriff's Department, testified to how the jail routinely handled calls of the type that

Halverson received from Danielson (R. 48:14–24). After hearing additional argument, the court denied the motion for reconsideration, again holding that *Fields* did not abrogate the rule in *Armstrong* and *Schimmel* that a person is per se in *Miranda* custody when he is incarcerated. (R. 48:34.)

The court memorialized those decisions in written orders (R. 43; 44), from which the State, through the Chippewa Falls District Attorney's Office, appealed (R. 46). After the parties submitted briefs, this Court converted the case to a three-judge appeal and ordered the attorney general to submit this supplemental brief.

STANDARD OF REVIEW

Whether evidence should be suppressed due to an alleged *Miranda* violation is a question of constitutional fact. *State v. Knapp*, 2005 WI 127, ¶ 19, 285 Wis. 2d 86, 700 N.W.2d 899. This Court will uphold the circuit court's factual findings unless they are clearly erroneous, but it assesses whether those findings support a determination of custody for *Miranda* purposes de novo. *State v. Bartelt*, 2018 WI 16, ¶ 25, 379 Wis. 2d 588, 906 N.W.2d 684.

ARGUMENT

Halverson was not in custody for *Miranda* purposes during the jail phone call.

To start, based on *Fields*, the Fifth Amendment does not equate incarceration with *Miranda* custody. Indeed, the parties agree on this point. As for the points on which the parties disagree, the factors typically accompanying *Miranda* custody were not present here, and the Wisconsin Constitution does not offer expanded protections supporting the circuit court's ruling. Suppression was not warranted and this Court should reverse.

Accordingly, the attorney general joins the district attorney's briefs and reasoning therein. It summarizes and supplements those arguments below.

A. Incarceration alone is not custody for *Miranda* purposes under the Fifth Amendment.

The Fifth Amendment to the United States Constitution and article 1, section 8 of the Wisconsin Constitution protect suspects from incriminating themselves in criminal matters. *State v. Ezell*, 2014 WI App 101, ¶ 8, 357 Wis. 2d 675, 855 N.W.2d 453. Accordingly, police may not interrogate a person held in custody without advising that person of his or her *Miranda* rights. *Id.* (citing *State v. Torkelson*, 2007 WI App 272, ¶ 11, 306 Wis. 2d 673, 743 N.W.2d 511). "Statements obtained via custodial interrogation without the *Miranda* warnings are inadmissible against the defendant at trial." *Id.*

"Custody," as used in the *Miranda* context, is a term of art specifying circumstances that generally "present a serious danger of coercion." *Fields*, 565 U.S. at 508–09. The first step is to determine "whether, in light of 'the objective circumstances of the interrogation,' a 'reasonable person [would] have felt he or she was not at liberty to terminate the interrogation and leave.'" *Id.* at 509 (citations omitted). This assessment of the suspect's objective "freedom of movement" requires a totality-of-the-circumstances analysis weighing "the location of the questioning, its duration, statements made during the interview, the presence or absence of physical restraints during the questioning, and the release of the interviewee at the end of the questioning." *Id.* (citations omitted); *see also Bartelt*, 379 Wis. 2d 588, ¶ 32 (listing factors as "degree of restraint; the purpose, place, and length of the interrogation; and what has been communicated by police officers").

The "freedom of movement" inquiry is the first, not the last, step in the analysis. *Fields*, 565 U.S. at 509. "Not all restraints on freedom of movement amount to custody for purposes of *Miranda*." *Id.* Instead, courts ask "the additional question whether the relevant environment presents the same inherently coercive pressures as the type of station house questioning at issue in *Miranda*." *Id.*

Further, incarceration is not per se custody for *Miranda* purposes: "[w]hen a prisoner is questioned, the determination of custody should focus on all the features of the interrogation" and whether the inherently coercive pressures "that powered the decision" in *Miranda* are present. *Id.* at 514.

B. *Miranda* custody is not effectuated by a voluntary phone call between a jail inmate and law enforcement.

The overarching feature of the questioning in this case is that it occurred over the telephone, not in person, which begs the question whether an inmate's voluntary telephone interview with law enforcement can effectuate *Miranda* custody.

Courts generally apply the "freedom of movement" analysis and assess coercive pressure to face-to-face interrogations. *See, e.g.*, *Fields*, 565 U.S. at 511 ("In the paradigmatic *Miranda* situation—a person is arrested in his home or on the street and whisked to a police station for questioning—detention represents a sharp and ominous change, and the shock may give rise to coercive pressures."). Although Wisconsin courts have not addressed the question whether a phone call can effectuate *Miranda* custody, other courts have consistently answered this question "no," so long as the call is voluntary, i.e., the inmate initiated the call, was free to reject it, or was free to terminate it.

To that end, the district attorney's brief correctly identifies several cases in which courts either concluded that a person's voluntary telephone interview cannot effectuate *Miranda* custody, or at least expressed skepticism that such contact could effectuate *Miranda* custody.[2] For example, in *State v. Mills*, 293 P.3d 1129, 1135–36 (Utah Ct. App. 2012), the court concluded that Mills was not in custody for *Miranda* purposes where he voluntarily participated in a ten-minute phone call with police. That court noted that Mills, despite having limited freedom of movement on a military base, was in "familiar surroundings," experienced no pressure from his chain of command to participate in the call, and had nothing preventing him from hanging up and terminating the interview. Moreover, the duration and nature of the questioning "was not of a kind that might break down Mills's will and result in an involuntary statement." *Id.*

The attorney general has identified several more cases in which courts have rejected the notion that a voluntary telephone interview by an inmate was "custody" for *Miranda* purposes.[3] Its research has uncovered no authority for the

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[2] *See* Dist. Att'y Br. 13–14 (citing *State v. Mills*, 293 P.3d 1129, 1135 (Utah Ct. App. 2012); *Pasdon v. City of Peabody*, 417 F.3d 225, 227–28 (1st Cir. 2005); *Commonwealth v. Smallwood*, 401 N.E.2d 802, 807 (Mass. 1980)).

[3] *See, e.g.*, *People v. Anthony*, 230 Cal. Rptr. 268, 273 (Ct. App. 1986) (holding that there was no *Miranda* custody where inmate initiated phone call with police and where his "freedom of movement during these conversations cannot be characterized as more restricted than during the usual restraint on a jail inmate's liberty to depart"); *People v. J.D.*, 989 P.2d 762, 771 (Colo. 1999) (holding no *Miranda* custody where inmate initiated telephone contact and there was no change to inmate's already-limited freedom of movement); *Bradley v. State*, 449 S.E.2d 492, 494 (S.C. 1994) (holding that inmate was not in *Miranda* custody when he initiated call with police and could have hung up at any time); *State v. Denton*, 792 P.2d 537, 540 (Wash. Ct. App. 1990) (holding that

contrary proposition that an inmate voluntarily answering questions over the telephone with police is in custody necessitating *Miranda* warnings. Indeed, Halverson likewise identifies no such authority.

To be clear, the attorney general is not asserting that *Miranda* custody could never be effectuated by a police telephone interview. But, as these persuasive cases teach, when an inmate takes such a call voluntarily, the lack of physical presence by police—and, correspondingly, the lack of ability of the interrogator to engage in coercive in-person techniques, to physically limit the inmate's freedom of movement—heavily supports a determination that such a call does not effectuate *Miranda* custody.

C. Even if a voluntary phone call could be custody for *Miranda* purposes, the relevant factors demonstrate that Halverson's phone call with Danielson was not.

1. A reasonable person in Halverson's position would have felt free to terminate the phone call with Danielson.

The location of the questioning, from Halverson's perspective, was the Vernon County jail, where Halverson was in the midst of serving a 30-day hold based on a violation of his rules of supervision in a different matter. (R. 41:3.)

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inmate was not in *Miranda* custody during phone conversation with law enforcement given that officer was not physically present and inmate was free to terminate the call at any time); *cf. Rios v. Lansing*, 116 Fed. App'x 983, 987 (10th Cir. 2004) (holding that military inmate was not in custody for military law equivalent of *Miranda* when his freedom of movement was not curtailed during voluntary, monitored phone call); *Carr v. State*, 840 P.2d 1000, 1004 (Alaska Ct. App. 1992) (holding that inmate was not in *Miranda* custody where he was free to decline call and uninhibited from hanging up in a monitored call).

Halverson was not removed from his normal surroundings to a confined setting; he was living there. Accordingly, this jailhouse locale in these circumstances does not weigh toward a determination of custody. *See Fields*, 565 U.S. at 511 (noting unlike for an inmate, for whom detention "does not generally involve the shock that very often accompanies . . . the paradigmatic *Miranda* situation," for a person whisked from home or street "to a police station for questioning—detention represents a sharp and ominous change").

Specifically, Halverson participated in the call from the jail's "program room," a 15 by 25 foot room with tables, chairs, and a phone. (R. 48:18.) During inmate calls, the officer who escorts the inmate to the program room leaves the inmate alone in the room and closes the door, which locks. (R. 48:22.) Officers can see the inmate through observation glass, but they do not listen in on the conversation or record those calls. (R. 48:19.) Nothing about the room or the procedure suggest that Halverson experienced a higher level of restraint than he normally would as a jail inmate.

Further, the duration of the call was very short, just three or four minutes (R. 51:6), and not of a length that would suggest that Danielson wore down Halverson or subjected him to coercive questioning. *See Bartelt*, 379 Wis. 2d 588, ¶ 38 (holding that 35-minute interview did not support determination of custody); *State v. Lonkoski*, 2013 WI 30, ¶ 31, 346 Wis. 2d 523, 828 N.W.2d 552 (same).

Moreover, the statements made during the interview do not support a determination that a person in Halverson's place would not have felt free to end the call. The call occurred shortly after 10 a.m. on September 27, 2016, when jail staff returned Danielson's call on Halverson's behalf. (R. 51:4–5.) Danielson introduced himself, explained why he was calling, and asked if Halverson knew of an incident in which some of E.M.'s documents went missing. (R. 51:5.) Halverson "knew of it," said that he helped E.M. clean his cell, and suggested that

"maybe the documents just happened to go in the garbage." (R. 51:5.)

Danielson then brought up the two letters in which Halverson had admitted "to the theft and destruction of those documents," and Halverson admitted to the crimes. (R. 51:5–6.) At that point, Halverson "became upset and made reference to the offenses that [E.M.] was incarcerated for" as seeming justification. (R. 51:6.) Danielson "thanked him for talking" and ended the call. (R. 51:7.)

There is nothing to suggest that Danielson deliberately withheld reading Halverson his *Miranda* rights. Danielson acknowledged that he did not provide *Miranda* warnings to Halverson because he "didn't think of [Halverson] as being in custody. He was speaking to me freely on the phone. Yes, he was in custody somewhere else for something else, but he wasn't in custody with me." (R. 51:8.)

Moreover, there was no evidence that Danielson or anyone else threatened or coerced Halverson during the call. To start, Danielson was not in the room with Halverson and cannot have attempted to physically restrain, threaten, or compel him to talk. Moreover, the call was under five minutes, and Danielson's tone of voice during the call "was the same as it is now"; he did not scream at, threaten, or promise anything to Halverson. (R. 51:6–7.) Danielson never indicated that Halverson's tone or words, at least until he confessed, suggested that Halverson was an unwilling participant in the phone call. Danielson heard no background noise nor anyone else speaking to—let alone yelling at or threatening—Halverson. (R. 51:7.)

The only features of the conversation that arguably support a determination of custody were that Danielson targeted Halverson as a suspect in the misdemeanors against E.M., and that Halverson confessed and became upset in the process. But those two things did not transform the call into

a custodial one, especially given that Danielson did nothing to change the tenor of the interview and there is nothing to suggest that Halverson's confession was involuntary or compelled. *See Bartelt*, 379 Wis. 2d 588, ¶ 48 (stating that conversational tone during interview supports determination of lack of custody). And even if Halverson's confession somehow transformed the interview into a custodial one, the interview ended immediately after his confession, so there are no statements to suppress. *See, e.g.*, *id.* ¶ 23 (noting that where defendant claimed noncustodial interview became custodial with his admission, the defendant sought to suppress his subsequent statements).

In addition, there was no evidence that jail staff compelled Halverson to return Danielson's call or restrained him in any manner. Matthew Hoff, a corporal with the Vernon County's Sheriff's Department, was on duty on September 27, 2016. (R. 48:14.) According to Hoff, jail inmates "receive calls occasionally" from "probation agents, attorneys, judges in some cases, and also law enforcement." (R. 48:14.) Although Hoff did not personally recall the details of Halverson's call, he did recall that "[t]here was nothing unusual about" it. (R. 48:15, 22.)

Hoff further explained the standard procedure for inmate calls. When jail staff received a call for an inmate, they either put the person on hold or—as occurred here—arrange to call the person back. (R. 48:15–16.) Jail staff would then inform the inmate that he has a call and who the caller is. (R. 48:15–17.) Provided the inmate agreed to talk to the caller, the staff would escort him into the jail's program room, hand him the phone, and leave him alone in the room to take the call. (R. 48:15–16.)

During this procedure, the inmates are neither handcuffed nor forced to take or return the call: "[a]t any time the inmate can tell us he doesn't want to talk to whatever individual is on the other line because we're not going to force

them to speak with somebody. I'm not going to drag somebody out of the pod down to the program room to talk to somebody they don't want to talk to." (R. 48:18–19.)

Finally, Halverson was, by all accounts, released back to his pod after the call and subject to the exact same limited freedom of movement that he had been before and during the call. Hoff testified that generally, when the officer sees the inmate hang up, the officer opens the door and escorts the inmate back to his pod. (R. 48:19–20.) Again, Hoff recalled nothing unusual occurring in the jail that day (R. 48:22), and there is nothing to suggest that the jail deviated from its standard practice regarding Halverson's call.

In all, the relevant factors weigh toward a conclusion that Halverson was not in custody for *Miranda* purposes during his phone call with Danielson. This Court should reverse the circuit court's order granting Halverson's suppression motion.

2. Halverson's arguments to the contrary are not persuasive.

As for Halverson's claim that the program room and its environs were inherently coercive and custodial, there was nothing in the testimony to suggest that the Vernon County jail's procedure for facilitating inmate phone calls and use of the program room "creates exactly the sort of psychologically coercive atmosphere the *Miranda* Court sought to restrain." (Halverson's Br. 16.) Rather, as argued in the district attorney's reply (Dist. Att'y Reply 9), Hoff's testimony reflected a process that balances the prisoner's need for privacy and to make and receive phone calls with the jail's need to maintain a safe and secure facility.

Further, *Fields* teaches that standard confinement conditions do not create a "custodial" atmosphere for an inmate living in a prison or jail. *See* 565 U.S. at 513–14; *see also People v. Anthony*, 230 Cal. Rptr. 268, 273 (Ct. App. 1986)

(holding that there was no *Miranda* custody where inmate's "freedom of movement during these [phone] conversations cannot be characterized as more restricted than during the usual restraint on a jail inmate's liberty to depart"); *People v. J.D.*, 989 P.2d 762, 771 (Colo. 1999) (holding that there was no *Miranda* custody where there was no change to inmate's already-limited freedom of movement). Rather, "[w]hen a prisoner is questioned, the determination of custody should focus on all the features of the interrogation . . . includ[ing] the language that is used in summoning the prisoner to the interview and the manner in which the interrogation is conducted." *Fields*, 565 U.S. at 514. Here, there is nothing to suggest that there were coercive features to either how Halverson was summoned or how Danielson conducted his questioning.

As for Halverson's complaint that Danielson did not expressly tell him that he was free to leave and could end the call, Hoff's testimony indicates that Halverson would have been told by jail staff—either initially or after Halverson asked—who was calling and if he wanted to return the call. (R. 48:17–18.) True, in *Fields*, it was "important" to the court's holding that Fields's interrogator expressly told him that he could end the interview and return to his cell whenever he wanted. *Fields*, 565 U.S. at 515. But that fact was compelling in *Fields* because that case involved a live interview between an inmate and an armed deputy whose presence had a much more coercive effect than that of a remote officer on the telephone would. Unlike Halverson, Fields could not simply press a button to end his conversation; he had to say so to the armed officer sitting across from him. In contrast, here, Halverson made a voluntary phone call while alone in the room. Hence, that Danielson did not expressly tell Halverson the obvious—that Halverson could end the call when he wanted by hanging up the phone—did not turn the situation custodial.

Finally, that the State could not present a witness who recalled the specifics of Halverson's three-to-four-minute phone call on September 27, 2016, is neither fatal to the State's position, nor even surprising. The hearings on the motion occurred 13 and 17 months after the call, October 23, 2017, and February 28, 2018. (R. 44; 51.) Given that delay, the State was highly unlikely to locate anyone who remembered details of an inmate's unremarkable, three-to-four-minute phone call. Indeed, as Hoff testified, he was working at the jail on the day of the call and nothing unusual happened, which lends weight to the inference that the call happened according to standard jail procedure, without Halverson resisting or refusing to go to the program room. As for Hoff's testimony, the circuit court found Hoff's explanation of the standard procedure credible, stating, "I certainly believe that the officer that testified [Hoff] knows what he's talking about." (R. 48:34.)

And while the circuit court declined to presume that the jail staff told Halverson who was calling or gave him an option to not return the call (R. 48:32), the attorney general agrees with the district attorney's view that to the extent that was a finding, it was clearly erroneous, given Hoff's credible testimony regarding the standard procedure, his testimony that nothing unusual happened on the day of the call, and the absence of any evidence that Halverson involuntarily participated in the call (Dist. Att'y Reply 7–8).

In any event, even assuming jail staff neglected to tell Halverson who was on the phone and Halverson—in the walk from his pod to the program room—never asked, Danielson informed Halverson immediately who he was and why he was calling. By all indications, Halverson talked freely with him; there was nothing to indicate that Halverson was physically or psychologically compelled to continue the conversation.

D. The circuit court's decision was based on abrogated law.

The circuit court's legal reasoning does not provide a basis for affirmance.

The circuit court granted the motion to suppress across two hearings. At the end of the first hearing, at which Officer Danielson testified, the court made the following findings:

> This came about, and it's not disputed, that the officer was investigating the matter; that he wanted to contact Mr. Halverson as part of his investigation; that he found out that Mr. Halverson was at the Vernon County jail, contacted the jail and spoke with Mr. Halverson.
>
> He asked him questions. Mr. Halverson was incarcerated at the jail at that time. Had this been in-person, I think that the situation would have never occurred because of the fact that the officer, having in his focus that this person is in a jail and he is asking questions, would have given the *Miranda*. It would have just happened.
>
> Officers regularly do investigations by phone. It's part day in and day out of what they do, and they are almost always speaking to people that aren't in a jail so that they get in the habit of just proceeding on with their investigation.
>
> I don't think that this officer intended to do anything other than his job as best as he could. He didn't give the *Miranda*, and I think that's solely because of the fact that it was a phone conversation and he wasn't thinking about whether or not the second part of *Miranda*, which is in custody, was a factor here, but it can be.

(R. 51:23–24.)

The court then discussed *Armstrong*, 223 Wis. 2d at 355–56 and *Schimmel*, 84 Wis. 2d 287, stating that the supreme court "created a very strong rule" holding "that a

person who is incarcerated is per se in custody for purposes of *Miranda*." (R. 51:24.) It held that *Fields* was factually distinguishable from Halverson's case and disagreed that *Fields* impacted the per se rule in *Armstrong* and *Schimmel*. (R. 51:25–26.)

At the second hearing, at which Hoff testified to the Vernon County Jail standards, the court reiterated that *Armstrong* and *Schimmel* remained good law:

> I am not convinced that our supreme court is necessarily going to go along with [*Fields*]. They set up a bright line when the U.S. Supreme Court did not, so that there is some window there. They made their decision, and it's been almost a generation of well-settled law.
>
> I see nothing compelling in this case that would convince me to overturn the Wisconsin Supreme Court's decision enunciated in *Schimmel* and reaffirmed in [*Armstrong*], and apparently *Schimmel* has been viewed with a smiley face, so to speak, recently.

(R. 48:34.)[4] The court went on to hold that based on that rule, Halverson "was definitely in custody" and "was definitely interrogated" and thus, ordered suppression. (R. 48:35.)

While the circuit court was correct that *Armstrong* and *Schimmel* have long held that incarceration was per se custody under *Miranda*, that holding is no longer good law given the Supreme Court's express rejection of that reasoning in *Fields*.

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[4] The court's "smiley face" remark appeared to have followed from an erroneous statement by Halverson's counsel at the hearing indicating that this Court in its 2017 *Bartelt* decision reaffirmed the rule in *Schimmel*. (R. 48:30.) Neither this Court's nor the supreme court's *Bartelt* decisions, nor any Wisconsin decision within the last 15 years, mention *Schimmel* or its per se rule. The language counsel appeared to be referencing was in the supreme court's 1999 decision in *Armstrong*, 223 Wis. 2d 331, ¶ 36.

1. *Fields* overruled the rule in *Armstrong* that, under the Fifth Amendment, incarceration is per se custody for *Miranda* purposes.

The parties agree that *Fields* abrogates or overrules the rule in *Armstrong* and *Schimmel* holding that incarceration is per se custody for *Miranda* purposes—to the extent that that rule is based in the Fifth Amendment. (Dist. Att'y Br. 8–10; Halverson's Br. 13.) The attorney general agrees, and rather than reproduce the reasoning here, it relies on and joins the district attorney's briefs.

No Wisconsin appellate court has yet expressly recognized that *Fields* abrogates or overrules the per se rule in *Armstrong* and *Schimmel*, the attorney general is not aware of any active cases with that issue squarely before this Court or the supreme court.[5] While normally, only the supreme court may "overrule, modify, or withdraw language from a previous [state] supreme court case," *Cook v. Cook*, 208 Wis. 2d 166, 189, 560 N.W.2d 246, this Court nevertheless has power to recognize that *Fields* directly conflicts with *Armstrong*, and that this Court is bound by *Fields* and not *Armstrong* as a result. *See State v. Jennings*, 2002 WI 44, ¶ 19, 252 Wis. 2d 228, 647 N.W.2d 142 (stating that court of appeals "must necessarily adhere to" a subsequent United

[5] The only related case the attorney general is aware of is *State v. Hanson*, Case No. 2016AP2058-CR, which is currently pending before the supreme court. Hanson alleged a Fifth Amendment *Miranda* violation when he, as an inmate, was questioned in a John Doe hearing. In its brief, the State asks the supreme court to recognize that *Fields* abrogates *Armstrong* and its line of cases. (State's Br. 37–38.) That said, a ruling on the per se rule is not seemingly necessary to the court's disposition in *Hanson*.

States Supreme Court decision, even though it "means deviating from the conflicting earlier decision of" the Wisconsin Supreme Court).

Alternatively, this Court has discretion to certify to the Wisconsin Supreme Court "a conflict between a decision of this court and a subsequent decision of the United States Supreme Court as a matter of federal law." *Id.*; *see also* Wis. Stat. § 809.61. But given that Halverson has agreed that *Fields* trumps *Armstrong*'s rule of per se custody based on interrogation, this Court can soundly recognize on its own that *Fields* abrogates *Armstrong* and its line of cases related to the per se rule.[6]

2. There is no justification to expand the protections offered in article I, section 8 of the Wisconsin Constitution to preserve *Armstrong*'s per se rule.

As the district attorney correctly points out (Dist. Att'y Br. 7–10; Dist. Att'y Reply 1–2), the per se rule in *Armstrong* is based on an erroneous interpretation of a United States Supreme Court decision interpreting the Fifth Amendment. Nothing in *Armstrong* or its line of cases identify expanded protections in Wisconsin's identical provision in Article 1, section 8 of the state constitution. The Wisconsin Supreme Court typically "interpret[s] both the United States and Wisconsin constitutions the same way." *State v Elder*, 2013 WI 73, ¶ 29, 350 Wis. 2d 1, 833 N.W.2d 564 (citing *Jennings*, 252 Wis. 2d 228, ¶ 6).

[6] *See, e.g.*, *State v. Hockings*, 86 Wis. 2d 709, 720 & n.5, 273 N.W.2d 339 (1979); *Schimmel v. State*, 84 Wis. 2d 287, 294–95, 267 N.W.2d 271 (1978), *overruled on other grounds by Steele v. State*, 97 Wis. 2d 72, 294 N.W.2d 2 (1980).

The attorney general agrees that expansion of Wisconsin constitutional protections is not warranted to preserve the per se custody rule. The attorney general joins the district attorney's brief on these points and agrees that the intentional *Miranda* violation present in *Knapp* was not present here. (Dist. Att'y Reply 2–5.)

Further, this Court should leave to the supreme court the question whether to interpret article 1, section 8 broader than the Fifth Amendment to preserve the per se custody rule. *See Blum v. 1st Auto & Cas. Ins. Co.*, 2010 WI 78, ¶ 47, 326 Wis. 2d 729, 786 N.W.2d 78 (stating that while the court of appeals has a secondary law-development function, the "supreme court's primary function is that of law defining and law development"). Unlike its discretion to recognize Supreme Court law that has overruled a state court decision, this Court remains bound by Wisconsin Supreme Court precedent interpreting article 1, section 8 protections identically with those offered in the Fifth Amendment. *See, e.g.*, *Hart v. Artisan & Truckers Cas. Co.*, 2017 WI App 45, ¶ 20, 377 Wis. 2d 177, 900 N.W.2d 610. Accordingly, this Court should decline Halverson's request to interpret article 1, section 8 more broadly than the Fifth Amendment in his case.

* * * *

In summary, the attorney general joins the district attorney's request for affirmance and its reasoning supporting that request. This Court should hold that *Fields* abrogates the per se custody rule in *Armstrong* and that, under the circumstances here, Halverson was not in custody during his voluntary phone call with Danielson and thus did not require *Miranda* warnings.

CONCLUSION

This Court should reverse the decision of the circuit court and remand with instructions ordering that court to vacate the order granting Halverson's motion to dismiss and to enter an order denying Halverson's motion to dismiss.

Dated this 7th day of May 2019.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 5,466 words.

_____
SARAH L. BURGUNDY
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 7th day of May 2019.

_____
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