No. 17-

In the Supreme Court of the United States

DANIEL J.H. BARTELT,

Petitioner,

v.

WISCONSIN,

Respondent.

On Petition for a Writ of Certiorari to the Wisconsin Supreme Court

PETITION FOR A WRIT OF CERTIORARI

STUART BANNER
UCLA School of Law
Supreme Court Clinic
405 Hilgard Ave.
Los Angeles, CA 90095

COLLEEN D. BALL
Counsel of Record
LEON W. TODD
Office of the State
Public Defender
735 N. Water St., Ste. 912
Milwaukee, WI 53202
(414) 227-3110
ballc@opd.wi.gov

QUESTION PRESENTED

Whether a non-custodial interrogation at a police station becomes custodial once the defendant confesses to a serious crime, because at that point a reasonable person would know that he is not free to leave.

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PETITION FOR A WRIT OF CERTIORARI

Daniel J.H. Bartelt respectfully petitions for a writ of certiorari to review the judgment of the Wisconsin Supreme Court.

OPINIONS BELOW

The opinion of the Wisconsin Supreme Court is published at 906 N.W.2d 684 (Wis. 2018). App. 1a. The opinion of the Wisconsin Court of Appeals is published at 895 N.W.2d 86 (Wis. Ct. App. 2017). App. 39a.

JURISDICTION

The judgment of the Wisconsin Supreme Court was entered on February 20, 2018. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the U.S. Constitution provides in relevant part: "nor shall any person … be compelled in any criminal case to be a witness against himself."

STATEMENT

This case involves a very common situation. The police conduct a non-custodial interrogation of a suspect at a police station. After a period of questioning, the suspect breaks down and confesses to the crime. The police then continue their questioning without altering any of the other circumstances of the interrogation. During this period of post-confession questioning, the suspect makes additional statements regarding additional crimes.

What are the legal implications of this recurring sequence of events? The lower courts have divided into two camps in answering this question.

In some jurisdictions, the interrogation becomes custodial once the suspect confesses, because any reasonable person would know that he is no longer free to leave the police station. The confession is still admissible, of course, because the interrogation was non-custodial when the confession was elicited, but the suspect's statements *after* the confession are governed by the *Miranda* line of cases, because after the confession the interrogation has become custodial.

In a second group of jurisdictions, by contrast, the interrogation remains non-custodial even after the suspect confesses. These jurisdictions hold that where the other circumstances of the interrogation have not changed, a confession is not enough to cause a non-custodial interrogation to become custodial. In these jurisdictions, the suspect's statements after the confession are *not* governed by the *Miranda* line of cases, because the interrogation remains non-custodial throughout.

This case provides a perfect opportunity to resolve the conflict.

1. In July 2013, two crimes took place in Washington County, Wisconsin. On July 12, a woman named M.R. was attacked and seriously injured by an unknown man with a knife while she was walking her dog in a park. App. 2a. Three days later, a woman named Jessie Blodgett was strangled to death in her home by an unknown assailant. App. 2a-3a.

The police quickly identified petitioner Daniel Bartelt as a suspect in the attack on M.R. App. 3a. On July 16 they asked him to come to the police station for an interview. App. 3a. Bartelt came to the station that afternoon. App. 3a. In the interview room, Bartelt was interrogated by two police officers wearing guns and badges, who told him that he was not under arrest and that he could leave at any time. App. 4a. After being interrogated for approximately half an hour, App. 8a, Bartelt confessed that he was the one who attacked M.R. App. 7a.

After confessing, Bartelt asked what would happen next. App. 7a. "I can't say," responded Detective Joel Clausing. "We'll probably have more questions for you, quite honestly." App. 7a. Clausing later testified that once Bartelt had confessed to attacking M.R. with a knife, he "was going to be under arrest, and he probably wasn't free to get up and leave." App. 7a.

Bartelt then asked to speak with a lawyer. App. 8a. The police did not allow him to do so. App. 8a. Rather, they took away his cell phone, told him he was under arrest, placed him in handcuffs, searched him, and took him to jail. App. 8a.

The next day, on July 17, the police still did not honor Bartelt's request to speak with a lawyer. Instead, they brought Bartelt to a different interrogation room for further questioning, this time about the murder of Jessie Blodgett. App. 8a. They read Bartelt his *Miranda* warnings. App. 8a. Bartelt agreed to speak to the police without a lawyer. App. 8a. During the ensuing ninety-minute interrogation, Bartelt admitted that on the day of the murder he

had spent several hours at Woodlawn Union Park. App. 8a-9a.

Using this information, the police searched the garbage cans in Woodlawn Union Park. App. 9a. They found many types of rope and tape, as well as antiseptic wipes with red stains. App. 9a. On one of the ropes was DNA that belonged to both Bartelt and Blodgett. App. 9a. This rope matched the ligature marks on Blodgett's neck. App. 9a. Another rope matched the ligature marks on her wrists and ankles. App. 9a.

Bartelt was charged with first-degree intentional homicide for the killing of Jessie Blodgett, and with attempted first-degree intentional homicide, among other charges, for the attack on M.R. App. 9a.

Bartelt moved to suppress his July 17 statements to the police, and the evidence derived from those statements, on the ground that his Fifth Amendment rights had been violated under the *Miranda* line of cases. App. 9a. The trial court denied the motion. App. 9a. The court reasoned that Bartelt was not in custody until after he requested an attorney, approximately ten minutes after confessing to the attack on M.R. App. 9a. The court held that because Bartelt was not yet in custody when he asked to speak with a lawyer, the police were free to resume questioning the next day, because "an assertion of *Miranda* … which a person makes while they are not in custody, does not prospectively prohibit law enforcement from attempting to interview an individual later." App. 9a-10a.

After a jury trial, Bartelt was convicted of first-degree intentional homicide for the killing of Jessie Blodgett. App. 10a. He was sentenced to life impris-

onment without the possibility of parole. App. 10a. The parties then reached a plea agreement on the charges related to M.R. App. 10a. Bartelt pled guilty to first-degree reckless endangerment. App. 10a. He was sentenced to five years' imprisonment and five years' extended supervision, to be served consecutively to his life sentence. App. 10a.

2. The Wisconsin Court of Appeals affirmed. App. 39a-67a.

In the Court of Appeals, Bartelt again argued that the interrogation became custodial once he had confessed to attacking M.R., because after the confession a reasonable person would have known that he was not free to leave. App. 49a. Because the interrogation was custodial when he requested an attorney, he contended, the police violated his right to counsel by resuming questioning the next day rather than honoring his request for counsel. App. 49a. He argued that the statements he made during the second day of questioning, along with the evidence derived from those statements, should have been suppressed. App. 49a-50a.

The Court of Appeals rejected Bartelt's argument. The court held that his confession "did not render him in custody." App. 57a. The court reasoned that "a defendant making an incriminating statement does not necessarily transform a noncustodial setting into a custodial one." App. 59a. Rather, because "the police did not change the circumstances of the interview after Bartelt made incriminating admissions," App. 63a-64a, "the dynamics in that room bearing on the question of custody had not changed," App. 65a. Therefore, the Court of Appeals concluded, "at the moment Bartelt asked about counsel, he was

not in custody and any request for counsel was of no significance for purposes of *Miranda*." App. 65a.

The Court of Appeals recognized "that there are cases from other jurisdictions that have held that a suspect's incriminating admission is dispositive on the custody issue." App. 62a n.10. But the court found that these cases "are not persuasive." App. 62a n.10.

3. The Wisconsin Supreme Court affirmed by a vote of 5-2. App. 1a-38a.

The Wisconsin Supreme Court acknowledged that under *Miranda v. Arizona*, 384 U.S. 436 (1966), and *Edwards v. Arizona*, 451 U.S. 477 (1981), when a defendant requests counsel during a custodial interrogation, the interrogation must cease. App. 12a-13a. "Stated otherwise," the court explained, "once a suspect has invoked his Fifth Amendment right to counsel, the *Miranda-Edwards* rule prohibits police from engaging in subsequent, uncounseled interrogations regarding the same or separate investigations." App. 13a. But because "the right to counsel may not be invoked until a suspect is 'in custody,'" App. 14a, the court turned its "attention to what 'in custody' means." App. 15a.

In determining whether an interrogation is custodial, the court noted, "[w]e consider a variety of factors to determine whether under the totality of the circumstances a reasonable person would feel at liberty to terminate an interview and leave." App. 16a. If a reasonable person would not feel free to leave, the court continued, "we must then consider whether 'the relevant environment presents the same inherently coercive pressures as the type of station house

questioning at issue in *Miranda*.'" App. 16a (quoting *Howes v. Fields*, 565 U.S. 499, 509 (2012)).

The court held that despite Bartelt's confession, the interrogation was not custodial thereafter when he requested counsel. App. 25a. The court reasoned that the other circumstances of the interrogation had not changed, in that "both before and after Bartelt's confession, [the police officers] spoke in a conversational tone," App. 25a, and "the discussion otherwise was not aggressive or confrontational," App. 26a. Although the police officers "had enough evidence to arrest him when he confessed," the court concluded, "that in itself did not restrain Bartelt's freedom of movement." App. 26a-27a.

"We therefore conclude," the court held, "that although admission of guilt to a serious crime is a factor to consider in a custody analysis, Bartelt's admission to attacking M.R. was not enough to transform his status to that of 'in custody' given the totality of the circumstances." App. 29a. "Because Bartelt was not in custody when he asked about counsel, his Fifth Amendment right to counsel did not attach." App. 29a.

Justice Ann Walsh Bradley dissented, joined by Justice Shirley S. Abrahamson. App. 29a-38a.

Justice Bradley observed: "Essentially, the majority determines that a suspect in Bartelt's situation could state to the police, 'I committed a serious, violent felony. I'm leaving, see you later,' and then march past detectives on the way out of the interrogation room and the police station. This stretches the bounds of credulity." App. 34a-35a. In fact, she suggested, a suspect who had just confessed to a serious crime would not be free to leave the

police station. "[W]ould a reasonable suspect in such a position really think he could just get up and walk out?", she asked. "Only in a fantasy world would a suspect act in this manner. Common sense tells us that a real world suspect would do no such thing." App. 35a-36a.

Justice Bradley accordingly determined that "Bartelt was not free to leave. Rather, he was in custody for *Miranda* purposes immediately after confessing to the attack on M.R." App. 36a. Because Bartelt had unequivocally invoked his right to counsel, she concluded, his statements in response to the subsequent interrogation should have been suppressed. App. 36a-38a.[1]

REASONS FOR GRANTING THE WRIT

The Court should grant certiorari. The lower courts are deeply divided on this question, the decision below is wrong, and this case is an excellent vehicle for resolving the conflict.

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[1] Before the Wisconsin appellate courts, the state argued that even if Bartelt was in custody following his confession, his request for an attorney was too ambiguous to invoke his right to counsel. Neither the Wisconsin Supreme Court nor the Wisconsin Court of Appeals reached this issue, which remains to be litigated if this Court grants certiorari and reverses. Our view is that when Bartelt asked "can I speak to a lawyer," and then added "I think I'd prefer that," App. 8a, he unequivocally requested an attorney.

I. The lower courts are divided over whether a non-custodial interrogation at a police station becomes custodial once the defendant confesses to a serious crime.

The decision below adds yet another jurisdiction to what is now a 9-6 split among state supreme courts and federal courts of appeals on this question. This conflict obviously cannot be resolved without the Court's intervention.

A. Many jurisdictions hold that an interrogation at a police station necessarily becomes custodial once the defendant confesses to the crime, because at that point a reasonable person would know that he is no longer free to leave. These jurisdictions include:

Florida: In *Roman v. State*, 475 So. 2d 1228, 1231-32 (Fla. 1985), the Florida Supreme Court observed: "occasions would be rare when a suspect would confess to committing a murder and then be allowed to leave. Certainly the noncustodial atmosphere leading up to a confession and probable cause would thereby be expected to be converted to a custodial one." In subsequent cases, Florida courts have interpreted this passage to mean that an interrogation becomes custodial once a defendant confesses to any serious crime at a police station. *See Cushman v. State*, 228 So. 3d 607, 618-19 (Fla. Ct. App. 2017) (holding that an interrogation became custodial once the defendant admitted to sexual battery of a child); *State v. Pitts*, 936 So. 2d 1111, 1134 (Fla. Ct. App. 2006) ("A reasonable person understands that when a suspect confesses to committing a serious criminal act, the police ordinarily will not permit the suspect to go free. What begins as a noncustodial interrogation accordingly may be transformed into a custodial

interrogation by a confession that the suspect utters during the interrogation.") (holding that an interrogation became custodial once the defendant admitted pointing a gun at the victims).

Georgia: In *Jackson v. State*, 528 S.E.2d 232, 234 (Ga. 2000), the defendant confessed in a non-custodial setting to committing murder. He then made an additional statement in response to further questioning. *Id.* The Georgia Supreme Court held that his initial confession was admissible, because "[u]p to that time, all contact between the sheriff's deputies and Jackson was by consent." *Id.* at 235. But the court held that the defendant's subsequent statement in response to police questioning was inadmissible. "A reasonable person in Jackson's position, having just confessed to involvement in a crime in the presence of law enforcement officers would, from that time forward, perceive himself to be in custody, and expect that his future freedom of action would be significantly curtailed," the court explained. *Id.* Accordingly, his subsequent statement "must be considered to have been made in a custodial interrogation without the benefit of *Miranda* warnings and was wrongly admitted." *Id.* at 236.

Massachusetts: In *Commonwealth v. Smith*, 686 N.E.2d 983, 987 (Mass. 1997), the Massachusetts Supreme Judicial Court held that "after the defendant told the police that he was there to confess to the murder of his girl friend, given the information the police already had received about the murder, we conclude that if he had wanted to leave at that point, he would not have been free to do so." The court accordingly concluded that *Miranda* warnings were required before the police could interrogate the de-

fendant after his confession, because the setting became custodial once he had confessed. *Id.* *See also* *Commonwealth v. Hilton*, 823 N.E.2d 383, 396-97 (Mass. 2005) (noting that an interrogation becomes custodial *after* the defendant confesses, not at the precise instant the defendant *begins* to confess).

Texas: In *Dowthitt v. State*, 931 S.W.2d 244, 256 (Tex. Ct. Crim. App. 1996), the defendant's interrogation at the police station began as non-custodial. "However, at approximately 1:00 a.m. a significant additional circumstance occurred—appellant admitted that he was present during the murder." *Id.* The Texas Court of Criminal Appeals noted that the defendant's "admission that he was present during the murders was incriminating, and a reasonable person would have realized the incriminating nature of the admission." *Id.* at 257. As a result, the court held, "we believe that 'custody' began after appellant admitted to his presence during the murders." *Id.* *See also* *Ruth v. State*, 645 S.W.2d 432, 435 (Tex. Ct. Crim. App. 1979) (holding that an interrogation became custodial "after the appellant admitted that he shot the victim, explained his motive, and reenacted the offense. The appellant must have been in custody by that time.").

Vermont: In *State v. Muntean*, 12 A.3d 518, 520 (Vt. 2010), the defendant came to the police station voluntarily at the request of the police. During the ensuing interrogation, the police confronted the defendant with allegations that he had inappropriate sexual contact with his daughters and grandsons, and he admitted to having touched his daughters. *Id.* at 520-21. The Vermont Supreme Court held that the interrogation became custodial. *Id.* at 527-28.

"[A] reasonable person in defendant's shoes," the court explained, "would not have felt as though he remained free to leave …. This is particularly true where, as here, the defendant has confessed to at least some of the allegations made against him." *Id.* at 528. *Cf. State v. Oney*, 989 A.2d 995, 1000 (Vt. 2009) (holding that an interrogation did not become custodial where a defendant confessed merely to misdemeanors, because "mere confession to what the defendant believed to be three misdemeanors would not necessarily lead a reasonable person in defendant's circumstances to believe that he was not free to leave").

Wyoming: In *Kolb v. State*, 930 P.2d 1238, 1244 (Wyo. 1996), the Wyoming Supreme Court held: "After Mr. Kolb confessed to the killing, he was in custody under *Thompson v. Keohane*, --- U.S. at ---, 116 S. Ct. at 459. A reasonable person who confessed to a killing while being interviewed at a police station would not feel free to terminate the interview and leave the station."

Intermediate appellate courts in several more states have taken the same view. *See Haas v. State*, 897 P.2d 1333, 1336 (Alaska Ct. App. 1995) (holding that an interrogation that began as non-custodial became custodial once the defendant made inculpatory statements indicating "that he was the one who had committed the homicides," because at that point no "reasonable person in Haas' position would have felt free to leave"); *State v. Linck*, 708 N.E.2d 60, 63 (Ind. Ct. App. 1999) (holding that the defendant "was in custody after he admitted smoking" marijuana, because at that point "a reasonable person would not have felt free to leave"); *People v. Carroll*, 742 N.E.2d

1247, 1250 (Ill. Ct. App. 2001) (holding that an interrogation became custodial once the defendant "had just, moments earlier, inculpated himself in the crime," because after confessing, "any reasonable person in defendant's position would have believed himself to be in custody despite the officers' assurances to the contrary"); *People v. Ripic*, 182 A.D.2d 226, 236 (N.Y. App. Div. 1992) ("[I]t is utter sophistry to suggest that a person in defendant's position, having made such an incriminating statement to police officers concerning the very homicide they were investigating, would feel that she was not under arrest and was free to leave."); *State v. Singleton*, 1999 WL 173357, *6 (Ohio Ct. App. 1999) ("Having just confessed to aggravated murder, we conclude as a matter of law that a reasonable person in Singleton's situation would not have thought he was at liberty to walk away from the police station even though he was not placed under arrest, told he was under arrest, or told he was not free to leave.").

The First Circuit has declared that it would also take this view if it were reviewing the issue de novo. "We believe it likely that a reasonable person would not have felt that he was at liberty to terminate the interrogation and leave after confessing to a violent crime," the court observed. *Locke v. Cattell*, 476 F.3d 46, 54 (1st Cir. 2007). But under the deferential AEDPA standard of review, the First Circuit could not overturn a state court decision to the contrary. The First Circuit explained: "Reluctantly, however, we conclude that such a holding by the state court is not an unreasonable application of clearly established federal law." *Id.*

Had our case arisen in any of these jurisdictions, the court would have found that Bartelt was in custody after he confessed to attacking M.R. His subsequent statements regarding the Jessie Blodgett murder would thus have been inadmissible under *Miranda* and *Edwards*.

B. On the other side of the split are eight jurisdictions, in addition to Wisconsin, in which an interrogation does not become custodial once the defendant confesses to the crime, so long as the other circumstances of the interrogation do not change. In these jurisdictions, courts will not conclude that an interrogation has become custodial unless the police take some additional action after a confession to alter the circumstances or atmosphere of the interrogation. This approach creates a fundamentally different standard for determining custody.

These jurisdictions are:

Tenth Circuit: In *United States v. Chee*, 514 F.3d 1106, 1111 (10th Cir. 2008), the defendant confessed to sexual assault, after which he was interrogated further. The Tenth Circuit held that the interrogation did not become custodial once the defendant confessed, because none of the other circumstances of the interrogation changed. *Id.* at 1114. The court reasoned that "the tone remained calm and conversational throughout the interrogation, even after Mr. Chee confessed." *Id.* As a result, the Tenth Circuit concluded, even after the confession "we conclude that a reasonable person in Mr. Chee's situation would not believe he was effectively under arrest and that Mr. Chee, therefore, was not 'in custody' under *Miranda*." *Id.*

Connecticut: In *State v. Lapointe*, 678 A.2d 942, 958 (Conn. 1996), the Connecticut Supreme Court rejected the defendant's argument "that as soon as he implicated himself in the crime in his first statement, his status became custodial because, at that point, no reasonable person would have felt free to leave." The court concluded instead that "the police in this case never altered the circumstances of their interviews in such a way that his initial noncustodial status became custodial." *Id. See also State v. Edwards*, 11 A.3d 116, 125 (Conn. 2011) ("[T]he circumstances of the defendant's interview were not altered such that his noncustodial status became custodial … after he had admitted to Buyak that he had 'played rough' with the victim.").

Kansas: In *State v. Vandervort*, 72 P.3d 925, 930 (Kan. 2003), *overruled on other grounds in State v. Dickey*, 350 P.3d 1054, 1064 (Kan. 2015), the defendant confessed in a non-custodial setting at a police station to molesting his daughters. The police questioned him afterwards. *Id.* The Kansas Supreme Court held that "a reasonable person in Vandervort's position would not perceive that he or she was 'in custody' of police, triggering the requirement of the *Miranda* warning." *Id.* at 932.

Louisiana: In *State v. Redic*, 392 So. 2d 451, 452 (La. 1980), the defendant confessed in a non-custodial setting at a police station to rape and robbery. The police questioned him afterwards. *Id.* The Louisiana Supreme Court rejected the defendant's argument that his confession caused "an ineffable 'shift' from a noncustodial to a custodial relationship." *Id.* at 453.

Maryland: In *Thomas v. State*, 55 A.3d 680, 696 (Md. 2012), the Maryland Court of Appeals concluded that "a confession does not, *per se*, render an individual in custody," where "the atmosphere in the room never changed" after the confession. As a result, "Thomas's admission to sexual offense involving his daughter did not render him in custody." *Id. Cf. id.* at 707 (Bell, C.J., dissenting) ("It strains the imagination to accept, as the majority does, that a reasonable person …. would believe that he could admit to committing these horrific acts and think that he could freely walk away from a police station."); *id.* at 709 (Adkins, J., concurring and dissenting) ("I would find that—after Petitioner admitted to inappropriate touching—he could not have felt that he was at liberty to end the interrogation.").

Minnesota: In *State v. Heden*, 719 N.W.2d 689, 695 (Minn. 2006), the Minnesota Supreme Court observed: "We have rejected a bright line rule that when a suspect makes a significantly incriminating statement, that statement automatically converts a noncustodial interrogation into a custodial interrogation." Because the other circumstances of the interrogation did not change, the court held that "a reasonable person in these circumstances would believe he was not in custody." *Id.* at 696. *See also State v. Champion*, 533 N.W.2d 40, 43 (Minn. 1995) ("If a station house interrogation is noncustodial at the outset and police do not change any of the circumstances of the interrogation during the course of the interrogation, they should be free to continue to ask questions after the suspect makes a significant incriminating statement without first stopping and giving the suspect a *Miranda* warning.").

New Hampshire: In *State v. Locke*, 813 A.2d 1182, 1189 (N.H. 2002), the New Hampshire Supreme Court held that a police station interrogation did not become custodial once the defendant confessed to robbery. The court emphasized the absence of evidence "that the character and tone of the interview substantially changed after the defendant admitted to participating in the robbery. The interview's duration was not excessive: it lasted for three and one-half hours. There was no evidence of shouting or harsh tones at any time during the interview, and the defendant was never restrained." *Id.*

West Virginia: In *State v. Farley*, 797 S.E.2d 573, 586 (W. Va. 2017), the West Virginia Supreme Court rejected the defendant's argument "that having already confessed to murder, a reasonable person in his position … would have considered his freedom of action curtailed to a degree associated with formal arrest." The court held instead that the portion of the interrogation that took place after the defendant confessed was "a mere continuation of the statement that commenced in the interview room." *Id.*

In these jurisdictions, as in Wisconsin, an interrogation does not become custodial once the defendant confesses, so long as the other circumstances of the interrogation do not change.

We are not the first to notice this conflict. *See Oney*, 989 A.2d at 1007 (Johnson, J., dissenting) ("Courts are fairly divided as to the appropriate weight to be given to admissions when determining if custody existed."); App. 62a n.10 (acknowledging the conflict and finding the cases on other side "not persuasive"); *Maryland Law of Confessions* § 8.13 (Westlaw ed.) (in a section titled "Should custody at-

tach as soon as the defendant makes an incriminating statement?", observing that "[c]ourts are divided on the question").

The conflict cannot be wished away, as merely the application of a uniform totality-of-the-circumstances test to varying fact situations. The lower courts are applying two different rules to decide these cases. In some jurisdictions, the defendant's confession causes a station house interrogation to become custodial, without any change in the other circumstances of the interrogation. In other jurisdictions, so long as the other circumstances of the interrogation do not change, the interrogation remains non-custodial even after the defendant confesses.

A lower court conflict this deep and long-lasting will never be resolved by the lower courts themselves. Only this Court can bring the lower courts into uniformity.

II. The decision below is wrong, because a reasonable person would know that he is not free to leave a police station after confessing to a serious crime.

The Wisconsin Supreme Court erred in concluding that a defendant who confesses at a police station to a serious crime is, after the confession, nevertheless not in custody. An interrogation at a police station is non-custodial where a reasonable person would understand that he is free to leave. But no reasonable person would think that the police would let him leave a police station after confessing to a serious crime.

"In determining whether a person is in custody" for *Miranda* purposes, "the initial step is to ascertain

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." *Howes v. Fields*, 565 U.S. at 509 (citations, quotation marks, and brackets omitted). This is an objective inquiry. *J.D.B. v. North Carolina*, 564 U.S. 261, 270 (2011). Custody does not depend on the subjective beliefs of the defendant or the police. *Stansbury v. California*, 511 U.S. 318, 323 (1994) (per curiam). Rather, "custody must be determined based on how a reasonable person in the suspect's situation would perceive his circumstances." *Yarborough v. Alvarado*, 541 U.S. 652, 662 (2004).

The inquiry has a second step where the interrogation takes place somewhere other than a police station, such as in a prison, *Howes*, 565 U.S. at 509; *Maryland v. Shatzer*, 559 U.S. 98, 112-13 (2010), or during a traffic stop, *Berkemer v. McCarty*, 468 U.S. 420, 437-39 (1984). This "additional question" is "whether the relevant environment presents the same inherently coercive pressures as the type of station house questioning at issue in *Miranda*." *Howes*, 565 U.S. at 509. Where the interrogation is actually *in* the station house, however, the environment is by definition "the type of station house questioning at issue in *Miranda*." In the station house, an interrogation is thus custodial when, in light of the objective circumstances, a reasonable person would know that the police will not let him get up and leave. *Thompson v. Keohane*, 516 U.S. 99, 112 (1995); *California v. Beheler*, 463 U.S. 1121, 1125 (1983) (per curiam); *Oregon v. Mathiason*, 429 U.S. 492, 495 (1977) (per curiam).

Any reasonable person would know that if he confesses in a police station to a serious crime, he will not be free to walk away. Only a lunatic would think otherwise. Once a defendant confesses at a police station, therefore, the interrogation becomes custodial thereafter.

The court below, like the other courts on the wrong side of the split, erred in placing inordinate emphasis on the fact that the other circumstances of the interrogation, particularly the demeanor of the police, did not change after the defendant confessed. But these other circumstances are of no significance once the defendant confesses to a serious crime. After the confession, the demeanor of the police may be just as polite and non-confrontational as before, but all reasonable people know that the police will not let the defendant walk out of the police station. Even if the police do not draw their guns or start yelling at the defendant after his confession, a reasonable person in the defendant's position would know very well that he is no longer free to leave.

The decision below gives the police a horrible set of incentives. If an officer knows that a non-custodial interrogation will always remain non-custodial so long as he keeps a conversational tone and avoids telling the suspect he is under arrest, the officer has no reason ever to give the suspect his *Miranda* warnings, and no reason ever to honor the suspect's request for counsel. This is not a fanciful scenario. As Judge Watford has observed, some police departments have already adopted this strategy. *Smith v. Clark*, 612 F. App'x 418, 424 (9th Cir. 2015) (Watford, J., concurring).

The correct view of this issue, by contrast, gives the police the proper incentives. They can conduct non-custodial interrogations at a police station for as long as they like. If the suspect confesses, the confession will be admissible, because the interrogation was non-custodial when the confession was elicited. At that point, however, the incentive will be for the police to give the suspect his *Miranda* warnings, so that the suspect's subsequent statements will also be admissible.

III. This case is an excellent vehicle for addressing this important question.

This case is an excellent vehicle for resolving the lower court conflict. The issue is squarely presented, with no procedural obstacles to a decision on the merits. The historical facts are uncontested. Because of the thorough dissenting opinion below, the arguments on both sides have been fully aired. Indeed, the Wisconsin Supreme Court is a newcomer to the conflict, which has existed for so long that by now there is nothing new to say on either side. There is nothing to be gained from further percolation.

This issue is important because it arises so often and because so much turns on it. Any time the police conduct a successful non-custodial interrogation at a police station—that is, an interrogation that yields a confession—this issue will arise. The size of the lower court conflict suggests this is a common occurrence.

The consequence of resolving this issue will be the applicability, or not, of the entire *Miranda* line of cases, which governs custodial interrogations but not non-custodial ones. If a police station interrogation

becomes custodial once the defendant confesses to the crime, the police will have to provide *Miranda* warnings and they will have to respect the defendant's request for counsel. But if a police station interrogation does not become custodial when the defendant confesses, the police will have no such obligations. They will be able to ignore the defendant's requests for counsel and continue interrogating him, long after any reasonable person would know that the defendant is not free to leave the police station.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

STUART BANNER
UCLA School of Law
Supreme Court Clinic
405 Hilgard Ave.
Los Angeles, CA 90095

COLLEEN D. BALL
Counsel of Record
LEON W. TODD
Office of the State
Public Defender
735 N. Water St., Ste. 912
Milwaukee, WI 53202
(414) 227-3110
ballc@opd.wi.gov