STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT III

Case No. 2018AP000858-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

BRIAN L. HALVERSON,

Defendant-Respondent.

On Appeal from Orders Entered in the
Chippewa County Circuit Court,
the Honorable Steven R. Cray, Presiding.

SUPPLEMENTAL RESPONSE BRIEF OF DEFENDANT-RESPONDENT

MEGAN SANDERS-DRAZEN
Assistant State Public Defender
State Bar No. 1097296

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 266-8383
sandersdrazenm@opd.wi.gov

Attorney for Defendant-Respondent

TABLE OF CONTENTS

CASES CITED

CONSTITUTIONAL PROVISIONS

ISSUES PRESENTED

I. Under the federal constitution, incarceration alone does not amount to *Miranda* custody; a court must assess the totality of the circumstances attending an interrogation to determine whether it was custodial. Does the longstanding rule that incarceration amounts to *Miranda* custody persist under the state constitution?

The circuit court did not directly address this issue. It observed that incarceration alone amounts to *Miranda* custody according to Wisconsin Supreme Court precedent, and it declined the state's invitation to depart from that precedent.

II. If incarceration does not on its own amount to *Miranda* custody, such that a court must review the totality of the circumstances, was Halverson's interrogation custodial due to the coercive environment in which it took place and the interrogating officer's failure to employ "adequate protective devices" to counteract that coercion?

The circuit court did not address this issue, as it concluded that incarceration alone amounts to *Miranda* custody.

POSITION ON ORAL ARGUMENT AND PUBLICATION

Oral argument is not requested but would be welcomed if this court would find it helpful in resolving the novel issues presented. Publication, however, is warranted. This case will likely result in the enunciation of a new rule of law or the modification or clarification of an existing rule of law. *See* Wis. Stat. § 809.23(1)(a)1. It will also require this court to resolve a conflict between prior decisions of the state and federal supreme courts. *See* Wis. Stat. § 809.23(1)(a)3.

PREFATORY NOTE

Halverson's response brief includes a supplemental statement of the case and facts, significant background on the governing law and standard of review, and a much fuller response to the arguments the state makes in its appellant's brief (some of which it discusses in its supplemental appellant's brief, as well). By contrast, this brief tackles the arguments the state raised or developed *exclusively* in its supplemental appellant's brief. Accordingly, Halverson asks this court to read his two briefs together.

ARGUMENT

I. The Wisconsin Constitution Should Be Interpreted to Preserve the Longstanding Bright-Line Rule That Incarceration Alone Amounts to *Miranda* Custody.

This court need not and should not abandon the bright-line rule that incarceration alone amounts to *Miranda* custody. *See State v. Armstrong*, 223 Wis. 2d 331, 355-56, 588 N.W.2d 606 (1999). Although the United States Supreme Court has held that the Fifth Amendment requires courts to engage in a totality-of-the-circumstances analysis to determine whether an interrogation was custodial—even when the subject of the interrogation was confined in a jail or prison—no case has resolved whether the *Armstrong* rule survives under Article I, Section 8 (1) of the Wisconsin Constitution. *See Howes v. Fields*, 565 U.S. 499, 508-09 (2012). For the reasons set forth in Halverson's response brief, this court should address that issue head-on and declare that the *Armstrong* rule endures under the state constitution. *See* Resp. Br. 9-14.

The state says this is a question for the Wisconsin Supreme Court to decide. Supp. App't's Br. 19. On the contrary, while this court may not interpret the state constitution inconsistently with supreme court precedent, and while the supreme court is the final arbiter of the meaning of the state constitution, this court can and should interpret the state constitution when it's confronted with a question the supreme court hasn't decided. "[U]nder some circumstances," the court of appeals

"necessarily performs a . . . law defining and law development" function. *Blum v. 1st Auto & Cas. Ins. Co.*, 2010 WI 78, ¶47, 326 Wis. 2d 729, 786 N.W.2d 78 (quoting *Cook v. Cook*, 208 Wis. 2d 166, 188, 560 N.W.2d 246 (1997)).

Unless this court decides Halverson's interrogation was custodial under the totality of the circumstances—obviating the need to determine whether his incarceration put him in *Miranda* custody on its own—deciding the issues presented will entail deciding whether the *Armstrong* rule remains valid under the Wisconsin Constitution. And contrary to the state's assertion that the right against self-incrimination protected by the state constitution is identical to that afforded by the Fifth Amendment, considerations of fairness and logic have previously led the Wisconsin Supreme Court to hold otherwise. *See* Resp. Br. 12-14.

Considerations of fairness and logic dictate that this court should follow suit here. Incarceration, the most obvious form of custody, presents precisely the "compelling pressures" the United States Supreme Court originally sought to restrain in *Miranda v. Arizona*, 384 U.S. 436, 467 (1966). *Armstrong* recognized as much and responded with a clear, fair rule to ensure protection of the inmate's right against self-incrimination: when police interrogate an inmate in a jail or prison, they must read him his *Miranda* rights first. 223 Wis. 2d at 355-56. Although this rule has functioned well for two decades, the state says there is no good reason for state constitutional protection of the right against self-incrimination to extend beyond the federal constitution's protection of

the same. Halverson submits there is no good reason to abandon a settled, straightforward rule that protects a deeply important constitutional right—and does so precisely where that right is most at risk of violation.

In sum, given the significance of the right at stake, departing from the *Armstrong* rule simply to mimic the United States Supreme Court makes little sense. This court should interpret the Wisconsin Constitution to uphold the commonsensical notion that an inmate in a prison or jail is necessarily in the kind of custody that warrants *Miranda* warnings. And, because Halverson was an inmate at the Vernon County Jail when his interrogation took place but wasn't given *Miranda* warnings, this court should affirm the circuit court's decision suppressing his confession.

II. Under the Totality of the Circumstances, Halverson Was in *Miranda* Custody During His Interrogation.

Whether the bright-line *Armstrong* rule continues to govern or the *Fields* totality-of-the-circumstances analysis controls, Halverson's interrogation was custodial. The record shows it occurred in a coercive environment, and unlike in *Fields*, it lacked the "protective devices" necessary to counteract that coercion. *See Miranda*, 384 U.S. at 457 (establishing the need for "adequate protective devices"); *Fields*, 565 U.S. at 515 (emphasizing that the inmate's interrogator repeatedly told him he could end the questioning at will). More fundamentally, the record shows very little, as the

state couldn't find anybody at the Vernon County Jail who recalled the interrogation or made a record of it. It is the state's burden to prove Halverson's interrogation was non-custodial. *Armstrong*, 223 Wis. 2d at 345. It plainly fell short of fulfilling it.

The circuit court recognized these problems. It noted and relied on the factual differences between *Fields* and this case, particularly the interrogating officer's failure to tell Halverson he could end their phone call. (51:26; App. 126). It later explained, "we don't know in this particular case" whether the jail followed its standard procedures when Halverson was interrogated, "but we do know that . . . he knew it was law enforcement [on the phone] and they were asking him questions." (48:32-33; 160-61). Given the the state's paltry evidence and the indisputably coercive setting in which Halverson was interrogated, this court should affirm the circuit court's suppression decisions whether or not it rules on the continued vitality of the *Armstrong* rule.

There are two strains to the state's counterargument. First it contends that "an inmate's voluntary telephone interview with law enforcement" cannot "effectuate *Miranda* custody." App't's Supp. Br. 6-8. Then it says that even if it could, "the relevant factors weigh toward a conclusion that Halverson was not in custody for *Miranda* purposes during his phone call." *Id.* at 8-12. Neither contention holds water.

First, in arguing that a "voluntary" phone call with police can't qualify as a custodial interrogation, the state clarifies that it means a phone call the

inmate initiated or was free to reject or end. Supp. App't's Br. 6. It's undisputed that Halverson did not initiate his interrogation. (51:4-5; App. 104-05). The record also indicates that the interrogating officer never told him he could reject or end their phone call (51:6-7; App. 106-07), and the circuit court made no findings of fact that support the state's apparent assumption that Halverson knew he could do so. In short, the state's argument on this point lacks any foundation in the record.

A similar flaw permeates its discussion of the circumstances attending Halverson's interrogation. Because no one at the Vernon County Jail recalled or made a record of the interrogation, the state elicited testimony from a jail corporal about how professional calls for inmates are typically handled in Vernon County. (*See* 48:15-23; App. 143-51). Halverson's attorney argued that while the corporal's testimony was relevant to showing the jail's standard procedures, "it's incumbent upon the state to show what happened, not what might have happened," since it bears the burden of proof. (48:9; App. 137). The circuit court agreed, accepting that the corporal accurately conveyed the jail's "habit," but stating, "from there I'm not going to take the leap that the officer can know exactly how this conversation went down." (48:32; 160). On the current record, then, the state has not proven what the circumstances surrounding Halverson's interrogation were—let alone that they weren't coercive enough to place Halverson in *Miranda* custody, notwithstanding his incarceration.

The state's arguments function to divert this court's attention from the basic point on which *Armstrong* is premised: an officer interrogating an inmate must confront the overwhelming coercion inherent in incarceration. There is virtually nothing an inmate is free to do; continuous submission to authority is required. Thus, even if this court rejects the *Armstrong* rule, it should recognize that subjecting an inmate to non-custodial police questioning requires clarifying that the rules have momentarily changed—that, in this particular conversation, the inmate needn't acquiesce to law enforcement's demands. Without such clarification, "the compulsion inherent in custodial surroundings" won't be dispelled, and whatever statement the inmate ultimately provides won't "be the product of his free choice." *Miranda*, 384 U.S. at 458.

Thus, even if incarceration isn't enough to prove *Miranda* custody—which it ought to be under the Wisconsin Constitution—the coercive jail environment in which Halverson's interrogation took place, combined with the interrogating officer's apparent failure to tell Halverson he could decline or end their call at will, show Halverson was in *Miranda* custody. The circuit court's decision suppressing his confession should be upheld.

CONCLUSION

Halverson requests that this court affirm the circuit court's orders granting his suppression motion and denying the state's motion for reconsideration.

Dated this 5th day of June, 2019.

Respectfully submitted,

MEGAN SANDERS-DRAZEN
Assistant State Public Defender
State Bar No. 1097296

Office of State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 266-8383
sandersdrazenm@opd.wi.gov

Attorney for Defendant-Respondent

CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 1,411 words.

CERTIFICATE OF COMPLIANCE WITH RULE 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 § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after 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 5th day of June, 2019.

Signed:

MEGAN SANDERS-DRAZEN
Assistant State Public Defender