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SUPREME COURT

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 ORDERS ENTERED IN CHIPPEWA COUNTY CIRCUIT COURT, THE HONORABLE STEVEN R. CRAY, PRESIDING

BRIEF OF PLAINTIFF-APPELLANT

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ISSUES PRESENTED

1. Under United States Supreme Court law, whether a suspect is in custody for purposes of *Miranda* and the Fifth Amendment requires a totality-of-the-circumstances analysis that considers the coercive pressures (or lack thereof) present during the questioning. That test applies to all suspects, including those who are already incarcerated.[1]

Does the totality-of-the-circumstances test leave an inmate's right against compelled self-incrimination so vulnerable that this Court must find expanded protections in the Wisconsin Constitution to hold that imprisonment is always custody for *Miranda* purposes?

The circuit court did not answer this question.

The court of appeals held that there was no basis to read expanded protections into the Wisconsin Constitution to preserve the per se rule of custody.

This Court should affirm the court of appeals.

2. Was Brian Halverson, an inmate at Vernon County jail on a probation hold, in custody for *Miranda* purposes when he returned a phone call from a police officer and, during the three-to-four-minute conversation during which there was no evidence that Halverson was pressured to make or continue the call, confirmed that he had committed misdemeanors?

The circuit court did not answer this question.

The court of appeals held that Halverson was not in custody for *Miranda* purposes.

This Court should affirm the court of appeals.

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[1] *Howes v. Fields*, 565 U.S. 499 (2012).

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

This Court typically publishes its opinions and holds oral argument. Both are appropriate in this case.

INTRODUCTION

When Halverson was an inmate at Vernon County jail, he returned a telephone call from an officer who was investigating allegations that Halverson had committed crimes unrelated to his jail custody. 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 court based its decision on *State v. Armstrong*, 223 Wis. 2d 331, 588 N.W.2d 606 (1999), which had interpreted federal Fifth Amendment law to hold that inmates are per se in custody for *Miranda* purposes.

The court of appeals reversed in a published decision. It agreed with the parties that *Armstrong* was overruled by *Howes v. Fields*, 565 U.S. 499 (2012), in which the Supreme Court held that jail and prison inmates are not per se in custody for *Miranda* purposes but instead are subject to the same totality-of-the-circumstances analysis as any other suspect. It declined Halverson's invitation to identify expanded protections in the Wisconsin Constitution to preserve the *Armstrong* rule. Finally, applying the totality-of-the-circumstances analysis, the court of appeals held that Halverson was not in custody for *Miranda* purposes during the phone call.

This Court should affirm the court of appeals. *Fields* overruled *Armstrong*, and there is no basis to find expanded protections under the Wisconsin Constitution to preserve that per se rule. Further, Halverson was not in custody for *Miranda* purposes when, based on the evidence presented, he agreed to return the officer's phone call, he was provided a private room to make the call, and was at no point subjected to the types of coercive pressures or reduced freedom of movement that he would not normally experience as an inmate.

STATEMENT OF THE CASE

E.M., an inmate at Stanley Correctional Institution, claimed that another inmate, Halverson, had stolen and destroyed documents and other items that belonged to him. (R. 1:1–2.) E.M. contacted Matthew Danielson, an officer from the Stanley police department, about the theft. During that discussion, E.M. showed Danielson two letters written by Halverson in which Halverson admitted to the theft and destruction of E.M.'s property. (R. 1:2.)

At that point, 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 beginning September 12, 2016, for violations of his extended supervision. (R. 1:2; 41:3.) On September 27, 2016, Danielson followed up with Halverson over a phone call to that jail, during which Halverson admitted committing the crimes. (R. 1:2.) The State charged Halverson with misdemeanor counts of criminal damage to property and theft, both as a repeater. (R. 1:1.)

Halverson filed a motion to suppress his statements 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.) Danielson testified that 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.) During the conversation, Danielson introduced himself, explained why he was calling, and asked if Halverson was familiar with an incident in which E.M. had some documents that went missing. (R. 51:5.) Halverson "knew of" the incident, stated that he had helped E.M. clean his cell, and said 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 destroying E.M.'s documents. (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 Halverson and ended the call. (R. 51:7.) The call lasted three or four minutes. (R. 51:6.)

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.) Danielson testified his 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.) To that end, Danielson heard no background noise or anyone else speaking to—let alone yelling at or threatening—Halverson. (R. 51:7.) Nor, according to Danielson, did Halverson sound tired or ever refuse to talk. (R. 51:6–7.)

The court made an initial ruling at 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 per se in *Miranda* custody due to his incarceration. (R. 51:22–24.) It further concluded that *Fields* did not change the per se rule in *Armstrong* and *Schimmel*. (R. 51:24–26.) Because one of the State's planned witnesses that day was unavailable, 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. Hoff was on duty at the Vernon County jail 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 also agreed that "[t]here was nothing unusual" that occurred that day with regard to a phone call.[2] (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—arranged to call the person back. (R. 48:15–16.) Jail staff would then find the inmate in his pod, inform him of the call, and identify the caller. (R. 48:15–17.) If the inmate agreed to talk to the caller, the staff would walk the inmate a short distance—about 75 feet—to the jail's program room, dial the caller, hand

[2] The hearings on the motion occurred October 23, 2017, and February 28, 2018, 13 and 17 months after the phone call between Danielson and Halverson. (R. 48; 51.)

the inmate the phone, and leave him alone in the room with a closed, locked door to take the call. (R. 48:15–16, 18, 22.)

Hoff estimated that the program room is about 15 by 25 feet and stated that it functions as the jail library. (R. 48:18.) The room is carpeted and has video equipment to accommodate remote court appearances. (R. 48:18.) The room otherwise had tables, chairs, and a phone with an unrecorded line. (R. 48:18.) Hoff explained while inmates have use of that and other program rooms, jail staff must escort them to and from those rooms. (R. 48:20.)

The officer then will watch the inmate through observation glass to "make sure they're still on the phone, [and] not touching any of the video equipment." (R. 48:19.) Then, 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.)

During this whole procedure, staff do not handcuff the inmate or shackle him. (R. 48:10.) Nor do staff force the inmate to go to the program room or 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." (R. 48:18–19.) Hoff explained, "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. 48:19.)

After hearing additional argument, the 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.) Nevertheless, it denied the motion for reconsideration, reiterating that under *Armstrong* and *Schimmel*, a person is per se in *Miranda* custody when he is incarcerated:

> 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.)[3] The court went on to hold that based on the per se rule, Halverson "was definitely in custody" and "was definitely interrogated" and thus, ordered suppression. (R. 48:35.)

The court memorialized those decisions in written orders (R. 43; 44), from which the State initiated a one-judge appeal (R. 46). On appeal, the parties agreed that the circuit court erred in holding that *Armstrong* remained good law in light of *Fields*. Halverson urged the court of appeals to hold that the per se rule in *Armstrong* should be preserved under the Wisconsin Constitution. Alternatively, Halverson insisted that he was nevertheless in custody for *Miranda* purposes under the totality of the circumstances. The State disagreed that the Wisconsin Constitution supported a per se rule and argued that Halverson was not in custody for purposes of *Miranda* under the totality of the circumstances.

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[3] The court's "smiley face" remark appeared to reference an erroneous statement by Halverson's counsel that language in *Bartelt* reaffirmed the rule in *Schimmel*. (R. 48:30.) *State v. Bartelt*, 2018 WI 16, 379 Wis. 2d 588, 906 N.W.2d 684. The language counsel appeared to be referencing was in *Armstrong*, 223 Wis. 2d 331. Neither *Bartelt* nor any other Wisconsin decision within the last 20 years mentions *Schimmel* or its per se rule.

After the parties submitted briefs, the court of appeals converted the case to a three-judge appeal and ordered supplemental briefing from the attorney general. After receiving supplemental briefing, the court of appeals reversed the circuit court's decision in a published opinion. *State v. Halverson*, 2019 WI App 66, 389 Wis. 2d 554, 937 N.W.2d 74 (Pet.-App. 101–127).

To start, the court of appeals agreed with the parties that the Supreme Court's decision in *Fields* conflicted with and therefore overruled *Armstrong*'s per se rule, which relied exclusively on Fifth Amendment law. *Id.* ¶ 34. It also declined to find expanded protections under the Wisconsin Constitution to preserve *Armstrong*'s rule. *Id.* ¶ 47. It noted that Halverson's state constitutional argument was "largely conclusory" and lacked any sort of comparative analysis between the protections offered under the federal and state constitutions. *Id.* ¶ 43. It likewise distinguished the sole case upon which Halverson relied in his request to preserve the per se rule.[4] *Id.* ¶ 44. Finally, it rejected Halverson's insistence that the "inherently compelling pressures" of life in confinement justified preserving the per se rule, noting that Halverson failed to explain how the totality-of-the-circumstances test in *Fields* did not provide inmates adequate protection. *Id.* ¶ 45.

It also held, in applying the totality-of-the-circumstances test, that Halverson was not in custody for *Miranda* purposes when he returned Danielson's call. *Id.* ¶ 60. It reached that conclusion because the call was brief, Danielson never raised his voice or threatened Halverson, Halverson never indicated that he wanted to end the call, and Halverson was not restrained or threatened by jail staff. *Id.*

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[4] *See State v. Knapp*, 2005 WI 127, 285 Wis. 2d 86, 700 N.W.2d 899 (*Knapp II*).

It further observed that Halverson retained his ability to choose whether to return Danielson's call, to continue the call, and to hang up the phone at any point in the conversation. *Id.* ¶ 61. While Danielson failed to tell Halverson that he could end the discussion at any time, that fact weighed less significantly toward a determination of custody given that questioning over the phone "tends to make the interrogation less likely to be custodial." *Id.* ¶ 63.

Accordingly, the court of appeals reversed the decision of the circuit court and remanded for further proceedings. *Id.* ¶ 66. Halverson then petitioned for review, and this Court granted his petition.

STANDARD OF REVIEW

The interpretation of the Wisconsin Constitution and its application to undisputed facts is a question of law that this Court reviews independently. *See State v. Williams*, 2012 WI 59, ¶ 10, 341 Wis. 2d 191, 814 N.W.2d 460.

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 (*Knapp II*). This Court will uphold the circuit court's factual findings unless they are clearly erroneous, and it will assess 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

I. There is no basis to interpret the Wisconsin Constitution to provide expanded protections that would preserve *Armstrong*'s per se rule.

As he did before the court of appeals, Halverson concedes that *Fields* overruled the per se rule in *Armstrong*. (Halverson's Br. 11.) He insists, however, that the per se rule should survive under the Wisconsin Constitution. (*Id.*) As discussed below, he is wrong.

A. *Armstrong* incorrectly held, based on federal law, that incarceration is per se custody for *Miranda* purposes.

The Fifth Amendment to the United States Constitution and article I, 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 must provide *Miranda* warnings before interrogating a person who is in custody for the purpose of that interrogation. *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 focus of the custody inquiry centers on the "interrogation environment created by the police" and whether it is one "in which the authorities could take advantage of the situation." *See State v. Clappes*, 117 Wis. 2d 277, 283, 344 N.W.2d 141 (1984). To that end, it is the change from a person's normal environment to the intimidating environment of a police station, where the suspect is isolated from friends and advocates, that triggers

the need for warnings: "An individual swept from familiar surroundings into police custody, surrounded by antagonistic forces, and subjected to the techniques of persuasion described above cannot be otherwise than under compulsion to speak." *Miranda v. Arizona*, 384 U.S. 436, 461 (1966).

The first step in assessing whether a person is in custody for *Miranda* purposes 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.'" *Fields*, 565 U.S. at 509 (citations omitted). The objective "freedom of movement" test 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 to include "degree of restraint; the purpose, place, and length of the interrogation; and what has been communicated by police officers").

Second, even if the "freedom of movement" inquiry is satisfied, because "[n]ot all restraints on freedom of movement amount to custody for purposes of *Miranda*," 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*." *Fields*, 565 U.S. at 509; *see also Bartelt*, 379 Wis. 2d 588, ¶ 33. For example, while a traffic stop involves a restraint on freedom of movement, that sort of detention "does not 'sufficiently impair [the detained person's] free exercise of his privilege against self-incrimination to require that he be warned of his constitutional rights.'" *Fields*, 565 U.S. at 509 (quoting *Berkemer v. McCarty*, 468 U.S. 420, 437 (1984)).

What if the suspect is already a prisoner? In 1999, this Court interpreted United States Supreme Court law to hold that inmates were categorically in custody for *Miranda* purposes. *Armstrong*, 223 Wis. 2d at 354–55. In reaching that holding, this Court relied on *Mathis v. United States*, 391 U.S. 1 (1968), and "its Wisconsin counterpart," *Schimmel*, 84 Wis. 2d 287.[5] *Armstrong*, 223 Wis. 2d at 353. This Court wrote:

> [A] person who is incarcerated is *per se* in custody for purposes of *Miranda*. Under *Mathis* and *Schimmel*, the reason that a person was incarcerated is irrelevant to a determination of whether he or she was in custody . . . . Indeed, we can think of no situation in which a defendant is more clearly in custody, as envisioned by the *Miranda* Court, than when the defendant is confined in a prison or jail.

Id. at 355–56.

But the *Fields* Court expressly rejected that reading of *Mathis* and related interpretation of the Fifth Amendment. The Court made clear that it had never held—in *Mathis* or any of its other precedents—that the Fifth Amendment supported a categorical rule of *Miranda* custody for prisoners. In addition, it wrote, such a categorical rule "is simply wrong." *Fields*, 565 U.S. at 508.

The Court noted that imprisonment alone was insufficient to constitute *Miranda* custody for three reasons. "First, questioning a person who is already serving a prison term does not generally involve the shock that very often

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[5] The *Schimmel* court interpreted *Mathis* to hold that "a defendant who was incarcerated on an unrelated state conviction was in custody for the purpose of applying the *Miranda* rule to an interrogation conducted by a federal reserve agent." *Schimmel v. State*, 84 Wis. 2d 287, 294, 267 N.W.2d 271 (1978), *overruled on other grounds by Steele v. State,* 97 Wis. 2d. 72, 294 N.W.2d 2 (1980).

accompanies arrest." *Id.* at 511. "Second, a prisoner, unlike a person who has not been sentenced to a term of incarceration, is unlikely to be lured into speaking by a longing for prompt release." *Id.* Third, "a prisoner, unlike a person who has not been convicted and sentenced, knows that the law enforcement officers who question him probably lack the authority to affect the duration of his sentence." *Id.* at 512. Accordingly, the Court explained, the totality-of-the-circumstances test assessing the facts surrounding the interrogation applied to inmates just as it did to non-inmates. *See id.* at 509.

Thus, the Court explained, when the suspect is a prisoner, a court's determination of custody for *Miranda* purposes "should focus on all of the features of the interrogation. These include the language that is used in summoning the prisoner to the interview and the manner in which the interrogation is conducted." *Id.* at 514 (citing *Yarborough v. Alvarado,* 541 U.S. 652, 665 (2004)). "An inmate who is removed from the general prison population for questioning and is 'thereafter . . . subjected to treatment" during that questioning "that renders him 'in custody' for practical purposes . . . will be entitled to the full panoply of protections prescribed by *Miranda*." *Id.* (quoting *Berkemer,* 468 U.S. at 440).

As the parties and court of appeals agree, *Armstrong*'s reasoning was wholly premised on federal constitutional law and, hence, *Fields* overruled *Armstrong*'s categorical Fifth-Amendment-based rule. This does not appear to be a debatable point before this Court, which has recently recognized *Fields*'s holding that "service of a term of imprisonment, without more, is not enough to constitute *Miranda* custody." *State v. Hanson*, 2019 WI 63, ¶ 35, 387 Wis. 2d 233, 928 N.W.2d 607.

Instead, Halverson asks this Court to plumb the Wisconsin Constitution for enhanced protections to save the *Armstrong* rule. As discussed below, there is no basis on which to fulfill Halverson's request.

B. Article I, section 8 provides identical protections to those in the Fifth Amendment and should be interpreted identically with the federal constitution in this case.

This Court should reject Halverson's state constitution-based argument for the same reasons the court of appeals did: Halverson fails to provide any analysis why the text and history of article I, section 8 provide expanded protections, *Knapp II* is legally and factually distinguishable, and Halverson's other arguments are unpersuasive. *See Halverson*, 389 Wis. 2d 554, ¶¶ 43–45.

1. Halverson fails to provide any analysis why this Court should identify enhanced protections for interrogated prisoners in the state constitution.

This Court rarely interprets the state constitution to provide protections greater than what the federal constitution provides.[6] That is so because while "states have the power to afford greater protection to citizens under their constitutions than the federal constitution does . . . the question for a state court is whether its state constitution actually affords greater protection." *State v. Roberson*, 2019 WI 102, ¶ 56, 389 Wis. 2d 190, 935 N.W.2d 813. "A state court does not have the power

[6] The State has identified only two non-overruled cases in which this Court has identified greater state constitutional protections than those provided in the Fourth, Fifth, or Sixth Amendments: *State v. Eason*, 2001 WI 98, ¶ 63, 245 Wis. 2d 206, 629 N.W.2d 625, and *Knapp II*, 285 Wis. 2d 86, ¶ 73.

to write into its state constitution additional protection that is not supported by its text or historical meaning." *Id.*

Accordingly, an analysis of text and historical meaning of article I, section 8, and why it provides additional protections under these circumstances would be necessary for Halverson to prevail. Yet here, as he did before the court of appeals, he offers only a "largely conclusory" argument without any analysis of the state constitution's text or historical meaning to support finding additional protections. *See Halverson*, 389 Wis. 2d 554, ¶ 43. Because Halverson declines to engage in the analysis necessary to succeed on his claim, this Court should reject it. *See State v. Brantner*, 2020 WI 21, ¶ 36, 390 Wis. 2d 494, 939 N.W.2d 546 (stating that this Court will not develop an undeveloped argument for a party) (citing *Clean Wis., Inc. v. Pub. Serv. Comm'n of Wis.*, 2005 WI 93, ¶ 180 n.40, 282 Wis. 2d 250, 700 N.W.2d 768).

Halverson's omission is understandable because there appears to be no persuasive analysis that he could make. Indeed, in addressing challenges regarding a defendant's constitutional protections against compelled self-incrimination, this Court has routinely interpreted article I, section 8 of the Wisconsin Constitution to provide identical protections to those in the Fifth Amendment. *See, e.g.*, *State v. Edler*, 2013 WI 73, ¶ 29, 350 Wis. 2d 1, 833 N.W.2d 564; *State v. Ward*, 2009 WI 60, ¶ 55, 318 Wis. 2d 301, 767 N.W.2d 236; *State v. Jennings*, 2002 WI 44, ¶ 40, 252 Wis. 2d 228, 647 N.W.2d 142.

Halverson does not discuss those cases. Instead, he focuses on *Knapp II*, the only case in which this Court has interpreted article I, section 8 to provide stronger protections than the Fifth Amendment does with regard to the application of the exclusionary rule to *Miranda* violations. (Halverson's Br. 12–13.) *See Knapp II*, 285 Wis. 2d 86, ¶ 73. But *Knapp II* involved circumstances and implicated policy

concerns absent from either Halverson's case or other cases involving whether an officer's interrogation of an inmate is custodial for *Miranda* purposes.

2. *Knapp II* is legally and factually distinguishable from this case.

Knapp II involved a situation where police questioned Knapp as a person of interest in a homicide investigation without providing him *Miranda* warnings. *Knapp II*, 285 Wis. 2d 86, ¶¶ 7–10. The investigating officer testified that even though he was aware that Knapp wanted an attorney early in the questioning, he purposely avoided providing the warnings so he could "keep the lines of communication open." *Id.* ¶ 14. This Court initially held that because the officer intentionally violated Knapp's Fifth Amendment rights, the physical evidence police obtained as a result of the *Miranda* violation was inadmissible. *Id.* ¶ 1 (citing *State v. Knapp*, 2003 WI 121, 265 Wis. 2d 278, 666 N.W.2d 881 (*Knapp I*)).

After the State petitioned the Supreme Court, that Court vacated and remanded *Knapp I* for further consideration in light of *United States v. Patane*, 542 U.S. 630 (2004). In *Patane*, a plurality of that Court held that the fruit of the poisonous tree doctrine did not apply to physical evidence obtained as a result of the suspect's unwarned but voluntary statements. *Id.* at 639–40.

On remand, this Court held that even if the Fifth Amendment did not compel the suppression of physical evidence obtained as a result of an intentional *Miranda* violation, article I, section 8 of the Wisconsin Constitution did. *Knapp II*, 285 Wis. 2d 86, ¶ 73. The Court justified this broader application of the exclusionary rule under the state constitution for two policy reasons. First, the need for deterrence was high when police intentionally violated *Miranda* to obtain evidence. *Id.* ¶ 75. Second, and relatedly,

for courts to allow police to exploit the fruits of intentional violations would erode judicial integrity. *Id.* ¶ 79. "When law enforcement is encouraged to intentionally take unwarranted investigatory shortcuts to obtain convictions, the judicial process is systemically corrupted." *Id.* ¶ 81.

Those features are not present in this case. To start, *Knapp II* expanded the application of the exclusionary rule to intentional *Miranda* violations. This case focuses on how to assess whether an inmate is in "custody" for *Miranda* purposes based on his status as an inmate. To that end, Halverson engages in no historical or comparative analysis of the language of article I, section 8 to justify expanding the scope of its protections with regard to *Miranda* custody beyond what federal law provides. He identifies no language or past interpretations of article I, section 8 that could arguably support *Armstrong*'s erroneous, Fifth-Amendment-based rule. Nor does he explain how article I, section 8 would justify granting greater protections for inmates than the Fifth Amendment does.

Further, Halverson's case does not involve an intentional *Miranda* violation.[7] Hence, the concerns that drove the holding in *Knapp II*—the strong needs for deterring intentional violations and maintaining judicial integrity in condemning such violations—are absent here.

Finally, the holding in *Knapp II* avoided an inequitable result—without the exclusionary rule, police were unfettered in exploiting the fruits of an intentional *Miranda* violation. Here, the result for Halverson is fair: the State still has to

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[7] The circuit court here found that Danielson's alleged *Miranda* violation was unintentional: "the interrogating officer[] made a simple error because of the fact that [he wasn't] present with the defendant and forgot to [advise him of] his *Miranda* rights." (R. 48:34.)

prove that he was not in custody for *Miranda* purposes during the phone call based on the totality of circumstances. That test provides Halverson and other inmates in his position the same constitutional protection against compelled self-incrimination as what the federal and state constitutions provide non-inmates, no more and no less. To that end, Halverson offers no argument why the totality-of-the-circumstances test inadequately protects his or any inmate's rights to avoid compelled self-incrimination such that *Armstrong*'s per se rule should be preserved.

3. Halverson's other arguments are unpersuasive.

To start, Halverson's recognition that *Miranda* custody "takes countless forms" (Halverson's Br. 14), supports the notion that a totality-of-the-circumstances analysis is the most sound way to gauge whether a person who is living in jail or prison "custody" also is in interrogational "custody" as a term of art for *Miranda* purposes.

Halverson contends that prisons and jails have rules limiting inmates' freedom of movement, along with rules regarding daily activities and punishing mild infractions that make "coercion . . . incarceration's defining feature." (Halverson's Br. 14–17.) True, jails and prisons have extensive rules and regulations. Yet so do virtually all forms of group living and work situations: military bases, school dormitories, housing collectives, convents, apartment buildings, office buildings, and more.

And while prison and jail certainly restrict inmates' movement more than the living situations in those examples, it does not follow that institutional rules necessarily create an atmosphere so intimidating and coercive that inmates are presumptively vulnerable to involuntarily incriminating themselves when questioned by police. To that end, Halverson

identifies no cases in which the number and nature of rules that a person is subject to in his daily life is dispositive—let alone factors into—whether he is in custody for *Miranda* purposes.

Nor are any of the rules that Halverson highlights coercive either in purpose or effect. (Halverson's Br. 14–17.) That the institution controls the menu and timing of meals, recreation options, quiet hours and bedtime, and other day-to-day issues is simply necessary for ensuring orderly operation and staff and inmate safety and health. Likewise, inmates are subject to discipline for breaking rules; that discipline is not directed at creating a coercive atmosphere to compel self-incrimination, but rather to ensure inmate and staff safety.

Notably, none of the institutional rules that Halverson invokes requires inmates to do or abstain from doing anything that would impact the analysis whether he was in custody for *Miranda* purposes. For example, no rules require him to submit to an interview with law enforcement, to answer or return law enforcement's phone calls, to answer any questions from law enforcement, to not terminate an interview with law enforcement, or to inform the institution of the content of his conversations with law enforcement. No rules subject him to discipline or loss of privileges if he does not confess to crimes in response to law enforcement questions, if he chooses to end a law enforcement interview, or if he refuses a law enforcement request for questioning.

Halverson criticizes the reasoning in *Fields* in several respects, though his main critique appears to be that the Court disregarded that life in jail or prison is so pervasively coercive that law enforcement's questioning an inmate should always constitute custody for *Miranda* purposes. (Halverson's Br. 18–19.) The Court didn't disregard that position; it simply disagreed that the Fifth Amendment requires an inflexible

rule that every prisoner is in custody for *Miranda* purposes in every interrogation. Halverson's position hinges on the unsupported assumption that every prisoner, no matter the circumstances, is susceptible to compelled self-incrimination, when *Fields* reasons—correctly—that whether an individual prisoner is so vulnerable depends on the context and facts of the interrogation.

Halverson likewise faults the *Fields* Court's highlighted policy reasons supporting its conclusion that imprisonment is not per se custody for *Miranda* purposes. He claims that the Court employed "a long list of questionable assumptions" in discussing those policies when in reality, there are numerous individual circumstances driving whether the questioning presents a shock, the inmate believes cooperation could result in release, or the questioner has authority to release the inmate. (Halverson's Br. 20–21.)

Halverson's argument undercuts his position that this Court should preserve *Armstrong*'s per se rule. Indeed, numerous circumstances can influence whether an inmate's freedom of movement is impaired and the questioning environment is coercive. Because of that, it is illogical to preserve a per se rule saying that imprisonment *always* renders inmates susceptible to compelled self-incrimination when circumstances can vary so widely. And that's precisely why courts should apply the totality-of-the-circumstances analysis to inmates just as they apply it to other citizens.

In sum, there is no basis to read article I, section 8 of the Wisconsin Constitution to require a rule that every inmate questioned by police in every circumstance is in custody for *Miranda* purposes. This Court should decline Halverson's invitation to reinterpret the state constitution to resuscitate a rule that was based on an incorrect interpretation of federal law.

II. Under the totality of the circumstances, Halverson was not in custody for *Miranda* purposes during the jail phone call.

The effect of continuing to interpret article I, section 8 as offering identical protections as the Fifth Amendment in the context of prisoner interrogations is minimal. Rather than presume that inmates are in custody for *Miranda* purposes, courts consider the facts to determine whether they are. Considering the facts presented here, the court of appeals correctly concluded that Halverson was not in custody for *Miranda* purposes.

A. Whether a person is in custody for *Miranda* purposes depends on the freedom-of-movement and the questioning environment analyses.

As discussed, "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). Whether the suspect's objective freedom of movement is impaired 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").

Second, 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*." *Fields*, 565 U.S. at 509; *see also Bartelt*, 379 Wis. 2d 588, ¶ 33. To that end, "[w]hen a prisoner is questioned, the determination of custody should focus on all of the features of the interrogation" and whether the inherently coercive pressures "that powered the decision" in *Miranda* are present. *Id.* at 514.

B. A voluntary phone call between a jail inmate and law enforcement generally does not produce custody for *Miranda* purposes.

In this case, the freedom-of-movement and questioning environment queries are driven by the fact that the questioning in this case occurred over the telephone, not in person. It is unlikely that an inmate's voluntary telephone interview with law enforcement can ever effectuate *Miranda* custody; even if it can, the State cannot identify a single case in which courts held that a phone interrogation effectuated *Miranda* custody.

To be sure, phone interrogations are uncommon. Typically, courts applying the freedom-of-movement analysis are assessing 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."). Questioning over the phone necessarily removes many of the features that can make a questioning environment coercive. The questioner can't physically stop the suspect from hanging up; whether the questioner is armed over the phone is irrelevant. Likewise, the suspect can end the conversation by hanging up (absent evidence that he

somehow can't), rather than the more difficult task of ending the interview to the questioner's face.

In the telephone-interrogation cases that the State has identified, courts have uniformly held that a person's telephone interview did not effectuate *Miranda* custody, and at times expressed skepticism that such contact could ever effectuate *Miranda* custody.[8] For example, in *State v. Mills*, 293 P.3d 1129, 1135–36 (Utah Ct. App. 2012), Mills, who lived on a military base, was not in custody for *Miranda* purposes where he participated in a ten-minute phone call with police. Mills, despite his general limited freedom of movement on the base, was in "familiar surroundings," experienced no pressure from his chain of command to participate in the call, and was

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[8] *See Tawfeq Saleh v. Fleming*, 512 F.3d 548, 550–51 (9th Cir. 2008) (phone conversation initiated by inmate was not custody for *Miranda* purposes); *Pasdon v. City of Peabody*, 417 F.3d 225, 227 (1st Cir. 2005) (no *Miranda* custody where officer questioned inmate over the telephone); *United States v. Kearney*, 791 F. Supp. 2d 602, 604 (E.D. Ky. 2011) (same where inmate initiated phone call and could terminate it at any time); *People v. Anthony*, 230 Cal. Rptr. 268, 273 (Ct. App. 1986) (same where inmate initiated call and where his "freedom of movement during these conversations [was not] 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) (same where inmate initiated telephone contact and there was no change to inmate's already-limited freedom of movement); *Commonwealth v. Smallwood*, 401 N.E.2d 802, 807 (Mass. 1980) (holding that *Miranda* warnings aren't required for telephonic interviews); *Bradley v. State*, 449 S.E.2d 492, 494 (S.C. 1994) (no *Miranda* custody where inmate initiated call and was free to end it); *State v. Denton*, 792 P.2d 537, 540 (Wash. Ct. App. 1990) (same because officer was not present and inmate was free to end the call); *see also Rios v. Lansing*, 116 Fed. App'x 983, 987 (10th Cir. 2004) (inmate was not in custody for military-law equivalent of *Miranda* where his freedom of movement was not curtailed during voluntary, monitored phone call); *Carr v. State*, 840 P.2d 1000, 1004 (Alaska Ct. App. 1992) (no *Miranda* custody where inmate was free to decline or hang up a monitored call).

free to hang up and end 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.* at 1136.

The State has uncovered no authority for the contrary proposition that an officer's telephone call with an inmate or other individual with limited freedom of movement creates custody necessitating *Miranda* warnings. Indeed, Halverson identifies no such authority.

Certainly, there could be circumstances in which a phone call interview is accompanied by in-person pressures that would establish custody for *Miranda* purposes. Absent those additional pressures, though, a phone interview is highly unlikely to effectuate *Miranda* custody. That is so because the inmate can end the call with the click of a button, there is no coercive in-person presence from authorities, and no significant shock or change to the inmate's freedom of movement beyond what the inmate would normally experience.

C. The other relevant factors demonstrate that Halverson's phone call with Danielson did not create custody for *Miranda* purposes.

The facts demonstrate that a reasonable person in Halverson's position would have felt free to terminate the phone call with Danielson.[9]

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[9] Halverson challenged below, but not here, the court of appeals' ability to rely on Hoff's testimony regarding the standard jail procedures as mere "theorizing and conjecturing." *See State v. Halverson*, 2019 WI App 66, ¶ 52, 389 Wis. 2d 554, 937 N.W.2d 74. Accordingly, the State understands that argument to be abandoned. *See State v. Tate*, 2014 WI 89, ¶ 11 n.10, 357 Wis. 2d 172, 849 N.W.2d 798 (issues not raised in brief are deemed

The location of the questioning 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.) Halverson was not removed from his outside-world surroundings to a confined setting; he had been living in that jail for at least two weeks and had another two weeks or so on his hold there. Accordingly, the jail locale does not favor a determination of custody. *See Fields*, 565 U.S. at 511 (comparing an inmate, for whom detention "does not generally involve the shock that very often accompanies . . . the paradigmatic *Miranda* situation," to a person whisked from home or street "to a police station for questioning—[where] detention represents a sharp and ominous change").

Nor was there anything especially coercive about the setting of the call. The call occurred in a carpeted, furnished room that served as the law library. (R. 48:18.) Jail staff provided Halverson privacy to complete his call on an unrecorded line; no one remained in the room to exert implicit or explicit pressure. (R. 48:22.) Nothing about the room or the procedure suggests that Halverson experienced a higher level of restraint or coercive pressures than he normally would as a jail inmate.

Further, the call was very short, just three or four minutes (R. 51:6), a length that would have not allowed Danielson to wear down Halverson or subject him to coercive techniques. *See Bartelt*, 379 Wis. 2d 588, ¶ 38 (holding that a 35-minute interview did not support *Miranda* custody determination); *State v. Lonkoski*, 2013 WI 30, ¶ 31, 346 Wis. 2d 523, 828 N.W.2d 552 (same with regard to a 30-minute interview). To that end, based on Danielson's uncontradicted

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abandoned). Moreover, the court of appeals' determination that it could rely on Hoff's testimony was sound. *See Halverson*, 389 Wis. 2d 554, ¶¶ 52–56.

testimony, the conversation was straightforward: Danielson asked Halverson what he knew about E.M.'s destroyed property, Halverson suggested that the materials were thrown away, Danielson asked Halverson about his letters, and Halverson admitted to the crime. (R. 51:5–7.) Danielson ended the call shortly after. (R. 51:7.)

Moreover, based on the unchallenged evidence of the conversation's content and tone, a person in Halverson's position would have felt free to end the call. It occurred shortly after 10 a.m. (R. 51:4–5.) Danielson introduced himself, explained why he was calling, and asked Halverson what he knew about E.M.'s allegations. (R. 51:5.) His tone was conversational; he never yelled or threatened Halverson. (R. 51:6–7.) *See Fields*, 565 U.S. at 515 (lack of physical restraint and "not uncomfortable" conference-room setting was "consistent with interrogation environment in which a reasonable person would have felt free to terminate the interview and leave") (quoting *Yarborough*, 541 U.S. at 664–65); *Bartelt*, 379 Wis. 2d 588, ¶ 48 (noting that conversational tone indicated lack of custody).

There was no reason for Halverson to think that he could secure early release by talking to Danielson. *See Fields*, 565 U.S. at 511–12 (noting that it is unlikely that prisoner would be lured into speaking by possibility of early release or that questioner would have ability to effectuate such release). Danielson was a police officer from a different county calling on a matter unrelated to Halverson's probation hold. He had no connection to Vernon County jail. He had no authority to change the conditions of Halverson's probation hold or release him early. A reasonable person in Halverson's shoes would have understood those things.

In addition, 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.)

Nor was there evidence that jail staff pressured Halverson with regard to the call. Based on Hoff's testimony, Halverson would have been told that Danielson had called and given the choice whether to return the call. Halverson apparently chose to return the call, at which point the staff person walked him to the program room without handcuffs or shackles. Hoff emphasized that staff would not force or drag an unwilling inmate to return a call. (R. 48:18–19.) Again, no staff remained in the program room to pressure Halverson or listen to the call. Halverson merely had to hang up the phone to signal to the jail staff that he was ready to return to his pod. (R. 48:19–20.) *See Fields*, 565 U.S. at 516–17 (that Fields had to be escorted to and from the conference room involved same degree of restraint that Fields would have been accustomed to in prison).

Finally, even assuming that jail staff neglected to tell Halverson that Danielson was the caller and Halverson never asked, Danielson introduced himself to Halverson immediately and explained why he was calling. (R. 51:5.) By all indications, Halverson talked freely with Danielson for the next three to four minutes. There was nothing to indicate that Halverson was physically or psychologically compelled to continue the conversation or admit to committing the crimes.

In all, the relevant factors weigh toward a conclusion that Halverson was not in custody for *Miranda* purposes during his phone call with Danielson.

D. 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 (Halverson's Br. 23), he paints a picture that's driven by fancy, not reality. To start, Halverson suggests his isolation in the program room to complete an unrecorded phone call while staff waited outside the room was psychologically coercive. (*Id.*) But isolation itself is not significantly coercive when an inmate is separated from the rest of the prison population for questioning. *See Fields*, 565 U.S. at 512–13. "Isolation from the general prison population is often in the best interest of the interviewee and, in any event, does not suggest on its own the atmosphere of coercion that concerned the Court in *Miranda*." *Id.* at 513.

And Danielson held no more "power over [Halverson's] future" (Halverson's Br. 23), than any officer would have held over any suspect. While the guards waiting outside the room may have had power over Halverson's daily life as an inmate in the jail, there was no evidence they exploited that power to force Halverson to return Danielson's call or answer Danielson's questions. Rather, Hoff's testimony reflected a process that balanced the inmate's need and desire for privacy during personal phone calls with the jail's need to maintain safety and order.

To that end, while Halverson frames his argument as fitting the totality-of-the-circumstances framework, he really seems to be circling back to his first argument for a per se rule. (*See* Halverson's Br. 26 (stating that imprisonment creates "a baseline level of coercion that pushes inmates towards *Miranda* custody—if not all the way there").) Again, *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. Rather, the test is

whether the conditions connected to the questioning involve more restrictions than the inmate normally experiences in the institution. *See, e.g.*, *People v. Anthony*, 230 Cal. Rptr. 268, 273 (Ct. App. 1986) (holding 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).

Thus, "[w]hen a prisoner is questioned, the determination of custody should focus on all of 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 coercion was in play regarding how Halverson was summoned, the program room setting, how Halverson returned the call, how Danielson conducted the conversation, or how the conversation ended.

And while Danielson did not expressly tell Halverson that he was free to leave and could end the call (Halverson's Br. 24–25), that fact, under the circumstances, did not turn the interview into a custodial one. To start, Halverson by all appearances knew that returning Danielson's call was optional, given Hoff's testimony that jail staff would have allowed Halverson to choose whether to return the call and told Halverson the caller's identity. (R. 48:17–18.) There is no conflicting testimony to suggest that staff deviated from standard procedure that day.

Granted, had Danielson expressly told Halverson that he was free to hang up, that would have been a significant factor showing that there was *no* custody for *Miranda* purposes. *See Fields*, 565 U.S. at 515. But the absence of that warning does not necessarily weigh significantly toward a

determination of custody, particularly in the context of a phone call. The presence of that warning was "important" in *Fields* because that case involved a face-to-face interview between an inmate and an armed deputy. That face-to-face contact created a higher likelihood of a coercive effect than a remote officer over the telephone would. Unlike Halverson, Fields could not just press a button to end his conversation; he had to inform the armed officer sitting across from him.

Halverson expresses confusion at the idea that ending a phone conversation is easier than ending an in-person discussion (Halverson's Br. 24), but it's common sense. The phone conveys users the power to immediately end a conversation with a click, rather than having to hear the person's reaction or see their response in a face-to-face conversation. In the context of law enforcement questioning, a suspect's ending a phone call with police simply ends the conversation. But without the officer there, the inmate experiences no immediate consequence to ending the call. There's no risk of the officer's resorting to more coercive behavior—i.e., raising his voice, physically preventing the suspect from leaving, drawing a weapon, threatening punishment—or the suspect's having to deal with additional conversation after choosing to end the interview.

Halverson reiterates that the "profound power imbalance" between him and Danielson created an inherently coercive environment, regardless whether there was a phone involved. (Halverson's Br. 25.) But that alleged imbalance would be present for every officer questioning every suspect in any setting. It could not significantly tip the scales toward *Miranda* custody; otherwise, the freedom of movement inquiry would virtually always result in a determination of *Miranda* custody.

Halverson criticizes the court of appeals' remarks that since he did not experience conditions or restrictions on his

freedom different from what other inmates would experience, the call environment was not coercive. (Halverson's Br. 25.) The court, however, was just echoing the *Fields* Court's remarks that questioning involving limitations of freedom based on jail staff's escorting an inmate to an interview room was not per se custodial because "such procedures are an ordinary and familiar attribute of life behind bars." *Fields*, 565 U.S. at 513. As that Court noted, jail staff's implementing those standard procedures does not produce the same shock, isolation, and disorientation as would police escorting someone off the street into a station house. *Id.*

Finally, contrary to Halverson's argument (Halverson's Br. 25), it is not reasonable to read *Fields* or the court of appeals' decision to suggest that *all* standard institutional procedures—particularly those related to disciplinary or extraordinary ones like solitary confinement—have no coercive effect. The totality-of-the-circumstances analysis weighs the nature and severity of institutional procedures involved in an interrogation. So, whether custody for *Miranda* purposes is effectuated in some other interrogation in which solitary confinement is involved is a question for another case. Here, the Vernon County jail staff's unremarkable act of accompanying Halverson 75 feet from a pod to a program room to allow him to make a phone call is not a procedure reasonably likely to have compelled Halverson to confess to Danielson.

In sum, Halverson was not in custody for purposes of *Miranda* under the totality of the circumstances.

CONCLUSION

This Court should affirm the decision of the court of appeals.

Dated the 7th day of July 2020.

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 8682 words.

Dated this 7th day of July 2020.

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Dated this 7th day of July 2020.

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