No. 17-1584

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

REPLY BRIEF FOR PETITIONER

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

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Wisconsin offers three arguments for denying the petition—first, that the lower courts are divided 11-2 rather than 9-6 (BIO 11-17); second, that the decision below is correct (BIO 17-24); and third, that this case is a poor vehicle (BIO 24-26). All three of these claims are mistaken.

First, Wisconsin misunderstands some of the state supreme court cases. The highest courts of Florida, Georgia, Massachusetts, Texas, Vermont, and Wyoming have all reached holdings precisely opposite to the one reached below by the Wisconsin Supreme Court. The split really is 9-6.

Second, Wisconsin is wrong on the merits. An interrogation at a police station becomes custodial when "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) (citation, brackets, and quotation marks omitted). Any reasonable person would know that the police will not let him leave the police station after he has confessed to a serious crime. After such a confession, therefore, the interrogation becomes custodial. Contrary to Wisconsin's parade of horribles, this conclusion does not authorize a defendant to "place himself into custody" (BIO 20). Nor does it require the police to stop "the suspect from confessing further until they have administered *Miranda* warnings" (BIO 24). It merely requires the police to honor a suspect's request for a lawyer after the suspect has confessed to a serious crime.

Third, Wisconsin is incorrect in calling this case a poor vehicle. As we explained in our certiorari petition (Pet. 8 n.1), because the state courts below held

that Daniel Bartelt was not in custody when he requested a lawyer, the state courts did not reach the question whether his request was unequivocal. There can be little doubt that it *was* unequivocal. Bartelt asked, "can I speak to a lawyer," and then, when he was told that he could, replied, "I think I'd prefer that." Pet. App. 8a. If the Court grants certiorari and reverses, Wisconsin will be free on remand to reassert its dubious theory that this request was ambiguous, but the remote chance that the state might prevail on this argument is hardly a reason to deny certiorari.

ARGUMENT

I. The lower courts are divided 9-6 on the question presented.

Six state supreme courts have correctly held that an interrogation becomes custodial once the defendant confesses to a serious crime, because at that point everyone knows the defendant is no longer free to leave. *Roman v. State*, 475 So. 2d 1228, 1231-32 (Fla. 1985) ("occasions would be rare when a defendant 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."); *Jackson v. State*, 528 S.E.2d 232, 235 (Ga. 2000) ("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."); *Commonwealth v. Smith*, 686 N.E.2d 983, 987 (Mass. 1997) ("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"); *Dowthitt v. State*, 931 S.W.2d 244, 257 (Tex. Ct. Crim. App. 1996) ("we believe that 'custody' began after appellant admitted to his presence during the murders"); *State v. Muntean*, 12 A.3d 518, 528 (Vt. 2010) (holding that custody begins when the police have evidence the defendant has committed a serious crime, particularly "where, as here, the defendant has confessed to at least some of the allegations made against him"); *Kolb v. State*, 930 P.2d 1238, 1244 (Wyo. 1996) ("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.").

Wisconsin concedes (BIO 16) that the decision below conflicts with the Georgia Supreme Court's decision in *Jackson* and the Wyoming Supreme Court's decision in *Kolb*. But Wisconsin misunderstands (BIO 16-17) the cases in the other four states on this side of the split.

Florida: Wisconsin asserts (BIO 17) that the Florida Supreme Court did not address our issue in *Roman*. This assertion would come as a surprise to Florida's judges, who understand *Roman* to mean that an interrogation becomes custodial when the defendant confesses to a serious crime. *See Cushman v. State*, 228 So. 3d 607, 618 (Fla. Ct. App. 2017) (citing *Roman* for the principle that "[w]hat begins as a noncustodial interrogation accordingly may be transformed into a custodial interrogation by a confession that the suspect utters during the interrogation");

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.").

Florida's intermediate appellate courts are reading *Roman* more accurately than Wisconsin is. In *Roman*, the defendant confessed after a non-custodial interrogation. *Roman*, 475 So. 2d at 1230. He argued that "he was in custody during the time he was interrogated"—that is, before his confession. *Id.* at 1231. The Florida Supreme Court held that custody began only *after* he confessed, because it was only after the confession that "the noncustodial atmosphere leading up to a confession and probable cause would thereby be expected to be converted to a custodial one." *Id.* at 1231-32. Had our case arisen in Florida, the outcome would have been different.

Massachusetts: Wisconsin is under the mistaken impression (BIO 13-14, 16-17) that the Massachusetts Supreme Judicial Court overruled *Smith* in *Commonwealth v. Hilton*, 823 N.E.2d 383 (Mass. 2005). But *Hilton* expresses no disapproval of *Smith*. Rather, *Hilton* repeats *Smith*'s holding that "as a suspect makes incriminating statements, a previously noncustodial setting can become custodial—a person who has just confessed to a crime would reasonably expect that she was no longer free to leave." *Id.* at 396. In *Hilton*, the court rejected the defendant's attempt to push the onset of custody even earlier, to the precise moment she *began* to confess, rather than afterwards. "[A]n interview does not automatically become custodial at the instant a defendant starts to confess," the court held. *Id.* The court "de-

cline[d] to 'freeze-frame' the instant when the defendant first made an inculpatory remark." *Id.* at 397.

The view of the Massachusetts Supreme Judicial Court—that custody begins *after* a defendant confesses, not at the moment the defendant begins to confess—is identical to the views of the other state supreme courts on this side of the split. Under this view, the defendant's confession is admissible, because it was elicited in a non-custodial interrogation. But additional statements made by the defendant in response to subsequent questioning are governed by the *Miranda-Edwards* line of cases, because the subsequent interrogation is custodial. Had our case arisen in Massachusetts, the outcome would have been different.

Texas: Wisconsin makes the puzzling claim (BIO 17) that the Texas case we principally discuss in our certiorari petition was subsequently overruled by *Dowthitt*. But *Dowthitt is* the case we principally discuss in our certiorari petition. Pet. 11. In *Dowthitt*, the Texas Court of Criminal Appeals held that a defendant's confession converted "a noncustodial encounter into a custodial one." *Dowthitt*, 931 S.W.2d at 256. The court observed that the case was similar to one of its earlier cases, *Ruth v. State*, 645 S.W.2d 482 (Tex. Ct. Crim. App. 1979), "where a pivotal admission established custody." *Dowthitt*, 931 S.W.2d at 256. The court noted that other factors, including the length of the interrogation, pointed toward the same conclusion, and then held that "'custody' began after appellant admitted to his presence during the murders." *Id.* at 257. Had our case arisen in Texas, the outcome would have been different.

Vermont: Wisconsin erroneously shifts Vermont (BIO 14-15, 17) to the opposite side of the split. In *Muntean*, the Vermont Supreme Court held that a reasonable defendant would not feel free to leave "where, as here, the defendant has confessed to at least some of the allegations made against him." *Muntean*, 12 A.3d at 528. The court distinguished *State v. Oney*, 989 A.2d 995, 1000 (Vt. 2009), a case in which the defendant had merely confessed to misdemeanors and thus *would* feel free to leave. *Muntean*, 12 A.3d at 528. The court reasoned that because the state's police officers typically issue citations for misdemeanors rather than taking defendants into custody, "a reasonable person in the defendant's situation in *Oney* would not expect to be arrested and detained by the police at the end of the interview." *Id.* The defendant in *Muntean*, by contrast, confessed to sexually abusing his children, so he "would not have felt as though he remained free to leave." *Id.* Had our case arisen in Vermont, the outcome would have been different.

Wisconsin's tally of the lower court conflict thus rests on a misunderstanding of several of the cases. There are six state supreme courts, not two, that agree with our view of this issue and disagree with the view of the Wisconsin Supreme Court.

II. The decision below is wrong.

An interrogation at a police station is custodial where a reasonable person would know that the police will not let him leave. *Thompson v. Keohane*, 516 U.S. 99, 112 (1995). All reasonable people know that if they confess in a police station to a serious crime,

they will not be free to leave. We urge anyone who doubts that to give it a try and see what happens.

Contrary to Wisconsin's view (BIO 20), this conclusion does not allow a suspect to "place himself into custody," except insofar as anyone can place himself into custody by committing a serious crime and then surrendering to the police. Custody is an objective inquiry that does not depend on the subjective intentions or beliefs of the defendant or the police. *Stansbury v. California*, 511 U.S. 318, 323 (1994) (per curiam). A defendant cannot place himself into custody simply by wishing it so. Custody exists only where a reasonable person would know he is not free to leave.

Wisconsin's error stems in part from its mistaken view that in our case the police did "nothing to change a non-custodial situation" (BIO 21) into a custodial one. The police did something extremely significant: They interrogated Daniel Bartelt until he confessed to a serious crime. His confession changed the objective circumstances of the encounter. When Bartelt entered the police station, a reasonable person would have deemed him free to leave. But after he confessed, no reasonable person would have thought he could leave. That is the definition of custody.

Because custody is an objective inquiry, Wisconsin errs in suggesting (BIO 21) that "custody turns not on what the suspect says, but on how law enforcement responds to those statements." Custody does not depend *solely* on what the suspect says, nor *solely* on how law enforcement responds, but on "all of the circumstances surrounding the interrogation." *Stansbury*, 511 U.S. at 322. Among these circum-

stances are "statements made during the interview," *Howes*, 565 U.S. at 509, by both parties. In determining whether custody exists, a court can no more ignore the defendant's words than it can ignore the police's actions.

Wisconsin further errs in claiming (BIO 24) that this conclusion requires the police to stop a defendant from confessing until they have administered *Miranda* warnings. The police need not interrupt a confession. They are free to let the defendant finish confessing. The confession will be admissible, because it was elicited when the interrogation was non-custodial.

When the defendant has finished confessing to a serious crime, however, the interrogation becomes custodial, because at that point reasonable people know that the defendant is no longer free to leave. From that point forward, the police must inform the defendant of his right to counsel and they must honor his request for a lawyer.

This conclusion is not just compelled by the Court's precedents; it is also sound policy, because it creates the right incentives for the police. This issue arises where what begins as a non-custodial conversation turns into an interrogation of a defendant who will be kept in jail. Once it is clear that the objective nature of the interaction has changed, the defendant needs a lawyer. We should be encouraging the police to respect the defendant's request for counsel. That is the purpose of the *Miranda* line of cases.

The decision below, by contrast, creates a terrible incentive for the police. It allows the police to disregard a defendant's requests for counsel by the simple device of speaking softly and refraining from telling

the defendant he is in custody. As amicus MacArthur Justice Center points out, there is evidence that the police are already pursuing this strategy, and it is hardly far-fetched to suppose that the decision below will encourage police departments in Wisconsin to do the same.[1]

III. This case is an excellent vehicle.

Wisconsin, with unjustified bravado, predicts (BIO 24-26) that if the Court were to grant certiorari and reverse, the state will win anyway on remand, because Bartelt's request for counsel was equivocal. Not so. Bartelt unambiguously asked for a lawyer. The lower courts did not reach this issue because they held that Bartelt was not in custody. On remand, they will most likely determine that Bartelt's request for counsel was unequivocal.

Bartelt asked, "Should I or can I speak to a lawyer or anything?" Pet. App. 8a. Detective Joel Clausing responded, "Sure, yes. That is your option." Pet. App. 8a. Bartelt replied, "I think I'd prefer that." Pet. App. 8a. But the police did not honor this request. Rather, they handcuffed Bartelt, clapped him in jail, and then resumed the interrogation the following day. Pet. App. 8a.

When Bartelt said "I think I'd prefer that," he was clearly saying that he preferred to have a lawyer. The only judges below who reached this issue, the two dissenting Justices of the Wisconsin Supreme

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[1] Wisconsin seems to misunderstand (BIO 21 n.5) the point of the amicus brief. Amicus is not accusing the officers in this case of dishonesty. Rather, amicus is explaining that the rule adopted by the Wisconsin Supreme Court will encourage officers to be dishonest in the future.

Court, had no trouble understanding what he meant. As they explained, suppose

> a customer went to a restaurant and asked the waiter, "What kind of light beers do you have on tap," and the waiter responded, "Miller Lite and Bud Light." If the customer then said, "Okay, I think I'd prefer a Miller Lite," no reasonable person would think this was anything other than a clear request for a Miller Lite.

Pet. App. 38a (internal quotation marks omitted).

In arguing to the contrary, Wisconsin relies entirely on *Davis v. United States*, 512 U.S. 452 (1994). But *Davis* is nothing like our case. In *Davis*, the defendant said "Maybe I should talk to a lawyer." *Id.* at 455. The police immediately stopped the questioning to clarify whether the defendant actually wanted a lawyer. *Id.* The defendant then explained "No, I'm not asking for a lawyer …. No, I don't want a lawyer." *Id.* The police accordingly resumed questioning. *Id.* The Court held that the defendant had not requested a lawyer with sufficient clarity to render his subsequent statements inadmissible. *Id.* at 462.

Our case is completely different. In our case, when given the opportunity to clarify his request, Bartelt unambiguously said he'd prefer to have a lawyer. But the police ignored his request.

Our case is thus a perfect vehicle for answering the question presented. This issue has divided the lower courts for a long time now. All the arguments on both sides have been fully aired. There is nothing to be gained by waiting for the conflict to grow even larger.

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