

No. \_\_\_\_\_

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In The  
Supreme Court of the United States

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RONNIE RICKS, JR.,  
*Petitioner,*

v.

THE STATE OF TEXAS,  
*Respondent.*

◆

ON PETITION FOR WRIT OF CERTIORARI TO  
THE COURT OF CRIMINAL APPEALS OF TEXAS

◆

PETITION FOR WRIT OF CERTIORARI

◆

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*Dated: June 24, 2019*

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**QUESTION PRESENTED FOR REVIEW**

Whether showing a videotape containing testimonial actions is proper, after an accused has invoked his right to counsel?

**LIST OF ALL PARTIES TO THE PROCEEDING**

The names of all the parties to the proceeding in the court whose judgment is sought to be reviewed are contained in the caption of this case. To the best of the Petitioner's knowledge, none of the parties has a parent company or non-wholly owned subsidiary, and if they do the acts and/or omissions of the parent and/or non-wholly owned subsidiary are in no way implicated by this case.

**LIST OF DIRECTLY RELATED  
PROCEEDINGS**

The following proceedings are directly related to this case:

*State v. Ricks*, Cause No. 14F1149-005, 5th Judicial District Court of Bowie County, Texas, judgment signed November 6, 2017;

*Ricks v. State*, Case No. 06-18-00016-CV, Sixth Court of Appeals for Texas at Texarkana, opinion issued August 30, 2018; and

*Ricks v. State*, Case No. PD-1099-18, Texas Court of Criminal Appeals, discretionary review refused March 27, 2019.

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## **OPINIONS AND ORDERS BELOW**

Ricks was convicted of burglary of a habitation by the 5th Judicial District Court of Bowie County, Texas. Appendix at 11a. This conviction was affirmed by the Texarkana Court of Appeals. *Ricks v. State*, 06-18-00016-CV, 2018 WL 4135037 (Tex. App. — Texarkana Aug. 30, 2018, pet. ref'd), *cert. filed*. Appendix at 2a. A Petition for Discretion Review of this decision was denied by the Texas Court of Criminal Appeals. Appendix at 1a.

## **STATEMENT OF JURISDICTION**

The decision of the Court of Appeals for the Sixth District of Texas at Texarkana sought to be reviewed was decided on August 30, 2018, and the request that the Texas Court of Criminal Appeals review the decision was denied on March 27, 2019. There has been no order granting an extension of time to file a petition for writ of certiorari. There has been no cross-petition for writ of certiorari filed. Jurisdiction to review the decision in question by writ of certiorari is conferred on this Court by 28 U.S.C. § 1257(a). This case does not require notification under Sup. Ct. R. 29.4(b) or (c).

## STATUTORY PROVISIONS AND REGULATIONS INVOLVED

U.S. Const., Amendment 5, provides:

No person shall be compelled in any criminal case to be a witness against himself.

*Miranda v. Arizona*, 384 U.S. 436, 444-45 (1966) provides:

If, however, he [a defendant] indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning [by the police].

### STATEMENT OF THE CASE

#### Statement of the Facts

Ricks was charged with burglary of a habitation, arising from an assault on a woman at a hotel. Ricks (along with other suspects) was questioned by the police, an interaction that was videotaped. After answering some questions Ricks invoked his right to counsel. However, this request was not honored and the interrogation continued, as did the recording.

At trial, the State offered the videotape of Ricks being interrogated. By both pretrial motion, and by an objection made during trial, Ricks objected to the admission of the tape of his interrogation because it was "illegally obtained in violation of the Fifth Amendment.. The trial court ruled the tape could be shown to the point where Ricks invoked his right to counsel. After that point the video could still be shown without the audio, i.e., the video played

with the sound turned down, because the trial court agreed with the State to allow the jurors to review the demeanor of Ricks (for approximately ten minutes).

The video shows that, under the continued questioning, Ricks made expressive gestures indicative of guilt, gestures requiring no sound to convey their meaning. The jury was allowed to see this portion of the video, despite the objections.

### **Proceedings Below**

Ricks was convicted by the jury. Appendix at 11a. Ricks appealed, and this decision was affirmed by the Court of Appeals. Appendix at 2a. Ricks asked the Texas Court of Criminal Appeals to exercise its discretion to review the case, a request that was refused. Appendix at 1a.

### **Basis for Federal Jurisdiction in the Court of First Instance**

Because this case began in the state courts, this Court is the first federal court to exercise jurisdiction over this matter, and such jurisdiction is conferred by 28 U.S.C. § 1257(a).

## ARGUMENT

**The Fifth Amendment, applied through *Miranda*, precludes showing the video of Ricks being interrogated, even with the sound down.**

### What *Miranda* Requires

The Constitution requires law enforcement, before questioning a person in custody, to inform the person of his right to remain silent and that any statement he makes may be used against him in court. *Miranda v. Arizona*, 384 U.S. 436, 445 (1966). The purpose of requiring these warnings is to protect an accused against coercive police action, and to protect his Fifth Amendment rights. *Edwards v. Arizona*, 451 U.S. 477, 482 (1981). Failing to properly warn an accused generally results in the State being unable to use statements obtained during the interrogation. *Miranda*, 384 U.S. at 445.

Entitlement to *Miranda* warnings depends on whether a person is subject to a custodial interrogation. A custodial interrogation is one initiated by law enforcement officers who have taken the subject into custody, or deprived him of his freedom in a significant way. *Thompson v. Keohane*, 516 U.S. 99, 107 (1995). A person is in custody when a reasonable person would believe his freedom of movement was restrained to a degree associated with arrest. *Thompson*, 516 U.S. at 107; *see also Howes v. Fields*, 565 U.S. 499, 509 (2012) (question is whether the environment of questioning has “the same inherently coercive pressures” as with the “station house questioning at issue in *Miranda*”). Whether a person is in custody is an objective

question, determined with reference to all the surrounding circumstances. *Howes*, 565 U.S. at 509.

If someone invokes his *Miranda* rights, the police must cease the interrogation. *Miranda*, 384 U.S. at 473-74. This rule is a “rigid” one, a *per se* rule necessary to protect the rights of an accused and to recognize the “unique role the lawyer plays in the adversary system of criminal justice ...” *Fare v. Michael C.*, 442 U.S. 707, 719 (1979).

### **What *Miranda* Prevents**

*Miranda* is supposed to prevent an accused from incriminating himself by keeping incriminating testimony from the jury. The questioning soliciting incriminating testimony may be either “express questioning” or its “functional equivalent,” this is, words or actions likely to elicit a response from a defendant as if he had been asked a question. *Rhode Island v. Innis*, 446 U.S. 291, 301 (1980).

The evidence subject to exclusion is anything that is “testimonial,” defined as evidence establishing a fact relevant to a criminal prosecution. *Davis v. Washington*, 547 U.S. 813, 822 (2006); *see also Pennsylvania v. Muniz*, 496 U.S. 582, 596 (1990) (evidence is testimonial when the question of whether to answer places the defendant in the “cruel trilemma” of self-accusation, perjury or contempt). Things like one’s tone of voice, physical characteristics and handwriting are not usually testimonial, because they do not “disclose the contents” of [the actor’s] mind.” *Curcio v. United States*, 354 U.S. 118, 128 (1957). However, acts, demeanor and body language can be testimonial, if

they do indicate the actor's thought. *Muniz*, 496 U.S. at 595 n. 9.

Many different acts, gestures or non-verbal movements have been found to be communicative, and therefore testimonial. *See, e.g., Schmerber v. California*, 384 U.S. 757, 761 n. 5 (1966) ("nod or head-shake" is an example of a testimonial act, because it is "as such a 'testimonial' or 'communicative' act ... as are spoken words"); *United States v. Clark*, 69 M.J. 438, 444 (C.A.A.F. 2011) ("where an accused points to the scene of a crime and then to himself ..."); *United States v. Green*, 541 F.3d 176, 187 (3d Cir. 2008) (in response to interrogation, accused "widened his eyes, lowered his head and sighed"), *vacated on other grounds*, 556 F.3d 151 (3rd Cir. 2009); *United States v. Johnson*, 415 F.3d 728, 730 (7th Cir. 2005) (accused pointed towards gun); *United States v. Green*, 272 F.3d 748, 753-74 & n. 12 (5th Cir. 2001) (accused opened combination locks to briefcase and safe); *United States v. Bedeau*, 07-299 (DSD/RLE), 2007 WL 4287680 at \* 8 & n. 7 (D. Minn. Dec. 4, 2007) (when accused was asked why she had mentioned stolen gun, she "responded by gesturing toward her head, as if to shoot herself"); *see also United States v. Finley*, 15-249 Erie, 2017 WL 3495345 at \* 9 (W.D. Pa. Aug. 15, 2017) (rejecting claim of ineffective assistance of counsel, in part, by noting counsel had successfully sought to suppress fact accused had "lowered his head and requested an attorney" when confronted with evidence of the crime).

### Decision of the Court Below

The Court of Appeals held the video of Ricks was not taken during a custodial interrogation, and therefore *Miranda* did not apply. Appendix at 2a. This decision fails to recognize that an encounter may begin as consensual, but then escalate into a custodial interrogation. *See, e.g., Florida v. Royer*, 460 U.S. 491, 503 (1983).

The interrogation of Ricks was hardly a friendly chat between a police officer and a witness. A review of the tape shows its purpose was not to gather information, but to build a case against Ricks. The officers questioning him lied to Ricks, falsely telling him the police had evidence showing he was guilty, cajoling him to confess by giving “his side of the story,” and explicitly threatened him with life in prison. Ricks was questioned in a place chosen by the police, was isolated from others, was subject to explicit threats, and was seated so the police blocked his exit, all circumstances showing custodial questioning. *Howes*, 565 U.S. at 509-13. A reasonable person would not have felt free to leave, and Ricks did not leave, even after he asked to be allowed to speak with a lawyer.

Allowing the part of his interrogation to be shown after Ricks invoked his *Miranda* rights, even without the sound, violates the Fifth Amendment. At trial, this silent video was likened to a “silent movie” intended to show Ricks was guilty, and the State admits as much, saying it wanted to show the video to the jury to show his “demeanor.” Because this “demeanor” showed what Ricks was thinking, this

was improper. *Muniz*, 496 U.S. at 595 n. 9; *Schmerber*, 384 U.S. at 761 n. 5.

By the time the sound was turned down, the jury well knew why the police were questioning Ricks. If the State did not believe Ricks's videoed behavior was testimonial, why would it insist the video be shown? The answer is obvious — it believed that, even without the sound, the video was a powerful means to convince the jury Ricks was guilty. The State was correct, Appendix at 2a, a fact the Court can confirm by viewing the video to see the same accusatory and testamentary silent movie the jury saw.

A well-known aphorism says a “picture is worth a thousand words.” Silent films presaged today’s million dollar blockbusters. Marcel Marceau conveyed thought and emotion without sound. And Ricks was forced to silently testify against himself when the video of his interrogation was shown to the jury.

## **CONCLUSION**

For all of the foregoing reasons, the Petitioner requests this Court to grant its Petition for Writ of Certiorari.

Respectfully submitted,

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