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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 a Decision of the Chippewa County Circuit Court, the Honorable Steven R. Cray, Presiding.

REPLY BRIEF OF DEFENDANT-RESPONDENT-PETITIONER

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TABLE OF CONTENTS

CASES CITED

WISCONSIN CONSTITUTION

ARGUMENT

I. Introduction.

The two issues in this case—whether inmates interrogated by police should always get *Miranda* warnings, and if not, whether warnings were still needed here—both require analysis of the coercion inherent in incarceration. The state says it inflicts no coercion at all (at least of the kind that would make inmates vulnerable to compelled self-incrimination). (Resp. Br. 19). Thus, it deems a per se rule inappropriate and says warnings weren't warranted here. (*Id.* at 3). The state's blindness to the psychologically coercive effects of confinement underlies all of its arguments. With the reality of confinement in mind, the state's arguments fall apart.

Every facet of the correctional experience deprives inmates of agency. Submission to authority is required around the clock, from the inmate's arrival to his release: at a correctional officer's direction, an inmate must, for example, get in line for lunch, remain in his cell, discuss his addiction, refrain from hugging his child, tuck in his shirt, or put his hands up. This is how incarceration threatens the right against self-incrimination—not by wearing away at inmates' will to resist confessing *specifically*, but by forcing them to do whatever's asked of them, whether they wish to or not.

Over 20 years ago, this court set forth a rule that pays heed to the profound coercion inflicted by incarceration, mandating *Miranda*

warnings whenever an inmate is questioned by police. *See State v. Armstrong*, 223 Wis. 2d 331, 355-56, 588 N.W.2d 606. The *Armstrong* rule is simple, sound, and gives police and courts the clearest guidance possible. It should be reaffirmed.

II. This court should reaffirm the *Armstrong* rule under the Wisconsin Constitution.

The state levels an array of attacks against *Armstrong*'s per se rule that distract from the central issues—and, more problematically, confuse them. In considering whether to reaffirm the *Armstrong* rule under article I, section 8(1) of the Wisconsin Constitution instead of its federal counterpart, this court should keep three basic points in mind.

First, *Miranda* warnings were devised by the United States Supreme Court in 1966 because they're necessary to protect the constitutional right against compelled self-incrimination from the coercive pressures of modern police interrogation—not because there is a right to such warnings enshrined in the Constitution. *See Miranda v. Arizona*, 384 U.S. 436, 467-77 (1966); *Dickerson v. United States*, 530 U.S. 428, 439-40 (2000). Thus, it isn't the scope of the constitutional right itself but the sweep of a court-made prophylaxis that this case involves.

Second, whether police are required to provide *Miranda* warnings depends on whether the interrogation they're conducting is custodial. *See id.* A custodial interrogation is one characterized by a "serious danger of coercion." *Howes v. Fields*, 565 U.S. 499, 508-09 (2012). The paradigmatic

example, but far from the only one, is a post-arrest interrogation conducted at the stationhouse. *Id.* at 511.

Third, this court's determination of whether Wisconsin inmates interrogated by police should *always* be read their rights will turn on whether the court considers incarceration so inherently coercive that case-by-case assessment is unwarranted. Case law is helpful, but no case or other text will dictate the court's conclusion one way or the other. There is no substitute for carefully weighing "the competing principles and policies" at stake. *See State v. Knapp* (*Knapp II*), 2005 WI 127, ¶60, 285 Wis. 2d 86, 700 N.W.2d 899.

With the issue in focus, the state's arguments against the *Armstrong* rule miss the mark.

A. History and text.

The state begins by criticizing Halverson for failing to engage with the text and history of the relevant constitutional provisions. (Resp. Br. 15). The state's concern appears to be with the rights the state and federal constitutions bestow, and whether there are textual or historical reasons to distinguish them from one another. But since the rights themselves aren't at issue here, the state's emphasis on text and history is misplaced. *See Michigan v. Tucker*, 417 U.S. 433 (1974) at 444. Halverson asks this court to expand the *protections* afforded the state right against self-incrimination beyond those afforded its federal counterpart—not to construe the two rights differently.

B. *Knapp II* and *Eason*.

The state next argues that *Knapp II*, a case discussed in Halverson's brief-in-chief, is legally and factually distinguishable. (Resp. Br. 16-18). It also notes that *Knapp II* is one of just two cases, along with *State v. Eason*, 2001 WI 98, ¶¶73-74, 245 Wis. 2d 206, 629 N.W.2d 625, in which this court has extended greater protections under the state constitution than the United States Supreme Court has recognized under the Fourth, Fifth, or Sixth Amendments. (Resp. Br. 14 n.6). This portion of the state's brief is an attack on a strawman. Halverson cites *Knapp II* not as binding precedent—the issues (and facts and law) are different—but because it illustrates that, when circumstances warrant it, this court will protect the constitutional rights of Wisconsin's citizens more expansively than the federal supreme court requires.

Although the state's discussion of this case law is largely nonresponsive to Halverson's claim, it reveals an important parallel between the *Armstrong* rule and the rules in *Knapp II* and *Eason*.

Knapp II held that physical evidence derived from intentional *Miranda* violations must be suppressed; doing so, said the court, will protect the right against self-incrimination by deterring its intentional infringement by police. 285 Wis. 2d 86, ¶¶72-74. Thus, *Knapp II* addressed the scope of a court-made constitutional rule (not the scope of the right that rule serves), taking it further than its federal corollary.

Eason held that the exclusionary rule, which aims to deter unlawful searches and seizures, is subject to a narrower good-faith exception under the Wisconsin Constitution than that which the federal supreme court recognizes. 245 Wis. 2d 206, ¶¶59-63. Here too, it was the scope of a "judicially created remedy designed to safeguard" a constitutional right—not the scope of the right itself—that the court expanded beyond its federal minimum. *Id.*, ¶43

The *Armstrong* rule, like the rules announced in *Knapp II* and *Eason*, doesn't distinguish the scope of a state constitutional right from its federal counterpart; it takes a judge-made rule that prevents the state right's violation, and it pushes it a bit further than the judge-made rule that prevents the federal right's violation. It is, in other words, the kind of rule this court has been willing to stand by when the federal supreme court takes a different path.

C. Adequacy of the *Fields* test.

The state's final round of arguments revolves around its position that the protections afforded inmates by *Fields's* totality-of-the-circumstances test are adequate; they don't need *Armstrong*. (Resp. Br. 18-20). The state contends that a totality-of-the-circumstances test accounts for variation in inmates' circumstances, while a per se rule does not. It says Halverson's request for a per se rule is rooted in the incorrect assumption that every inmate is equally susceptible to involuntarily incriminating himself. And, through a slew of jarring and inapt comparisons (between prisons and dorms, for example), it argues

that the restrictions inmates face are not so different in kind from the restrictions others face that categorical protection is warranted.

There is a lot to unpack here.

First, yes, a totality-of-the-circumstances test accounts for variation while a per se rule does not. (Resp. Br. 20). The *Armstrong* rule is designed to ensure that the protections of *Miranda* sweep broadly enough to encompass all who need them—not to ensure they reach *only* those who need them. *Miranda* itself takes this approach: "The Fifth Amendment privilege is so fundamental to our system of constitutional rule and the expedient of giving an adequate warning as to the availability of the privilege so simple, we will not pause to inquire in individual cases whether the defendant was aware of his rights without a warning being given." *Miranda*, 384 U.S. at 468. Thus, as with interrogation subjects more broadly, some inmates who don't don't need *Miranda* warnings will get them under *Armstrong*. Whatever injury that inflicts on their interrogations is an injury we've long accepted as the price of protecting a critical right.

Second, no, Halverson's position is not rooted in the assumption that "every prisoner . . . is susceptible to compelled self-incrimination." (Resp. Br. 20). The reason for the *Armstrong* rule, and for *Miranda* warnings generally, isn't that every individual in an unduly coercive environment will buckle under the pressures of police interrogation and involuntarily confess. *See Miranda*, 384 U.S. at 468-69. It's that an unduly coercive environment, combined with the pressures of police interrogation,

poses such a threat to the right against self-incrimination that we won't wait and see: *Miranda* warnings are required at the outset, across the board. *See id.* at 469-70; *see also Illinois v. Perkins*, 496 U.S. 292, 297 (1990).

Finally, the state says we don't look to the restrictions apartment dwellers, students in a dorm, or office workers face in their daily lives, so why should we do so with prisoners? (Resp. Br. 18-19). First, the everyday rules and regulations imposed on free members of our society don't hold a candle to the wholesale deprivation of liberty prison and jail inmates face. But there is a deeper problem. While it's true the rules governing an interrogation subject's apartment complex (to take one example) have no bearing on the *Miranda* custody analysis, that's not because the coercion a person faces in his daily life can't exert psychological pressures that render him vulnerable to confessing involuntarily. Rather, it's because the right against self-incrimination is only concerned with coercion exacted by the government. *Oregon v. Elstad*, 470 U.S. 298, 304-05 (1985). Arrest and its concomitant deprivation of liberty is the classic example; incarceration and its far broader deprivation of liberty is another.

This, then, is the heart of the state's quarrel with *Armstrong*: it doesn't believe incarceration presents coercive pressures that threaten the right against self-incrimination. The state's view of coercion is unjustifiably narrow.

As far as the state knows, prisons and jails don't explicitly require inmates to talk to police or

confess to crimes.[1] (Resp. Br. 19) So, the state says, whatever forms of coercion those institutions *do* inflict are irrelevant to the right against self-incrimination. (*Id.*).

But that's not how coercion works. Even in the state's oft-repeated paradigmatic *Miranda* scenario, in which a suspect is whisked off to the stationhouse, the coercive pressures the suspect faces are less overt than those the state imagines. The psychological pressures that threaten the right against self-incrimination, per *Miranda*, include everyday aspects of police interrogation: the fact that they take place in private, in a setting unfamiliar to the suspect; the fact that interrogators "display an air of confidence in the suspect's guilt" and offer "legal excuses for [the suspect's] actions in order to obtain an initial admission of guilt"; and the fact that, "[w]hen normal procedures fail," the interrogators "persuade, trick, or cajole [the suspect] out of exercising his constitutional rights." *Miranda*, 384 U.S. at 455. *Miranda* warnings were designed to counterbalance these coercive, if sometimes subtle, police tactics.

The state wants officers to assess, on a case-by-case basis, whether the inmates they interrogate are in an unduly coercive environment. Its goal is to keep *Miranda* warnings from reaching those who *don't*

[1] Inmates are likely compelled to make inculpatory statements when they participate in prison treatment and programming, just as they must when they participate in treatment and programming on supervision. *See State v. Peebles*, 2010 WI App 156, ¶19, 330 Wis. 2d 243, 792 N.W.2d 212 (discussing restrictions on the use of incriminating statements probationers are compelled to make by the rules of their supervision).

need them, not to ensure the warnings reach those who do. Should officers decide against providing warnings, the state wants courts to consider the totality of the circumstances (except those the state says it can disregard) in determining whether they erred. The state ignores the complications these amorphous standards will create for officers on the ground, as well as the litigation they will spawn.

Instead of adopting the state's imprecise (and thus manipulable) standard, this court should heed the significance of the right at stake, acknowledge inmates' special vulnerability to compelled self-incrimination, and give weight to the practical benefits—to law enforcement, litigants, courts, and of course interrogation subjects—of upholding *Armstrong*'s categorical rule.

III. Even under *Fields*, Halverson should have received *Miranda* warnings.

If this court adopts the *Fields* test, then the state must demonstrate that the totality of the circumstances surrounding Halverson's interrogation did not put him in *Miranda* custody. *See State v. Harris*, 2016 WI App 2, ¶9, 366 Wis. 2d 777, 874 N.W.2d 602. It seeks to meet that burden in part by emphasizing that Halverson was interrogated by phone, in part by downplaying the significance of Officer Danielson's failure to tell Halverson he could end their call, and in part by painting a rosy picture of jail. (Resp. Br. 22-27).

The state is right that interrogations by phone are, in general, less coercive than those conducted in person. (*Id.* 22-24). The fact that Halverson

was interrogated by phone weighs against a determination that he was in *Miranda* custody. But if the totality of the circumstances governs, as the state insists, then that is far from the end of the inquiry. A broader view of the circumstances surrounding Halverson's interrogation show he was subject to coercive pressures that threatened his right against self-incrimination—even though he was questioned by phone—and thus that he should have been Mirandized.

Fields teaches that a crucial factor in determining whether an inmate is in *Miranda* custody during an interrogation is whether the inmate is told he can end the interrogation at will. *See Fields*, 565 U.S. at 515. This makes sense, not because questioning by police is inherently intimidating (though it is), but because the psychological toll of incarceration so degrades the individual's capacity to resist pressure from police that it requires an offset. A statement by the interrogator that the inmate can return to his cell at will may not be a prerequisite to a non-custodial inmate interview under *Fields*, but, absent special circumstances that ensure the inmate knows he has a choice in the matter, most prisoners will need that explicit admonition. They are not accustomed to defying requests—especially from law enforcement.

While adopting a totality-of-the-circumstances analysis means incarceration is not dispositive of the custody analysis, it remains a weighty factor. Without the admonition offered in *Fields*, which moderates the coercive pressures of incarceration, an inmate subjected to police interrogation will ordinarily be in *Miranda* custody. And since

Halverson wasn't given the *Fields* admonition—and no other aspect of his interrogation communicated that it was optional—he was in *Miranda* custody when Officer Danielson questioned him.

The picture the state paints of a cozy law library ("carpeted, furnished") in which Halverson was afforded privacy (but for the room's glass walls and the correctional officers waiting outside) to have a quick, amiable call with a police officer (or to reluctantly answer questions about new criminal allegations) is fundamentally unrealistic. (*See* Resp. Br. 25-27). But there is one factor the state presents that warrants closer examination: that, unlike the subject "whisked from home or street" to the stationhouse, Halverson was confined both before and after his interrogation. (*See id.* at 25).

Various cases, including *Fields*, have noted that the shock accompanied by an arrest or other sudden deprivation of freedom is coercive. *See Fields*, 565 U.S. at 511. "In the paradigmatic *Miranda* situation," *Fields* says, "detention represents a sharp and ominous change" that may lead the subject of questioning to "feel coerced into answering." *Id.* Here, Halverson was summoned to a glass-walled room for a call from a police offer who confronted him with criminal accusation; the interrogation setting was a change from sitting in his jail pod, and possibly one he found ominous, but it wasn't the "shock" *Fields* was referring to. The state would have this fact weigh in its favor.

The problem is, in the context of incarceration, the *absence* of a shift in circumstances presents a threat to self-incrimination—just as, for those on the

outside, the entry into custody does. The state, despite advocating a holistic custody analysis, would have this court ignore the wholesale deprivation of freedom effected by institution rules and correctional officer whim. The court should not accept this invitation. The strictures binding inmates' daily life and the constant requirement that they submit to authority threatens the privilege against self-incrimination. Whether the threat is significant enough to mandate *Miranda* warnings across the board is one question, but whether the threat exists is no question at all. Thus, while there was no shock inflicted on Halverson like that involved in the typical *Miranda* scenario, the coercive pressures of confinement persisted—and weren't counteracted.

Halverson was in *Miranda* custody, whether the *Fields* or *Armstrong* analysis applies. Because he wasn't read his rights, his confession should be suppressed.

CONCLUSION

Brian Halverson asks this court to hold that he was in *Miranda* custody during his interrogation by Officer Danielson. He thus requests that this court reverse the court of appeals' decision and remand the case so the circuit court's suppression order can be reinstated.

Dated and filed by U.S. Mail this 11th day of August, 2020.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief 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 brief is 2,862 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

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

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

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Dated and filed by U.S. Mail this 11th day of August, 2020.

Signed:

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