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STATE OF WISCONSIN

IN SUPREME COURT

CASE NO. 2018AP858-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

BRIAN L. HALVERSON,

Defendant-Respondent-Petitioner.

On Review from a Decision of the Court of Appeals Reversing a Decision of the Chippewa County Circuit Court, the Honorable Steven R. Cray, Presiding.

BRIEF OF DEFENDANT-RESPONDENT-PETITIONER

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
sandersdrazenm@opd.wi.gov
(608) 266-8383

Attorney for Defendant-Respondent-Petitioner

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ISSUES PRESENTED

In 1999, this court held that an inmate in a prison or jail is necessarily in custody for *Miranda* purposes. It came to that conclusion based in part on precedent from the United States Supreme Court.

In 2012, the United States Supreme Court held that incarceration does not automatically produce *Miranda* custody under the federal constitution; the totality of the circumstances governs instead.

Here, Brian Halverson was interrogated—and confessed to a crime—while in jail. Because the interrogator did not provide *Miranda* warnings, Halverson moved to suppress his confession. The circuit court granted his motion, but the court of appeals reversed.

Two issues are presented.

1. **Does incarceration necessarily produce *Miranda* custody under the Wisconsin Constitution?**

The circuit court did not address the Wisconsin Constitution.

The court of appeals said no.

2. **Under the totality of the circumstances, was Halverson in *Miranda* custody during his interrogation?**

The circuit court did not address the totality of the circumstances.

The court of appeals said no.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Both oral argument and publication are customary for this court and are warranted here.

STATEMENT OF THE CASE AND FACTS

This case is about an interrogation. Brian Halverson was an inmate at the Vernon County Jail when he was summoned to speak by phone with a police officer. (51:4-5; App. 169-70). He did so alone, in a locked room, watched through the room's glass walls by jailers. (48:17-23; App. 145-51). The officer questioned Halverson about new criminal allegations, and Halverson confessed. (51:5-8; App. 170-73). He was not told he could decline the questioning or end it at will, nor was he told he had the right to remain silent or have counsel by his side. (51:7-8; App. 172-73). On this record, the circuit court held that Halverson's interrogation ran afoul of *Miranda*, and it suppressed his confession. (51:22-27; 48:33-35; App. 161-63, 187-92). The court of appeals reversed. *State v. Halverson*, 2019 WI App 66, ¶¶2-4, 389 Wis. 2d 554, 937 N.W.2d 74; (App. 101-27). Halverson asks this court to reverse again.

The charges against Halverson include one count of misdemeanor theft and one count of criminal damage to property. (1:1). The complaint alleges that while he was an inmate at Stanley Correctional Institution, Halverson took and destroyed documents and a watchband that belonged to another inmate. (1:1-2). The state's evidence appears to consist solely of statements to law enforcement, both by the alleged victim and by Halverson. (1:2).

Halverson moved to suppress the incriminating statements he made, arguing they were obtained in violation of his right against compelled self-incrimination. (18). There were two hearings on his motion. (51; 48; App. 129-94). The circuit court granted suppression at the first. (51:22-27; App. 187-92). The state then moved for reconsideration (38), and the court heard more testimony and reconsidered its ruling at the second. (48; App. 129-65). Its decision did not change. (48:33-35; App. 161-63).

Officer Matthew Danielson was the sole witness at the first suppression hearing. (51:3-19; App. 168-84). Danielson testified that he investigated the alleged victim's theft report and, in the process, learned Halverson was an inmate in the Vernon County Jail. (51:4; App. 169). Danielson called the jail and was told by "somebody" there "that they would get [Halverson]" and call him back. (51:4-5; App. 169-70). About ten minutes later, he got the call back, and Halverson was put on the phone. (51:5; App. 170).

Danielson testified that he asked Halverson about the Stanley inmate's allegations against him, and Halverson eventually admitted they were true. (51:5-6; App. 170-71). Danielson also testified that the interrogation was brief—it took "just a few minutes" to get Halverson's confession. (51:5; App. 171). Danielson acknowledged that he did not provide *Miranda* warnings before questioning Halverson, saying he didn't think Halverson was in custody. (51:7-8; App. 172-73).

Although the state called another witness at the next hearing, Danielson was the only person with

direct knowledge of Halverson's interrogation to testify about it. (*See* 48:15; App. 143). And since he wasn't *with* Halverson, his testimony left questions unanswered. What tone and language did the jailers use when telling Halverson he'd gotten a call from a police officer? Was Halverson instructed to take the call, or given a choice? How was he transported from his cell (or wherever he was) to the phone? Was he shackled? What kind of room did the interrogation take place in, and could Halverson leave? Was the call recorded? How many officers were standing by? Were they armed?

To fill these gaps, the state called Corporal Matthew Hoff at the second suppression hearing. (48:14; App. 142). Hoff had no memory of the call and testified that there was no record of it, but he discussed the Vernon County Jail's "standard operating procedure" when an inmate receives a professional call. (48:15-22; App. 143-50). Hoff explained that an inmate who receives a call is escorted from his "pod" to a locked "program room"; that the program room has a phone with a private, unrecorded line; and that the room's walls are made of glass, enabling continuous observation of the inmate inside. (48:17-23; App. 145-51). Hoff also testified that inmates aren't usually shackled or handcuffed en route to the program room or within it, that they choose whether to take professional calls, and that they're escorted back to their pods once their calls end. (48:17-19; App. 145-47).

At the end of both hearings, the circuit court concluded that Halverson was in *Miranda* custody when Danielson interrogated him. (51:22-27; 48:33-35; App. 122-27, 161-63). It reasoned that binding

case law from the Wisconsin Supreme Court establishes that incarceration always amounts to *Miranda* custody, and it distinguished the recent United States Supreme Court case holding otherwise. (51:24-26; 48:34-35; App. 161-63, 187-92).

In a published decision, the court of appeals reversed. *See Halverson*, 389 Wis. 2d 554; (App. 101-27). It explained that the United States Supreme Court refused to adopt a per se rule that incarceration always amounts to *Miranda* custody, and it declined to read the state constitutional right against self-incrimination more broadly than its federal counterpart. *Id.*, ¶¶2-3; (App. 102-03). Under both constitutions, the court held, the totality of the circumstances dictates whether an incarcerated interrogation subject is in *Miranda* custody. *Id.*, ¶4; (App. 103). And here, it concluded, the circumstances show Halverson wasn't. *Id.*; (App. 103).

Halverson petitioned this court to review the court of appeals' totality-of-the-circumstances analysis, as well as its lock-step interpretation of the Wisconsin Constitution. Review was granted.

OVERVIEW OF ARGUMENT

Both the state and federal constitutions bar the government from proving a defendant guilty of a crime by introducing statements he was compelled to make. *See* U.S. Const. amend. V; Wis. Const. art. 1, § 8(1). *Miranda* warnings are a prophylactic measure designed to prevent law enforcement from extracting compelled statements in the first place. *Miranda v. Arizona*, 384 U.S. 436, 467 (1966). The warnings advise the subject of a custodial interrogation about

his constitutional rights before he decides to talk, instilling confidence in the voluntariness of whatever statements follow—and helping to ensure their admissibility. *Id.* at 476. When the subject of a custodial interrogation does *not* receive *Miranda* warnings, such confidence is absent, and exclusion of the subject's statements is required. *Id.*

Here, Halverson confessed to a crime during an interrogation at which he did not receive *Miranda* warnings; that much is undisputed. The sole issue is whether Halverson was in custody at the time. As a literal matter, he clearly was—he was incarcerated in the Vernon County Jail. But throughout this litigation, the state has maintained that literal custody isn't enough to show *Miranda* custody. Halverson's confinement, the state insists, did not make his interrogation coercive enough to trigger the procedural protections of *Miranda.*

Two decades ago, in *State v. Armstrong*, this court came to the opposite conclusion, holding that an incarcerated person is necessarily in *Miranda* custody. 223 Wis. 2d 331, 355-56, 588 N.W.2d 606 (1999). At the state's urging, the court of appeals discarded that precedent and followed *Howes v. Fields*, 565 U.S. 499, 512 (2012), which held that incarceration doesn't automatically produce *Miranda* custody under the federal constitution. While the state and court of appeals are right that the *Armstrong* rule has been overruled insofar as it was grounded in the federal constitution, they're wrong that the rule should therefore be cast aside.

In the *Miranda* context, as elsewhere, this court has previously "afford[ed] greater protection . . .

under the Wisconsin Constitution than is mandated by the United States Supreme Court." *State v. Knapp*, 2005 WI 127, ¶59, 285 Wis. 2d 86, 700 N.W.2d 899. Given the United States Supreme Court's recent departure from the fair, practical approach this court unanimously adopted in *Armstrong*, such greater protections are warranted here. This court should preserve the *Armstrong* rule under the Wisconsin Constitution and hold that Halverson was in *Miranda* custody solely by virtue of his incarceration.

If it doesn't—if it abandons the logic of *Armstrong* and holds that interrogating an inmate in a prison or jail doesn't necessarily present the "inherently compelling pressures" *Miranda* warnings exist to mitigate—then it must apply the totality-of-the-circumstances analysis prescribed by *Fields*. *See Fields*, 565 U.S. at 507, 512.

Some of the circumstances surrounding Halverson's interrogation remain elusive, as the only jailer who testified did not recall it happening and found no record of its occurrence. But three facts are clear: first, Halverson was confined in jail; second, Officer Danielson questioned him by phone about criminal allegations; and third, Danielson failed to tell Halverson he could end the questioning at will. These are the salient facts in the balance, and they establish *Miranda* custody.

Thus, whether *Armstrong* or *Fields* controls, Halverson was subjected to a custodial interrogation, and Danielson's failure to provide *Miranda* warnings rendered his confession inadmissible.

ARGUMENT

I. This court should hold that incarceration necessarily produces *Miranda* custody under the Wisconsin Constitution.

A. Standard of review.

Whether incarceration necessarily produces *Miranda* custody under the Wisconsin Constitution is a question of law this court will decide de novo. *See State v. Williams*, 2012 WI 59, ¶10, 341 Wis. 2d 191, 814 N.W.2d 460.

B. Does incarceration necessarily produce *Miranda* custody? The *Armstrong-Fields* divide.

Half a century ago, the United States Supreme Court announced a series of "procedural safeguards," commonly called *Miranda* warnings, that must be employed in every custodial interrogation "to secure the privilege against self-incrimination." *Miranda*, 384 U.S. at 444. Absent these safeguards, the Court held, all statements stemming from a custodial interrogation must be suppressed. *Id.*

Since *Miranda* was decided, courts at every level have examined and reexamined its landmark holding. A whole body of case law, for example, has worked to define the "objective circumstances" that amount to custody for *Miranda* purposes. *See Howes v. Fields*, 565 U.S. 499, 508-09 (2012). Relevant here is a subset of that case law asking a more specific question: whether the subject of police interrogation is necessarily in *Miranda* custody if he's incarcerated when the interrogation occurs. *See, e.g.*, *id.* at 514-17.

The Wisconsin Supreme Court most recently considered this issue in *Armstrong*. Tonnie Armstrong was interrogated about a homicide while serving an unrelated sentence in the Racine County Jail. *Armstrong*, 223 Wis. 2d at 335. Before police read Armstrong his rights, he made inculpatory statements. *Id.* at 335. He later moved to suppress them on *Miranda* grounds. *Id.* The state claimed Armstrong was not in custody for *Miranda* purposes, even though he was incarcerated, because his custodial status didn't change when his interrogation began. *Id.* at 353.

This court was not convinced. It said it could "think of no situation in which a defendant is more clearly in custody" under *Miranda* than when he is "confined in a prison or jail." *Id.* at 356. The illogic of holding that an incarcerated defendant can be *out* of custody during an interrogation, in conjunction with contrary decisions from the state and federal supreme courts in analogous cases,[1] led the court to announce that an incarcerated person "is *per se* in custody for purposes of *Miranda*." *Id.* at 355.

In *Fields*, the United States Supreme Court came to a different conclusion. Like Armstrong, Randall Fields was serving a jail sentence when police arrived to question him about a new crime. *Fields*, 565 U.S. at 502. Fields was not read his rights and eventually confessed. *Id.* at 503.

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[1] *Armstrong* gave particular attention to the first United States Supreme Court case on *Miranda* custody of incarcerated defendants, *Mathis v. United States*, 391 U.S. 1 (1968), and to "its Wisconsin counterpart," *Schimmel v. State*, 84 Wis. 2d 287, 267 N.W.2d 271 (1978). *See State v. Armstrong*, 223 Wis. 2d 331, 353-56, 588 N.W.2d 606 (1999).

In assessing whether Fields was in custody, the Court declined to adopt a bright-line rule like that approved by *Armstrong*, explaining that "whether an individual's freedom of movement was curtailed" during his interrogation is merely "the first step in the analysis." *Id.* at 509. The Court held that *Miranda* custody of an inmate in a prison or jail turns on whether the circumstances surrounding the inmate's interrogation present "the same inherently coercive pressures as the type of station house questioning at issue in *Miranda*." *Id.* So, it turned to the circumstances of Fields's interrogation.

The record established that Fields was escorted from his cell to "a well-lit, average-sized conference room, where he was 'not uncomfortable.'" *Id.* at 515. There, he "was offered food and water, and the door . . . was sometimes left open." *Id.* Fields was questioned for over five hours, until well past his usual bedtime. *Id.* He wasn't physically restrained or threatened, but the sheriff's deputies who questioned him were armed, and one deputy used a "sharp tone." *Id.* "Most important, [Fields] was told at the outset of the interrogation, and was reminded again thereafter, that he could leave and go back to his cell whenever he wanted." *Id.*

With heavy emphasis on the fact that Fields was repeatedly told he could return to his cell at will, the Court decided his interrogation was *not* custodial. *Id.* at 517. *Fields* thus makes clear that incarceration does not necessarily produce *Miranda* custody for purposes of the Fifth Amendment; it is but one, albeit significant, factor.

C. Because the federal constitution is a floor, not a ceiling, *Armstrong* need not give way to *Fields*.

Insofar as the per se rule announced in *Armstrong* is rooted in the federal constitution, *Fields* overruled it. But the question remains whether the rule survives as a means of protecting the right against compelled self-incrimination provided by article I, section 8(1) of the Wisconsin Constitution.

Wisconsin courts usually construe state constitutional provisions in conformity with their federal counterparts. *See id.*, ¶58. Nevertheless, this court has repeatedly asserted that it "will not be bound by the minimums which are imposed by the Supreme Court of the United States if it is the judgment of this court that the Constitution of Wisconsin and the laws of this state require that greater protection . . . be afforded." *Id.*, ¶59 (quoting *State v. Doe*, 78 Wis. 2d 161, 171, 254 N.W.2d 210 (1977)). Such "greater protection" has been extended even where the texts of the state and federal constitutions align. *See State v. Knapp*, 2005 WI 127, ¶¶62, 73, 285 Wis. 2d 86, 700 N.W.2d 899 (2005) (*Knapp II*). Thus, while the texts of the Fifth Amendment and its Wisconsin analog are "virtually identical,"[2] that "cannot be conclusive, lest this court forfeit its power to interpret its own constitution to the federal judiciary." *See id.*, ¶62.

[2] The Fifth Amendment to the United States Constitution provides: "No person shall be . . . compelled in any criminal case to be a witness against himself." Article I, section 8(1) of the Wisconsin Constitution provides: "No person may be . . . compelled in any criminal case to be a witness against himself or herself."

Knapp, a case considered by this court on two occasions, illustrates this point.

The issue in *Knapp I* was "whether physical evidence obtained as the direct result of a *Miranda* violation should be suppressed when the violation was an intentional attempt to prevent the suspect from exercising his Fifth Amendment rights." *State v. Knapp*, 2003 WI 121, ¶1, 265 Wis. 2d 278, 666 N.W.2d 881 (*Knapp I*). Relying on federal precedent interpreting the Fifth Amendment, as well as "policy considerations related to deterrence and judicial integrity," the *Knapp I* court held that suppression was required. *Id.*, ¶2.

The United States Supreme Court reversed that decision and sent the case back to this court for further consideration in light of *United States v. Patane*, 542 U.S. 630 (2004). *Patane*, like *Knapp I*, raised "the physical-evidence-as-*Miranda*-fruit issue." 4 Wayne R. LaFave et al., *Criminal Procedure* § 9.5(b) (3d ed. 2007). A majority of the *Patane* Court concluded that physical evidence derived from statements a defendant gave without the benefit of *Miranda* warnings need not be suppressed. *Id.*

Thus, when the case returned to the Wisconsin Supreme Court, part of its premise in *Knapp I*—that the federal constitution requires suppression of physical evidence derived from an intentional *Miranda* violation—had fallen away. *Knapp II*, 285 Wis. 2d 86, ¶1. Unchanged, however, was the "strong need for deterrence" of such violations. *Id.*, ¶74. With that need in mind, the court rejected the "lock-step theory" (under which state constitutional

rights are read to match their federal equivalents) and upheld its earlier decision under the Wisconsin Constitution. *Id.*, ¶¶59, 83.

Knapp II shows that the protections afforded by the state constitutional right against self-incrimination are not defined by the United States Supreme Court's Fifth Amendment case law; they're defined by this court, exercising its "independent judgment." *Id.*, ¶60. "Federal jurisprudence is persuasive and helpful," but it cannot replace careful consideration of "competing principles and policies under the Wisconsin Constitution." *Id.*

D. This court should construe the state constitution to require *Miranda* warnings whenever an inmate in a prison or jail is interrogated.

The principles and policies at stake when an inmate is interrogated show *Miranda* warnings should *always* be required. As *Armstrong* observed, confinement in a prison or jail is the clearest form of custody. *Armstrong*, 223 Wis. 2d at 356. The absence of freedom that characterizes (indeed, *is*) such confinement presents exactly the "compelling pressures" *Miranda* aimed to keep in check. *Miranda*, 384 U.S. at 467. In *Fields*, the United States Supreme Court took a confusing step away from its longstanding commitment to safeguarding the privilege against self-incrimination in coercive environments like a prison or jail. *See generally*, George M. Dery, III, *The Supposed Strength of Hopelessness: The Supreme Court Further Undermines Miranda in Howes v. Fields*, 40 Am. J. Crim. L. 69, 72-87 (2012). But as *Knapp II* shows,

Wisconsin need not follow suit—and as *Armstrong* shows, it shouldn't.

Miranda defined custodial interrogation as one in which "questioning [is] initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in *any significant way*." *Miranda*, 384 U.S. at 444 (emphasis added). Due to this open-ended language, *Miranda* custody takes countless forms: a person might be subjected to custodial interrogation at the station house (*see Miranda*, 384 U.S. at 457-58), at home in his bedroom (*see Orozco v. Texas*, 394 U.S. 324, 326-27 (1969)) or while handcuffed in the back of a squad car (*State v. Morgan*, 2002 WI App 124, ¶17, 254 Wis. 2d 602, 648 N.W.2d 23). But while the setting can vary, an interrogation is only custodial under *Miranda* if it entails the same "compulsion inherent" in "a formal arrest." *See Miranda*, 384 U.S. at 467; *Stansbury v. California*, 511 U.S. 318, 322. That—whether an interrogation is characterized by compulsion—is the heart of the matter. *Miranda*, 384 U.S. at 458.

When police visit a prison or jail to interrogate an inmate suspected of a crime, the "inherently compelling pressures" that produce *Miranda* custody are necessarily present. *See id.* The control exerted over every facet of an inmate's life compels this conclusion, and *Fields* offers no cogent reason to hold otherwise.

If an inmate subjected to police interrogation is free to refuse questioning and leave, he can probably only return to his cell—and even that usually

requires a correctional officer's permission or escort.[3] And the restrictions on an inmate's movement are just the beginning; confinement results in a far more sweeping subjugation of individual will. An inmate generally can't decide what to eat, when to go to bed, where to work, how to dress, what kind of exercise or recreation to engage in, or how frequently to talk to his family: all of that is up to the institution.[4] Further, while an inmate lives the daily life prescribed by the institution,[5] he must comply with its rules and follow its staff's commands.[6] Small

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[3] *See, e.g.*, Redgranite Corr. Inst., Inmate Handbook, 14 (Revised 2017), https://doc.wi.gov/Documents/OffenderInformation/AdultInstitutions/RGCIInmateHandbook.pdf ("Movement in the institution is authorized by a printed schedule of activities, the public address (PA) system, staff escorts or as directed by staff."); Green Bay Corr. Inst., Inmate Handbook, 48 (Revised May 2017), https://doc.wi.gov/Documents/OffenderInformation/AdultInstitutions/GBCIInmateHandbookEnglish.pdf ("Inmate movement within the institution is permitted only under staff escort/supervision or via the Pass System.").

[4] The specifics vary from institution to institution. As examples, this brief cites the rules governing inmates in the Grant, Juneau, Ozaukee, and Price County Jails, as well as the rules governing state prisoners in the maximum-security Green Bay, medium-security Redgranite, and minimum-security Oakhill Correctional Institutions.

[5] *See, e.g.,* Redgranite Corr. Inst., *supra* note 3, 13 (setting forth the "Basic Institution Schedule").

[6] *See, e.g.*, Grant County Sheriff's Office, Inmate Rules, 1 (last visited May 25, 2020), http://www.grantcountysheriffwisconsin.com/Jail/images/Inmate_Rules.pdf ("YOU WILL OBEY ALL RULES OF THE JAIL AND THE JAILER'S INSTRUCTIONS.").

lapses in judgment—speaking too loudly,[7] littering,[8] using profanity,[9] participating in "[h]orseplay,"[10] even arguing about what TV show to watch[11]—can result in withdrawal of "privileges" (like phone access[12]) or more time behind bars (if "good time" is withdrawn[13] or "bad time" is imposed[14]). More serious misdeeds, like getting into a fistfight with

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[7] *See, e.g.*, Price County Jail, Inmate Rules & Regulations (Jan. 20, 2015), https://www.pricecountywi.net/CivicAlerts.aspx?AID= 75 ("Loud . . . behavior is prohibited.").

[8] *Id.* ("The throwing of litter . . . is prohibited."); *see also* Oakhill Corr. Inst., Inmate Handbook, 17 (2016-18), https://doc.wi.gov/Documents/OffenderInformation/AdultInstitutions/OCIInmateHandbook.pdf (saying inmates found littering "may be subject to discipline").

[9] Juneau County Jail, Inmate Rules & Regulations, 13 (2016), http://www.co.juneau.wi.gov/uploads/1/9/4/5/19459011/current_jail_rules_july_2016.pdf (listing examples of minor rule violations, including "[u]se of profanity/gestures").

[10] Price County Jail, *supra* note 7 ("Horseplay is prohibited.").

[11] Juneau County Jail, *supra* note 9, at 8 ("Any arguing about channels will be grounds for possible discipline.").

[12] *See, e.g.*, Oakhill Corr. Inst., *supra* note 8, 9-10 (penalties for institutional rules include loss of "telephone usage"); *see also* Sheriff Jim Johnson et al., Ozaukee County Jail Inmate Rules & Information, 7-8 (Revised March 2020), https://www.co.ozaukee.wi.us/DocumentCenter/View/13484/Jail-Handbook-Master-March-2019 ("If a prisoner violates a jail rule," and "the violation is minor," he lose "privileges" like "telephone use.").

[13] *See* Wis. Stat. § 302.43 ("An inmate who violates any law or any regulation of the jail . . . may be deprived by the sheriff of good time under this section . . . .").

[14] *See* Wis. Stat. § 302.11(2)(a) ("Any inmate who violates any regulation of the prison or refuses or neglects to perform required or assigned duties is subject to extension of the mandatory release date . . . .").

another inmate, can lead to a felony charge[15] or a stint in solitary confinement.[16] These are just some of the *official* ways confinement exerts control; every inmate knows that correctional officers' informal tactics, from selectively handing out favors to inflicting physical abuse, are at least as coercive.[17] In short, an inmate's behavior is strictly limited and there are grave consequences for failing to abide by those limits—for resisting, in other words, the coercion that is incarceration's defining feature.

Miranda recognizes that police interrogation conducted in an unduly coercive setting will "undermine the individual's will to resist" incriminating himself, even when "he would not otherwise do so freely." 384 U.S. at 467. As prisons and jails are quintessentially coercive settings, layering a police interrogation on top of the baseline compulsion they impose presents a serious threat to the privilege against self-incrimination. *Miranda* set forth a set of warnings that mitigate that threat, and inmates should have a right to receive them.

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[15] *See* Wis. Stat. § 940.20(1) ("Any prisoner . . . who intentionally causes bodily harm . . . [to] another inmate . . . is guilty of a Class H felony.").

[16] *See, e.g.*, Sheriff Jim Johnson et al., *supra* note 12, at 8 (listing "[i]solation" as a form of discipline meted out for "[m]ore serious violations" of jail rules).

[17] *See* John Wooldredge, *Prison Culture, Management, and In-Prison Violence*, 3 Ann. Rev. Crimonology 165, 174, 181-82 (2020); Alexander Z. Ibsen, *Ruling by Favors: Prison Guards' Informal Exercise of Institutional Control*, 38 L. & Soc. Inquiry 342, 343 (2013).

The holding in *Fields*—that incarceration does not necessarily produce *Miranda* custody—stands starkly at odds with this analysis. Its reasoning thus warrants close examination.

The *Fields* Court began by explaining that assessing for restrictions on an interrogation subject's freedom of movement is the beginning of the *Miranda* custody analysis, not the end. *Fields*, 565 U.S. at 509. It cited *Maryland v. Shatzer*, 559 U.S. 98 (2010), to support this proposition. In S*hatzer*, a prison inmate was interrogated twice. *Id.* at 100-102. The first time, he "declined to speak without an attorney" and was released. *Id.* at 100-01. The second time—over two years later—he waived his *Miranda* rights and made incriminating statements. *Id.* at 101-02. The inmate claimed his second interrogation violated *Edwards v. Arizona*, 451 U.S. 477 (1981), which held that invocation of the right to counsel precludes further questioning (unless the accused initiates it) "until counsel has been made available." *Id.* at 104 (quoting *Edwards*, 451 U.S. at 484-85). The *Shatzer* Court was not persuaded. *Id.* at 108-110. It held that the "*Edwards* disability" ended before the inmate's second interrogation began, as the coercive effects of the first interrogation had long ago subsided. *Id.* (Notably, all agreed the inmate was in *Miranda* custody during both interrogations.)

The *Fields* Court declared that if the inmate in *Shatzer* had "a break in custody . . . [while] serving an uninterrupted term of imprisonment," then "it must follow that imprisonment alone" does not establish *Miranda* custody. *Fields*, 565 U.S. at 510-11. There are two basic flaws in this reasoning.

First, the point the Court considers dispositive is that the inmate was not continuously in *Miranda* custody even though he was continuously in prison. If imprisonment alone produced *Miranda* custody, the logic goes, then no break in such custody would be possible. But there is a glaring hole in this logic: restrictions on a person's freedom only produce *Miranda* custody when that person is subjected to police interrogation. The inmate in *Shatzer* ceased to be in *Miranda* custody when his first interrogation ended, and when time stripped away the "coercive effects" of that interrogation, his invocation of the right to counsel ceased to bar further questioning. *Shatzer*, 559 U.S. at 108-09. Like the inmate in *Shatzer*, Halverson wasn't continuously in *Miranda* custody while in jail; but when Officer Danielson subjected him to questioning, he was.

Second and more fundamentally, the *Fields* Court discusses *Shatzer* to prove the broader point that determining whether an interrogation subject's freedom of movement is constrained is merely the first step in the holistic *Miranda* custody analysis. But incarceration deprives inmates of much more than their freedom of movement: it isolates them from their loved ones, limits their choices, enforces conformity, and requires them to follow directions from staff—no matter how difficult or arbitrary the directions may seem—day in, day out. Deeming incarceration sufficient to establish *Miranda* custody doesn't mean stopping the analysis at the freedom-of-movement inquiry; it means acknowledging these and the countless other forms of coercion prison and jail inmates face.

After holding that *Shatzer* shows imprisonment alone can't prove *Miranda* custody, the *Fields* Court set forth three policy reasons as further support. First, it explained, "questioning a person who is already serving a prison term does not generally involve the shock that very often accompanies arrest." *Id.* at 511. Second, interrogation subjects who are *not* incarcerated may be "lured into speaking by a longing for prompt release," while no such risk exists for people who can't go home. *Id.* And third, an inmate will know his interrogator "probably lack[s] the authority to affect the duration of his sentence," should one result from the new criminal allegations, while someone who isn't serving a sentence won't have that insight. *Id.* at 512.

There is a long list of questionable assumptions underlying these statements. If a person is sitting in jail for the first time, based solely on his failure to pay child support, won't he suffer a shock when cops pull him from his cell to question him about a grisly murder? While a prisoner may not enjoy returning to his cell as much as those on the outside enjoy going home, can't hours of questioning produce a level of stress and exhaustion that might lead him to yearn for the relative comfort of his institution beds? And while those behind bars often have more experience with the criminal justice system than the rest of the community, misconceptions about available paths to early release run rampant in the prison system; how can knowledge of who has "official power" to affect an inmate's sentence be assumed? *See Fields*, 565 U.S. at 512 (quoting *Illinois v. Perkins*, 496 U.S. 292, 297 (1990)).

But these issues merely highlight the variation in interrogation subjects' backgrounds and in their perceptions of questioning. *Miranda* is not designed to heed such variation; it is a prophylaxis that sweeps broadly, ensuring warnings reach those who need them but also those who don't. And while *Fields* gets bogged down in the particulars (how was the subject's "freedom of movement" restricted? Did the restrictions cause a "shock"?), *Miranda* takes a bird's-eye view, asking only whether the interrogation entails compelling pressures similar to those associated with arrest.

Prisons and jails exert a constant coercive pressure on inmates that ensures their interrogation by police will *always* be characterized by compulsion. Such interrogations should, therefore, always be deemed custodial. This per se rule is nothing new (*Armstrong* was decided in 1999). It's also a simple, workable rule that provides "clear guidance to law enforcement": an officer questioning an inmate never has to wonder whether *Miranda* warnings are needed to elicit an admissible confession. *See Riley v. California*, 573 U.S. 373 (2014) (regarding the value of categorical rules to law enforcement). Finally, it protects "one of our Nation's most cherished principles—that the individual may not be compelled to incriminate himself." *See Miranda*, 384 U.S. at 457-58. Notwithstanding *Fields*, which employed faulty reasoning to support its counterintuitive conclusion, the "principles and policies" at stake here show *Armstrong* was correctly decided. *See Knapp II*, 285 Wis. 2d 86, ¶60. This court should hold its ground and interpret article I, section 8(1) to preserve *Armstrong*'s per se rule.

II. Whether or not incarceration necessarily produces *Miranda* custody under the Wisconsin Constitution, Halverson was in such custody during his interrogation.

A. Introduction and standard of review.

If *Armstrong* survives under the Wisconsin Constitution, then Halverson was clearly in *Miranda* custody, as he was confined in the Vernon County Jail during his interrogation. But if *Fields* now governs, then "all of the features of [Halverson's] interrogation" collectively determine whether he was in custody, and the state bears the burden of proving those "features" show he was not—despite his incarceration. *See Fields*, 565 U.S. at 514; *see also Armstrong*, 223 Wis. 2d at 345.

Whether the state has met its burden of proving Halverson was not in *Miranda* custody during his interrogation is a question this court will resolve in two steps. *See Armstrong*, 223 Wis. 2d at 352-53. The circuit court's findings of fact will be upheld unless clearly erroneous, but this court will independently decide whether those facts establish *Miranda* custody. *See id.*

B. The totality of the circumstances shows Halverson was in *Miranda* custody.

Halverson's interrogation involved a range of coercive pressures—from the baseline compulsion wrought by his incarceration, to the isolated setting in which he was left to speak with Officer Danielson, to Danielson's failure to tell Halverson he could end the questioning at will. These pressures combined to

put Halverson in *Miranda* custody, and thus to necessitate *Miranda* warnings. Because Halverson didn't receive them, his confession is inadmissible.

The evidence presented by the state consisted of general testimony from Corporal Hoff about how the Vernon County Jail handles professional calls for inmates, and more specific testimony from Danielson about his call with Halverson. Neither witness lent much support to the state's position.

Hoff depicted a scene in which inmates are held in a locked, glass-walled "program room," watched by guards from outside the room, and privately interrogated by phone. (*See* 48:15-22; App. 143-50). The officer on the phone likely holds power over the inmate's future, at least with regard to the allegations under investigation. The guards standing outside the program room hold obvious power over the inmate's daily life. To be isolated, questioned, and controlled by such figures—especially together—is to face a psychologically coercive situation that, per *Miranda*, depletes the will to resist self-incrimination. *Miranda*, 384 U.S. at 448. Thus, far from proving Halverson wasn't in *Miranda* custody, Hoff's testimony showed he was.

So did Danielson's. Most importantly, there is nothing in the record suggesting that Danielson told Halverson he was free to end their call. That omission is the most significant factor, beyond Halverson's incarceration, weighing on the side of *Miranda* custody.

Fields makes this point clear. The *Fields* Court gave great weight to the fact that Fields was

repeatedly told he could end the interrogation "and go back to his cell whenever he wanted." *Fields*, 565 U.S. at 515. The Court called this the "[m]ost important" aspect of Fields's interrogation; it rooted its decision that Fields was *not* in custody "especially" in "the undisputed fact that [he] was told that he was free to end the questioning." *Id.* at 515-17. And its focus on this fact makes sense, given that inmates aren't free to do (or refuse to do) much of anything. *See supra* pp. 14-16. When an inmate receives a call from police and is not explicitly told he can end it, how can he know? The *Fields* Court understood that when continuous submission is what's required of an interrogation subject, as with an inmate, an express statement that the subject need not participate is necessary to override the natural assumption: that he has no choice.

Since Halverson didn't receive the crucial admonition given to Fields, there was nothing moderating the atmosphere of coercion in which his call with Danielson took place. Even under *Fields*, then, the testimony elicited by the state shows Halverson was in custody for *Miranda* purposes. The state, in other words, fell short of proving otherwise.

The court of appeals disagreed. *Halverson*, 389 Wis. 2d 554, ¶¶60-64. While this court owes no deference to the court of appeals' custody decision, two problems underlying it are worth noting.

First, while the court acknowledged Danielson's failure to tell Halverson he could end his interrogation, it considered that failure less significant since the two spoke by phone. *Id.*, ¶63. But why? It is undoubtedly relevant that Halverson's

interrogation took place by phone; as many jurisdictions have noted, phone calls aren't as intrinsically coercive as in-person interrogations. *See id.* Yet, no matter what mode of communication Halverson and Danielson used, one was a cop and one was an inmate; the cop questioned the inmate about criminal allegations; and while there was no lawyer by the inmate's side, there were jail guards just steps away. Given the profound power imbalance between the interrogator and its subject, the pervasively coercive environment in which the interrogation occurred, and the obvious stakes, it is critical to the custody analysis that Halverson wasn't told he could end the call.

Second, the court of appeals suggested that the universality of limitations on freedom among jail inmates undercuts the importance of such limitations to the custody analysis. *Id.*, ¶64. It is unclear why the court views common restrictions as less coercive; there is no clear correlation between prevalence and restrictiveness, let alone a causal relationship between the two. Take, for example, solitary confinement: it is no less psychologically coercive in the prisons with more segregation units than in those with relatively few.[18] In determining the level of compulsion present and whether it amounts to *Miranda* custody, what matters is the restriction the inmate faces, not whether others face it too.

[18] The psychiatric harm inflicted on the inmates of America's first prison, which consisted almost entirely of solitary confinement units, is well-documented. *See* Stuart Grassian, *Psychiatric Effects of Solitary Confinement*, 22 Wash. U. J. L. & Pol'y 325, 328 (2006).

Universal or not, incarceration deprives its subjects of agency in their daily lives, imposing a baseline level of coercion that pushes inmates towards *Miranda* custody—if not all the way there. Halverson's incarceration, in connection with all the other surrounding circumstances, show he was in *Miranda* custody when Danielson interrogated him. While the *Armstrong* rule remains an important and practical way to protect the privilege against self-incrimination, and should thus be upheld under the Wisconsin Constitution, even *Fields* dictates that Halverson was entitled to *Miranda* warnings. Because he did not get them, his confession is inadmissible.

CONCLUSION

Brian Halverson respectfully asks this court to hold that he was in *Miranda* custody during his interrogation by Officer Danielson, and thus to reverse the decision of the court of appeals.

Dated and filed by U.S. Mail this 28th day of May, 2020.

Respectfully submitted,

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-Appellant-Petitioner

CERTIFICATION AS TO FORM/LENGTH

I certify that this petition meets the form and length requirements of Rules 809.19(8)(b) and 809.62(4) 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 petition is 6,134 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this petition, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that:

This electronic petition is identical in content and format to the printed form of the petition filed on or after this date.

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

Dated and filed by U.S. Mail this 28th day of May, 2020.

Signed:

MEGAN SANDERS-DRAZEN
Assistant State Public Defender

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CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

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Signed:

MEGAN SANDERS-DRAZEN
Assistant State Public Defender