No. 17-1584

In the Supreme Court of the United States

DANIEL J. H. BARTELT, PETITIONER,

v.

WISCONSIN

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a suspect automatically places himself into "custody" under *Miranda v. Arizona*, 384 U.S. 436 (1966), and *Edwards v. Arizona*, 451 U.S. 477 (1981), by confessing.

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INTRODUCTION

Three days after assaulting a woman with a knife in a local park, Petitioner went to another woman's home and strangled her to death. The next day, police had identified Petitioner as a person of interest in the knife attack and asked Petitioner to speak with them at the police station. Petitioner agreed and met two detectives to participate in a concededly non-custodial interview. During the course of the interview, Petitioner made admissions implicating himself in the knife attack and eventually admitted to having been the attacker. Petitioner then made two brief comments about whether he should speak to a lawyer. Shortly thereafter, the detectives arrested Petitioner for the knife attack. The next day, two different detectives interviewed Petitioner about the murder. After waiving his *Miranda* rights, Petitioner told the detectives that he had been in another park on the day of the strangulation-murder. One of the detectives then went to that park, where he found evidence linking Petitioner to the murder.

Petitioner argued to the Wisconsin courts that, although he went to the police station willingly and was not in custody when he made his initial admissions, by admitting to the knife attack he placed himself into "custody" under *Miranda v. Arizona*, 384 U.S. 436 (1966), and *Edwards v. Arizona*, 451 U.S. 477 (1981) (*Miranda-Edwards*), and therefore the evidence that the police obtained based upon the statements he made after his confession was

inadmissible. The Wisconsin Supreme Court rejected Petitioner's argument, explaining that only law enforcement can place a suspect into custody. Because the detectives took no action to place Petitioner in custody at the relevant time, Petitioner was not entitled to the protections of *Miranda-Edwards*.

Petitioner argues that this Court should grant the Petition to settle a division of authority over whether a suspect who confesses places himself into custody, but the overwhelming majority of state courts of last resort and the only federal Court of Appeals to have opined on the issue agree with the Wisconsin Supreme Court that law enforcement must take action in response to a confession to create custody. Indeed, only two courts of last resort—in outlier decisions from 18 and 22 years ago—have taken Petitioner's approach. And this overwhelming majority of jurisdictions is correct because, under this Court's caselaw, only law enforcement can place an individual into custody. In any event, this case is a poor vehicle because resolving the Question Presented will not entitle Petitioner to any relief and will simply cause the victims and their families here to suffer unnecessary harm.

This Court should deny the Petition.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution, reproduced in the Petition, Pet. 1, applies to the States through the Fourteenth Amendment, *Malloy v. Hogan*, 378 U.S. 1, 6 (1964). Section 1 of the Fourteenth Amendment provides:

> [a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV.

STATEMENT

A. Petitioner attacked a woman in a park while wielding a knife. App. 2a–3a, 10a. The woman, M.R., was walking her dog in Richfield Historical Park when Petitioner attacked her. App. 2a, 10a. Petitioner tackled her to the ground, but M.R. wrestled the knife away from Petitioner, receiving "several knife wounds" in the process. App. 2a, 10a.

After M.R. disarmed him, Petitioner fled. App. 2a, 10a.

Three days later, Petitioner strangled Jessie Blodgett to death in her home. App. 2a–3a, 10a. Petitioner tied Ms. Blodgett's wrists and ankles and strangled her with a rope. App. 9a–10a.

With M.R.'s help, police identified Petitioner as a person of interest in the knife attack in the park. M.R. provided police with, among other things, Petitioner's physical description and a description of the vehicle he was driving. App. 41a. A police officer recognized the vehicle as having been in the same park before, and the officer had previously run a report on its license plate. App. 3a. The report indicated that the vehicle was registered to Petitioner's parents, and, using information from the Wisconsin Department of Transportation, police discovered that their son, Petitioner, matched M.R.'s description of her attacker. App. 3a.

Police then interviewed Petitioner in a concededly non-custodial environment. Petitioner agreed to meet with detectives at the Slinger Police Department to discuss "an incident." App. 3a. The Slinger Police Department is located in a shared municipal building whose main door is unlocked during normal business hours. App. 41a–42a. The interior door to the police department is also unlocked during business hours. App. 3a. Inside the lobby of the police department is a second interior door that is locked from the outside

but can be freely exited. App. 3a. Beyond that door is the interview room, which can be entered and exited via two doors that do not lock. App. 3a–4a. The room is equipped with an audio-video recording device. *See* App. 4a.[1] Petitioner met Detective Clausing and Detective Walsh at the Slinger Police Department and spoke with them in the interview room. *See* App. 4a, 42a. Both detectives wore civilian clothes and belts containing their badges and holstered weapons. App. 4a, 42a. The detectives did not search Petitioner or place him in any sort of restraints and they left the door to the interview room ajar. App. 4a, 19a, 42a. Petitioner sat on one side of the table, Detective Clausing sat at the end of the table, and Detective Walsh sat across the table from Petitioner. App. 4a. Detective Clausing began the interview by telling Petitioner that he was "not in trouble," was "not under arrest," and could leave any time he wanted, and Petitioner indicated that he understood this. App. 4a, 19a, 42a.

The detectives then questioned Petitioner about whether he had been in the park on the day of the knife attack, and Petitioner eventually admitted to committing the attack. At first, Petitioner denied being in any park. App. 4a, 43a. Detective Clausing asked about some scrapes that Petitioner had on his hand and arm, and Petitioner explained that he had

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[1] This device recorded the entirety of the interview between Petitioner and the detectives. App. 4a, 42a n.2.

stabbed his hand with a screw at work. App. 4a–5a. Shortly thereafter, Detective Walsh told Petitioner that police knew that his van had been in the park on days when Petitioner was supposed to be at work, and Petitioner admitted that he did not have a job. App. 6a, 43a–44a. Detective Walsh pleaded with Petitioner to give the victim closure and told Petitioner that good people can make mistakes and that if he made a mistake he should just be honest—a sentiment that Detective Clausing seconded. App. 6a–7a, 44a–45a. Petitioner then admitted to being in the park on the day of the incident. App. 45a. He admitted that he "went after that girl" because he "wanted to scare someone." App. 7a, 45a–46a. Petitioner explained that life scares him and so he wanted to scare someone else. App. 7a, 45a–46a. Petitioner later admitted that he had knocked M.R. down with a knife, and that he had dropped the knife and ran away. App. 46a.

After making these admissions, Petitioner made comments about an attorney. Detective Clausing asked Petitioner if he would be willing to provide a written statement, and Petitioner responded by asking what would happen to him. App. 7a. Detective Clausing responded that he did not know for sure, but that they would probably have some more questions for Petitioner. App. 7a. Petitioner then asked, "Should I or can I speak to a lawyer or anything?" App. 8a. Detective Clausing told him, "Sure, yes. That is your option." App. 8a. Petitioner responded, "I think I'd prefer that." App. 8a.

Shortly after this exchange, the detectives arrested Petitioner. Detective Clausing asked Petitioner for his cell phone, explaining that he was going to take it. App. 8a, 46a. The detectives then left the room and told Petitioner to stay where he was. App. 2a, 8a. The detectives returned several minutes later and placed Petitioner under arrest for the attack on M.R. App. 8a.

The entire interview lasted just over half an hour. App. 8a. Neither detective ever raised his voice, but instead spoke to Petitioner in a calm, "conversational" tone throughout the entire interview. App. 8a, 20a; 46a. Neither detective unholstered or mentioned his weapon throughout the interview. App. 8a, 46a. After Petitioner made admissions about the attack on M.R., neither detective acted any differently than he had throughout the entire interview. App. 8a, 47a.

The following day, two different detectives interviewed Petitioner. App. 8a. These detectives read Petitioner his *Miranda* rights, which Petitioner waived. App. 8a. The detectives asked Petitioner about Jessie Blodgett, the young woman who had been strangled to death. App. 2a–3a, 8a. Petitioner had told Detectives Clausing and Walsh that he had been at the Blodgett residence before coming to speak with them. App. 4a. Petitioner denied being at Ms. Blodgett's house on the day of the murder. App. 8a. Instead, Petitioner claimed he had been to Woodlawn Union Park that day. App. 9a. Eventually, Petitioner asserted his right to counsel, and the detectives

ceased the interview. App. 9a. One of the detectives then went to Woodlawn Union Park and searched the trash receptacles. App. 9a. The detective discovered, among other evidence, a rope matching the ligature marks on Ms. Blodgett's neck, which contained both Petitioner's and Ms. Blodgett's DNA. App. 9a. The State then charged Petitioner with Ms. Blodgett's murder. App. 9a.

B. Petitioner moved to suppress the evidence that the police recovered from Woodlawn Union Park because, according to Petitioner, his comments about an attorney during the interview with Detectives Clausing and Walsh had been an invocation of his right to counsel during custodial interrogation, rendering his *Miranda* waiver the next day ineffective. *See* App. 9a. The trial court denied Petitioner's motion, holding that Petitioner was not in custody when he asked about an attorney and therefore the protections of *Miranda-Edwards* had not yet attached. *See* App. 9a–10a.

After a seven-day trial, a jury convicted Petitioner of first-degree intentional homicide for the murder of Ms. Blodgett. App. 10a. Petitioner then pleaded guilty to first-degree reckless endangerment for the attack on M.R. App. 10a. The trial court sentenced Petitioner to life in prison without the possibility of parole for Ms. Blodgett's murder and to five years' imprisonment and five years' extended supervision for the attack on M.R., to run consecutive to his life sentence. App. 10a.

Petitioner appealed his conviction, claiming that the trial court improperly denied his suppression motion because he was in custody when he asked about an attorney and his comments about an attorney constituted an unequivocal request for counsel. *See* App. 49a–50a. The Wisconsin Court of Appeals upheld the conviction. App. 39a–67a. The court assumed without deciding that Petitioner made an unequivocal request for counsel as required by this Court's caselaw, App. 51a n.6, but determined that Petitioner was not in custody until after he made this request, and therefore *Miranda-Edwards* did not apply, App. 53a–66a. The court rejected Petitioner's argument that his admissions placed him in custody. App. 61a–63a. The court decided that because the detectives did not change the circumstances of the interview in response to Petitioner's admissions, those admissions did not place him in custody. App. 63a–64a.

C. The Wisconsin Supreme Court affirmed, App. 1a–38a, rejecting Petitioner's argument that his admissions placed him into custody. Only police can take a suspect into custody, so the analysis must focus on whether law enforcement reacted to a confession by changing the atmosphere of the interview "such that a reasonable person would not feel free to leave." *See* App. 25a. Because the detectives did not respond to Petitioner's admissions by restraining Petitioner's freedom to "the degree associated with an arrest," but instead maintained the non-custodial tone of the interview, the detectives did not place Petitioner in

custody. App. 25a–27a. Later, the detectives did place Petitioner into custody when they took Petitioner's cell phone and instructed Petitioner to remain in the interview room, just before placing Petitioner under formal arrest. App. 29a; App. 8a. But because the detectives did not take these actions until after Petitioner had made comments about an attorney, Petitioner's comments about an attorney did not invoke *Miranda-Edwards*. App. 29a. The Court, therefore, declined to address the issue of whether Petitioner's comments about an attorney constituted an unequivocal request for counsel. App. 29a.

Two Justices dissented, App. 29a–38a, concluding that, under the totality of the circumstances—including that Petitioner had admitted to the attack on M.R.—Petitioner was in custody when he made comments about an attorney, App. 32a–36a. The dissenting Justices also addressed the second issue and determined that Petitioner's comments about an attorney were sufficient to constitute an unequivocal request for counsel under *Miranda-Edwards*. App. 36a–38a.

Petitioner then timely filed the Petition.

REASONS FOR DENYING THE PETITION

I. The Vast Majority Of Courts To Have Addressed The Question Presented Agree With The Wisconsin Supreme Court That A Suspect Does Not Automatically Place Himself Into Custody By Confessing

A. As described below, a suspect is entitled to *Miranda-Edwards*' protections only if the suspect is in custody during the interrogation. *See infra* p. 18. The overwhelming majority of state courts of last resort and the only federal Court of Appeals to have opined on the issue agree with the Wisconsin Supreme Court that a suspect who is not in police custody during an interrogation does not automatically place himself into custody by confessing, such that the suspect becomes entitled to *Miranda-Edwards*' protections.

Tenth Circuit. In *United States v. Chee*, 514 F.3d 1106 (10th Cir. 2008), the Tenth Circuit rejected the defendant's argument that his confession at a police station placed him into custody, explaining that "the tone [of the law enforcement questioning] remained calm and conversational throughout the interrogation," and thus "a reasonable person in [the defendant's] situation would not believe he was effectively under arrest," *id.* at 1114.

Connecticut. In *Connecticut v. Lapointe*, 678 A.2d 942 (Conn. 1996), police interviewed the defendant at

a police station regarding a kidnapping, sexual assault, murder, and arson, and the defendant made "several incriminating oral and written statements," *id.* at 943–44, 946–47. The defendant argued "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." *Id.* at 958. The Connecticut Supreme Court disagreed, explaining that while "admissions of culpability may lead the police either to arrest a suspect or to place restraints on his freedom approximating an arrest, the police in this case never altered the circumstances of their interviews of the defendant in such a way that his initial noncustodial status became custodial." *Id.* at 958–59; *accord Connecticut v. Edwards*, 11 A.3d 116, 125–26 (Conn. 2011).

District of Columbia. In *Graham v. United States*, 950 A.2d 717 (D.C. 2008), the defendant admitted to theft during a station-house interview with the police, *id.* at 722–23. The District of Columbia Court of Appeals held that the suspect was not in custody after admitting to the theft because the police "did not react as if" the defendant's admissions placed him under arrest. *Id.* at 730–31.

Kansas. In *Kansas v. Vandervort*, 72 P.3d 925 (Kan. 2003), *overruled on other grounds by Kansas v. Dickey*, 350 P.3d 1054 (Kan. 2015), the Kansas Supreme Court held that the defendant was not in custody at the police station after he admitted, as

soon as he entered the station, to having had sex with his children, *id.* at 928–32.

Louisiana. In *Louisiana v. Redic*, 392 So. 2d 451 (La. 1980), the Louisiana Supreme Court determined that the defendant, who immediately confessed to police officers after entering the station, was not in custody until sometime after the confession, explaining that the "absence of any other pertinent factor mitigates against a finding that the relationship was 'custodial,'" *id.* at 452–54.

Maryland. In *Thomas v. Maryland*, 55 A.3d 680 (Md. 2012), police interviewed the defendant at the police station regarding alleged sexual abuse of his daughter and he confessed to sexually assaulting her, *id.* at 682. The Court of Appeals of Maryland held that the confession did not place the defendant into custody, explaining that "[i]f confession is the trigger for custody, [ ] then each person who confesses in a police station must have been given *Miranda* warnings *per se*, which is without basis in *Miranda* jurisprudence." *Id.* at 689.

Massachusetts. In *Massachusetts v. Hilton*, 823 N.E.2d 383 (Mass. 2005), police interviewed the defendant about an arson that had caused the deaths of five people, and the defendant eventually confessed, *id.* at 388–90. The Massachusetts Supreme Judicial Court explained that the defendant did not immediately place herself into custody because her "confession proceeded[ ] without any

change in the tenor of the questioning or any apparent change in her status." *Id.* at 397. The police did not place the defendant into custody until later, when they changed the tenor of the questioning. *Id.*

Minnesota. In *Minnesota v. Champion*, 533 N.W.2d 40 (Minn. 1995), the Minnesota Supreme Court explained that "[c]ase law [ ] does not support th[e] rule" that a suspect's confession automatically places him in custody, *id.* at 43. Instead, a suspect's admission is a factor to take into account when determining custody, but it is not "dispositive." *Minnesota v. Heden*, 719 N.W.2d 689, 695 (Minn. 2006); *see also Minnesota v. Staats*, 658 N.W.2d 207, 211 (Minn. 2003).

New Hampshire. In *New Hampshire v. Locke*, 813 A.2d 1182 (N.H. 2002), police interviewed the defendant at the police station regarding a robbery and murder, *id.* at 1186–87. The defendant admitted to involvement in the robbery and, later, to involvement in the murder. *Id.* at 1187–88. The New Hampshire Supreme Court explained that the defendant was not in custody after making admissions as to the robbery because "the character and tone of the interview [did not] substantially change[ ]." *Id.* at 1189.

Vermont. In *Vermont v. Oney*, 989 A.2d 995 (Vt. 2009), the Vermont Supreme Court explained that "[a] noncustodial situation does not become custodial automatically because the interviewee has confessed

to a crime," *id.* at 999–1000. A confession is "just one of the circumstances to consider in evaluating whether a reasonable person would believe he or she was free to leave." *Id.* at 1000; *accord Vermont v. Muntean*, 12 A.3d 518, 528–29 (Vt. 2010).[2]

Consistent with the Tenth Circuit and all of these state courts of last resort, the Wisconsin Supreme Court held in the present case that Petitioner's admissions to police did not automatically transform the non-custodial station-house interview into a custodial one. App. 25a–27a. The court explained that its inquiry must focus on the actions of law enforcement and that because law enforcement did not change the atmosphere of the interview "such that a reasonable person would not feel free to leave," Petitioner was not in custody even after his admissions. App. 25a–27a.

B. Petitioner claims that numerous courts have adopted his view that a confession can automatically place a suspect into custody, even without any change in the interrogation atmosphere by the police, Pet. 9–13, but only two courts of last resort support his

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[2] Contrary to Petitioner's claim, Pet. 17, *West Virginia v. Farley*, 797 S.E.2d 573 (W. Va. 2017), does not squarely address the Question Presented. In that case, the West Virginia Supreme Court of Appeals determined that the challenged statements were a "mere continuation" of the defendant's previous statements, and therefore police did not need to re-administer *Miranda* warnings. *Id.* at 586–87.

position. In *Jackson v. Georgia*, 528 S.E.2d 232 (Ga. 2000), the Georgia Supreme Court held that a suspect was in custody the moment he confessed to involvement in a murder, *id.* at 234–35. And in *Kolb v. Wyoming*, 930 P.2d 1238 (Wyo. 1996), the Wyoming Supreme Court held that the defendant was in custody the moment he confessed to killing the victim, *id.* at 1244.

None of the other relevant cases that Petitioner cites adopt his position.[3] Petitioner points to *Locke v. Cattell*, 476 F.3d 46 (1st Cir. 2007), Pet. 13, but the First Circuit held, in a case arising under the Antiterrorism and Effective Death Penalty Act, that the suspect was *not* in custody after confessing because "no Supreme Court case supports [defendant's] contention that admission to a crime transforms an interview by the police into a custodial interrogation," *Locke*, 476 F.3d at 53. While the First Circuit observed that it "might well [have] reach[ed] a different result" "[i]f the case were . . . on de novo review," *id.* at 54, that is dicta. Although Petitioner claims that the Massachusetts Supreme Judicial Court adopted his position in *Massachusetts v. Smith*, 686 N.E.2d 983 (Mass. 1997), Pet. 10–11, that court's subsequent decision in *Hilton*, 823 N.E.2d 383, discussed *supra* pp. 13–14, adopted precisely the

[3] While Petitioner cites some intermediate state courts that adopt his position, Pet. 9–10, 12–13, decisions of intermediate state courts do not create a split of authority warranting this Court's review, Sup. Ct. R. 10(a)–(b).

same approach to the Question Presented as the Wisconsin Supreme Court did. Similarly, *Ruth v. Texas*, 645 S.W.2d 432 (Tex. Ct. Crim. App. 1979), Pet. 11, does not support Petitioner, as the Texas Court of Criminal Appeals has, in a subsequent decision, made clear that it will consider a defendant's confession as only one factor in the totality of the circumstances, *see Dowthitt v. Texas*, 931 S.W.2d 244, 256–57 (Tex. Ct. Crim. App. 1996). The Vermont Supreme Court has taken the same approach. *See supra* pp. 14–15. Finally, while Petitioner claims that the Florida Supreme Court supports his position, Pet. 9–10, its decision in *Roman v. Florida*, 475 So. 2d 1228 (Fla. 1985), did not determine whether a suspect's confession places him in custody. Instead, the court held that the defendant was *not* in custody "prior to giving his [inculpatory] statement," which was the only statement at issue. *Id.* at 1232.

II. The Wisconsin Supreme Court Correctly Determined That Petitioner Did Not Place Himself Into Custody By Confessing

A. The Fifth Amendment to the United States Constitution provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V.[4] In *Miranda*, this Court created a set of "[p]rocedural safeguards" that

[4] This Court has held this privilege applicable against the States through the Fourteenth Amendment. *Malloy*, 378 U.S. at 6; U.S. Const. amend. XIV.

law enforcement must employ "when an individual is taken into custody or otherwise deprived of his freedom by the authorities in any significant way and is subjected to questioning." 384 U.S. at 478–79. *Miranda*'s safeguards apply when "the police take a suspect into custody and then ask him questions." *Berkemer v. McCarty*, 468 U.S. 420, 429 (1984). Police must inform the individual of his rights to remain silent and to counsel and may not use any statements or evidence obtained from the interrogation "unless and until" the individual waives those rights. *Miranda*, 384 U.S. at 479. If the individual requests counsel, "the interrogation must cease until an attorney is present." *Id.* at 474. In *Edwards*, this Court held that if an individual in custody "has clearly asserted his right to counsel," police may not "reinterrogate" the individual unless the individual himself reinitiates the conversation voluntarily. 451 U.S. at 485; *see also Arizona v. Roberson*, 486 U.S. 675 (1988) (applying this rule when the latter interrogation involves a different criminal investigation). To trigger the protections of *Miranda-Edwards*, a suspect "must unambiguously request counsel." *Davis v. United States*, 512 U.S. 452, 459 (1994).

The protections of *Miranda* and *Edwards* attach only when an individual is "in custody," *see Minnesota v. Murphy*, 465 U.S. 420, 430 (1984), the determination of which comprises a two-part inquiry.

First, the court must 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." *Howes v. Fields*, 565 U.S. 499, 509 (2012) (citations omitted). The court must look to the totality of the objective circumstances, including "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). Factors indicating non-custody include that the interviewee came to the station voluntarily, *Oregon v. Mathiason*, 429 U.S. 492, 495 (1977); that friends or relatives waited for the interviewee at the station, *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004); that the interviewee could physically leave the room and was not restrained, *see Howes*, 565 U.S. at 515; *Murphy*, 465 U.S. at 433; that only one or two officers interviewed the individual, *see Berkemer*, 468 U.S. at 438; that police told the interviewee he was free to leave, *Mathiason*, 429 U.S. at 495; and that the interview was short, *id.*

If a court determines that, based on the objective circumstances, a reasonable person would not have felt free to leave, the court must engage in a second inquiry. The court must decide "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. This is because "'the freedom-of-movement test identifies

only a necessary and not a sufficient condition for *Miranda* custody.'" *Id.* (quoting *Maryland v. Shatzer*, 559 U.S. 98, 112 (2010)).

B. In the present case, the Wisconsin Supreme Court correctly held that Petitioner did not place himself into custody by confessing to a crime.

As an initial matter, the Wisconsin Supreme Court correctly determined that Petitioner was not in custody at the beginning of his interview, a conclusion that Petitioner conceded below. App. 18a. Petitioner came to the Slinger Police Department voluntarily. App. 3a; *Mathiason*, 429 U.S. at 495. Two friends dropped Petitioner off and waited for him outside. App. 4a; *Yarborough*, 541 U.S. at 664. Petitioner could freely exit the interview room and the police department: the door to the main building was unlocked, the door to the police department lobby was unlocked, a second door leading to the internal portion of the police department did not lock from the inside, the doors to the interview room did not lock, and the detectives left at least one of these doors ajar. App. 3a–4a, 41a–42a; *see Howes*, 565 U.S. at 515; *Murphy*, 465 U.S. at 433. The detectives did not search Petitioner and did not place him in any restraints. App. 19a; *see Howes*, 565 U.S. at 515; *Murphy*, 465 U.S. at 433. Only two detectives interviewed Petitioner. App. 4a, 42a; *see Berkemer*, 468 U.S. at 438. The detectives spoke in a calm, conversational tone throughout the interview. App. 8a, 20a, 46a. Detective Clausing told Petitioner

at the outset of the interview that he was not in trouble, not under arrest, and could leave at any time. App. 4a, 19a, 42a; *Mathiason*, 429 U.S. at 495.[5] Finally, the entire interview lasted just over half an hour. App. 8a; *Mathiason*, 429 U.S. at 495.

After determining that the interview was not custodial at the outset, the Wisconsin Supreme Court then correctly rejected Petitioner's core argument that his confession transformed the non-custodial interview into a custodial one. App. 25a–29a. *Miranda* applies when "the police take a suspect into custody and then ask him questions." *Berkemer*, 468 U.S. at 429. If police do nothing to change a non-custodial situation, they have not "take[n] a suspect into custody." As the Wisconsin Supreme Court correctly held, custody turns not on what the suspect says, but on how law enforcement responds to those statements. App. 25a. If the police do nothing to alter a non-custodial interview in response to a suspect's admission, then they have not "take[n] [the] suspect into custody." *Berkermer*, 468 U.S. at 429. For example, in *Mathiason*, the defendant admitted at the police station to having burglarized a home. 429 U.S.

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[5] An *amicus* brief claims that some police departments train their officers to lie to suspects by telling them that they are free to leave in order to keep the interview non-custodial. *See* Roderick and Solange MacArthur Justice Center Br. 3–15. The present case does not present that issue. Nothing in the record even arguably suggests that Detective Clausing lied to Petitioner when he told Petitioner at the outset of the interview that Petitioner was free to leave. *See* App. 3a–4a, 41a–42a.

at 493. In its custody analysis, this Court focused on what the police had actually done, and found that the defendant's "freedom to depart was [not] restricted in any way" and therefore he was not in custody. *Id.*; *accord Berkemer*, 468 U.S. at 441–42.

Similarly, during the interview here, after Petitioner admitted to having run after M.R. and knocking her down with a knife, the detectives acted no differently. App. 7a–8a, 45a–47a. The detectives did not restrain Petitioner; rather, they maintained a calm, conversational tone and simply asked Petitioner if he would be willing to provide a written statement. App. 7a–8a, 46a. As the Wisconsin Supreme Court correctly held, because the detectives did nothing to alter the circumstances of the interview in response to Petitioner's admissions, Petitioner was not in custody. App. 25a–26a.

Later, *after* Petitioner made comments about an attorney, the detectives did place Petitioner into custody. Shortly after discussing the option of speaking with an attorney, Detective Clausing took Petitioner's cell phone from him. App. 8a, 46a. The detectives then left the room and instructed Petitioner to stay where he was. App 2a, 8a. These actions on the part of law enforcement restrained Petitioner's freedom of movement and changed the atmosphere of the interview to one that was more coercive. *See Howes*, 565 U.S. at 509. The detectives' taking of Petitioner's cell phone prevented Petitioner from speaking with individuals outside of the

police department, making the environment "incommunicado" and "police-dominated." *Miranda*, 384 U.S. at 455. And Petitioner knew from the detectives' directive that he was restrained from leaving the interview room. *Howes*, 565 U.S. at 509. Thus, as the Wisconsin Supreme Court correctly determined, the detectives placed Petitioner in custody through these actions. App. 2a, 29a. But because Petitioner made comments about an attorney only before the detectives placed him in custody, he did not invoke the protections of *Miranda-Edwards*. App. 29a.

C. Petitioner argues that because, in his view, no one would feel free to walk away after confessing, every person who confesses in a police station places himself into custody. Pet. 20. But *Miranda*'s "extraordinary safeguard does not apply outside the context of the inherently coercive custodial interrogations for which it was designed." *Murphy*, 465 U.S. at 430 (citation omitted). *Miranda*'s protection applies "'only in those types of situations in which the concerns that powered the decision are implicated.'" *Shatzer*, 559 U.S. at 112–13 (quoting *Berkemer*, 468 U.S. at 437). The types of situations that powered *Miranda* are those in which an individual is "*deprived* of his freedom" and "*thrust* into an unfamiliar atmosphere" that is "incommunicado[,] police-dominated," and "carries its own badge of intimidation" "to subjugate the individual to the will of his examiner." *Miranda*, 384 U.S. at 445, 456–57, 478 (emphases added). This

deprivation of freedom and creation of an intimidating atmosphere is something that is done "by the authorities." *Id.* at 478; *accord Berkemer*, 468 U.S. at 429. A suspect cannot "deprive[ ] [himself] of his freedom" nor create a "police-dominated atmosphere" by making a confession. *Miranda*, 384 U.S. at 456, 478.

Petitioner's contrary rule—a suspect can place himself into custody by confessing, without any reactive actions by the authorities—would lead to absurd results that this Court could never have intended when it created *Miranda*'s prophylactic regime. As *Miranda* explained, "[t]here is no requirement that police stop a person who enters a police station and states that he wishes to confess to a crime." 384 U.S. at 478. Yet, under Petitioner's desired rule, if police are questioning a suspect in a police station under non-custodial conditions and the suspect confesses to a crime, police must then "stop," *id.*, the suspect from confessing further until they have administered *Miranda* warnings, lest any answers that the suspect gives to follow-up questions (and evidence derived from those answers) be unavailable at trial.

III. This Case Is A Poor Vehicle For Addressing The Question Presented

This case is a poor vehicle because answering the Question Presented could not possibly help Petitioner's cause. For Petitioner to successfully

challenge the trial court's decision on his suppression motion, Petitioner must prevail on (as relevant here) two issues: (1) whether he was in custody, and (2) whether his comments about an attorney constituted an unequivocal request for counsel under *Davis*, 512 U.S. 452, such that his comments triggered the *Miranda-Edwards* rule, *see* App. 29a; *supra* pp. 9–10. The Wisconsin Supreme Court did not reach the second issue because it found that Petitioner was not in custody. App. 29a.

If this Court were to rule for Petitioner on the Question Presented, he would surely lose on remand on the unequivocal-request issue, thereby providing him no relief on his suppression motion. In *Davis*, this Court held that a "suspect must *unambiguously* request counsel" in order to trigger the protections of *Miranda-Edwards*. 512 U.S. at 459 (emphasis added). This Court then agreed with the lower court that Davis' comment, "Maybe I should talk to a lawyer," was insufficiently clear. *Id.* at 462. In the present case, neither of Petitioner's comments was sufficiently unambiguous to trigger *Miranda-Edwards*, in light of *Davis*. Petitioner's question, "Should I or can I speak to a lawyer or anything," App. 8a, was not an unambiguous request for counsel, but was more clearly a question seeking advice and clarification from Detective Clausing. And like the defendant's comment in *Davis*, Petitioner's comment, "I think I'd prefer [to speak to a lawyer]," App. 8a, was too ambiguous to trigger *Miranda-Edwards*. While this comment might have indicated that Petitioner

wished to speak to counsel, Petitioner might also have been merely "think[ing]" about it. Under *Davis*, this type of ambiguous comment is simply insufficient to trigger the protections of *Miranda-Edwards*.

While granting review would not benefit Petitioner, the continued pendency of this case would needlessly harm the victims of Petitioner's heinous crimes and their families. Both M.R., whom Petitioner attacked and seriously injured, and the family of Ms. Blodgett, the person whom Petitioner murdered by strangulation, would need to endure many additional months of anguish when no answer to the Question Presented could impact the bottom-line judgment on the suppression motion.

CONCLUSION

This Court should deny the Petition.

Respectfully submitted,

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