

No. 22A-____

In the Supreme Court of the United States

CARLOS R. RUIZ,

Applicant,

v.

COMMONWEALTH OF MASSACHUSETTS,

Respondent.

**APPLICATION FOR AN EXTENSION OF TIME WITHIN WHICH
TO FILE A PETITION FOR A WRIT OF CERTIORARI
TO THE MASSACHUSETTS APPEALS COURT**

TO THE HONORABLE STEPHEN BREYER, ASSOCIATE JUSTICE AND CIRCUIT JUSTICE FOR
THE FIRST CIRCUIT:

Pursuant to 28 U.S.C. § 2101(c) and Rule 13.5 of the Rules of this Court, applicant Carlos R. Ruiz respectfully requests a 58-day extension of time, to and including August 12, 2022, within which to file a petition for a writ of certiorari to review the judgment of the Massachusetts Court of Appeals in this case. The Massachusetts Supreme Judicial Court denied a timely request for further appellate review on March 17, 2022. Unless extended, the time to file a petition for a writ of certiorari will expire on June 15, 2022. The jurisdiction of this Court will be invoked under 28 U.S.C. § 1257(a). Copies of the lower court's opinion and the Supreme Judicial Court's order denying review are attached.

1. On February 25, 2014, Massachusetts police officers obtained a search warrant for an apartment in Worcester. Mar. 3, 2020, Trial Transcript (TT1) at 206, 225. They observed Carlos Ruben Ruiz and Yaritza Munoz-Delacruz exit the building and get into a car. TT1 at 195. When the officers searched the apartment, they found two small bags of heroin in a box in a filing cabinet (TT1 at 210-11), a larger bag of heroin in a box of laundry

detergent pods (TT1 at 216), two digital scales (TT1 216), and packaging material (TT1 2018-10). The lease for the apartment was in Ruiz's name; the utility bills were in Delacruz's. TT1 at 225, 234. Both were arrested, and the case proceeded to a joint jury trial on charges of trafficking and possession with intent to distribute a controlled substance.

2. Neither Ruiz nor Delacruz testified at trial. During its deliberation, the jury submitted the following question to the judge: "Can we take the defendants' body language into consideration? As evidence?" C.A. App. 15. There is no evidence in the record that either defendant did anything unusual or inappropriate in the courtroom. March 5, 2020, Trial Transcript (TT2), at 49. Indeed, Ruiz had been instructed by his attorney to show no emotion during the proceedings. TT2 at 51. Nonetheless, Ruiz and Delacruz were former romantic partners, and body language is not always advertent. Over the objections of Ruiz's counsel, the judge answered: "While not evidence, the jury is entitled to consider any observations you made of the defendants' demeanor during trial." TT2 at 55.

The jury convicted Ruiz of trafficking but acquitted Delacruz. TT2 at 56-57. The Massachusetts Court of Appeals affirmed. *Commonwealth v. Ruiz*, 100 Mass. App. Ct. 1112 (2021). The court observed that the Massachusetts Supreme Judicial Court had previously held that "[t]he jury [is] entitled to observe the demeanor of the defendant during trial." *Commonwealth v. Smith*, 387 Mass. 900, 907 (1983). And the panel concluded that *Smith* was still good law based on the Supreme Judicial Court's recent reiteration of this principle in *Commonwealth v. Watt*, 484 Mass. 742, 758 n.22 (2020). The Supreme Judicial Court subsequently denied Ruiz's timely request for Further Appellate Review.

3. The petition for certiorari will demonstrate that certiorari is warranted on the question whether it violates the Due Process Clause of the Fifth and Fourteenth Amend-

ments for a jury—either upon the instruction of the judge, or at the invitation of the prosecutor without a curative instruction from the judge—to consider a criminal defendant’s courtroom demeanor during deliberations, despite that the defendant did not testify and his demeanor was not a matter of record evidence.

Massachusetts law on this topic is contrary to decades of this Court’s precedents that assure a criminal defendant the right “to have his guilt or innocence determined solely on the basis of the evidence introduced at trial, and not on grounds of . . . other circumstances not adduced as proof at trial.” *Taylor v. Kentucky*, 436 U.S. 478, 485 (1978). Similarly, the Court explained in *McDonough Power Equip. v. Greenwood*, 464 U.S. 548 (1984), that a “touchstone of a fair trial is an impartial trier of fact—‘a jury capable and willing to decide the case solely on the evidence before it.’” *Id.* at 554 (quoting *Smith v. Phillips*, 455 U.S. 209, 217 (1982)). The Court has made clear that this requirement is a component of an accused’s due process rights. *Smith*, 455 U.S. at 217.

The question in this case has deeply divided state high courts and the federal courts of appeals. The federal courts of appeals for the D.C., Fourth, Ninth, and Eleventh Circuits have, for example, held that a jury is constitutionally barred from considering the courtroom demeanor of a nontestifying defendant, and that (absent a curative instruction) such consideration is prejudicial error. *United States v. Wright*, 489 F.2d, 1181, 1186 (D.C. Cir. 1973); *United States v. Carroll*, 678 F.2d 1208, 1209 (4th Cir. 1982); *United States v. Pearson*, 746 F.2d 787, 796 (11th Cir. 1984); *United States v. Schuler*, 823 F.2d 978, 998 (1987). Several state high courts are in accord. *See, e.g., Good v. State*, 723 S.W. 2d 734, 736 (Tex. Crim. App. 1986); *People v. Boyette*, 58 P.3d 391, 425 (Cal. 2002) (quoting *People v. Heishman*, 753 P.2d 629, 662–63 (Cal. 1988)); *State v. Sena*, 470 P.3d 227, 236 (N.M. 2020); *State v. Smith*, 984 P.2d 1276 (Haw. Ct. App. 1999). Other federal courts of

appeals have implied that encouragement of the jury to consider conduct like Ruiz's is constitutional error. *See, e.g., Gomez v. Ahitow*, 29 F.3d 1128, 1136 (7th Cir. 1994); *Borodine v. Douzanis*, 592 F.2d 1202, 1210 (1st Cir. 1979).

The Second and Fifth Circuits, by contrast, have resolved the question presented in a manner consistent with the Massachusetts court below. *United States v. Mendoza*, 522 F.3d 482, 493 (5th Cir. 2008); *United States v. Zemlyansky*, 908 F.3d 1, 16 (2d Cir. 2018). Some state high courts are also on that side of the split. *See, e.g., State v. Brown*, 358 S.E.2d 1, 16 (N.C. 1987); *Smith v. State*, 669 S.E.2d 98 (Ga. 2008); *see also, e.g., James v. State*, 564 So. 2d 1002, 1006 (Ala. Crim. App. 1989).

The disagreement among jurisdictions will not resolve itself without this Court's guidance. The question of whether and when a jury may consider the conduct of a nontestifying defendant occurs commonly and implicates the core of a defendant's right to a fair trial—the foundation of the entire American criminal justice system. And this case presents an excellent vehicle through which the Court could provide such guidance. The issue was plainly preserved through Ruiz's counsel's objection at trial and his arguments on appeal, and any error cannot have been harmless beyond a reasonable doubt—Ruiz's codefendant was acquitted while he was convicted.

4. Undersigned counsel was retained to prepare a petition in this case and has no prior familiarity with the facts. Additional time is needed to review the record and conduct additional original research. Beyond that, undersigned counsel is engaged in several other matters with proximate due dates, including a reply brief due May 16, 2022, in *Greiber v. NCAA*, No. 2021-9616 (N.Y. App. Div.); a summary judgment opposition and reply brief due June 15, 2022, in *Medical Imaging & Technology Alliance v. Library of Congress*, No. 22-cv-499 (D.D.C.); an answering brief due June 16, 2022, in *Plutzer v. Bankers Trust Co.*

of *South Dakota*, No. 22-561 (2d Cir.); and a possible petition for a writ of certiorari due July 11, 2022 in *Pharmaceutical Care Management Association v. Wehbi*, No. 18-2926 (8th Cir.).

For the foregoing reasons, the application for a 58-day extension of time, to and including August 12, 2022, within which to file a petition for a writ of certiorari in this case should be granted.

May 12, 2022

Respectfully submitted.

A handwritten signature in black ink, reading "Michael Kimberly", written over a horizontal line.

MICHAEL B. KIMBERLY
McDermott Will & Emery LLP
500 North Capitol Street NW
Washington, DC 20001
(202) 756-8000
mkimberly@mwe.com