No.

In the Supreme Court of the United States

CARLOS R. RUIZ,

Petitioner,

v.

MASSACHUSETTS,

Respondent.

On Petition for a Writ of Certiorari to the Massachusetts Appeals Court

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In a criminal trial, "[d]ue process means a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences." *Smith* v. *Phillips*, 455 U.S. 209, 217 (1982). Thus, a jury may not consider facts outside the official record in determining a criminal defendant's guilt or innocence. See, *e.g.*, *Taylor* v. *Kentucky*, 436 U.S. 478, 485 (1978).

The lower court's decision in this case offends that basic maxim. After the case was submitted to the jury in proceedings below, the jury foreman posed the following question to the trial judge:

> Can we take the defendants[']' body language into consideration? As evidence?

Over petitioner's repeated objections, but in compliance with settled Massachusetts law on the topic, the judge answered this way:

> While not evidence, the jury is entitled to consider any observations you made of the defendants' demeanor during the trial.

The lower courts are intractably split on the permissibility under the Federal Constitution of such an instruction.

The question presented is whether the Fifth and Fourteenth Amendments forbid judges (or prosecutors) from instructing (or inviting) the jury to take into account a non-testifying criminal defendant's courtroom demeanor as a basis for finding guilt.

STATEMENT OF RELATED PROCEEDINGS

This case arises from the following proceedings:

- *Commonwealth* v. *Ruiz*, 186 N.E.3d 720 (Table) (Mass. 2022)
- *Commonwealth* v. *Ruiz*, 178 N.E.3d 901 (Table) (Mass. App. Ct. 2021)
- *Commonwealth* v. *Ruiz*, 147 N.E.2d 1124 (Table) (Mass. App. Ct. 2020)

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INTRODUCTION

Ruiz was tried in a single trial on the same charges as his codefendant. The evidence against them was essentially identical. Neither testified. But when the jury announced its verdict, it convicted Ruiz and acquitted his codefendant.

One likely explanation for the discrepancy is a written question that the jury submitted during its deliberations: "Can we take the defendants['] body language into consideration? As evidence?" Over the petitioner's repeated objection, the trial court answered in the affirmative, proactively inviting the jury to consider the non-testifying defendants' body language and demeanor. The Massachusetts appellate court affirmed.

The due-process right to a fair trial is the cornerstone of the American criminal justice system. If that right means anything, it is that any conviction must be based on the evidence introduced and tested at trial, and not on extra-record facts or juror biases. For that and related reasons, more than a half dozen federal appellate courts and state high courts have held that a jury may *not* base its determination of guilt or innocence on the courtroom demeanor of a non-testifying defendant. The defendant's courtroom deportment—his mannerisms or ticks, his poise or lack thereof, his stress or fatigue, his interactions with counsel, and so forth—is not subjected to the truth-testing function of cross-examination, and allowing the jury to consider it is to countenance their unspoken biases. And in almost all cases, moreover, the defendant's courtroom demeanor is irrelevant to the fact questions that the jury must decide.

The Massachusetts Supreme Judicial Court has disagreed. The trial court below thus instructed the jury, over Ruiz's objection, that they were welcome to consider their personal (but untested) impressions of Ruiz's body

language and courtroom demeanor in determining his guilt. A number of other courts likewise would have held the instruction at issue here permissible.

This case presents an ideal opportunity for the Court to resolve this entrenched and deepening split. The issue was fully preserved. And because this was a joint trial in which petitioner was convicted and his codefendant was acquitted despite essentially identical evidence, it cannot be said that the error was harmless beyond a reasonable doubt. The Court should take this opportunity to clarify the law and safeguard the fundamental rights of criminal defendants across the Nation.

OPINIONS BELOW

The opinion of the Massachusetts Appeals Court is reported at 178 N.E.3d 901 and reproduced in the appendix at 1a-7a. The trial court ruled from the bench. Its oral decision is reproduced in the appendix at 14a-16a.

JURISDICTION

The Court's jurisdiction rests on 28 U.S.C. § 1257(a). The Massachusetts Appeals Court entered judgment on November 10, 2021. The Massachusetts Supreme Judicial Court denied a petition for further appellate review on March 17, 2022. On May 17, 2022, Justice Breyer extended the time to file a petition for a writ of certiorari to August 12, 2022.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment provides in relevant part: "No person shall * * * be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law."

The Sixth Amendment provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury * * * and to have the assistance of counsel for his defense."

The Fourteenth Amendment provides in relevant part: "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."

STATEMENT

1. Petitioner Carlos Ruiz shared an apartment with Yaritza Delacruz, then his girlfriend. Police searched the apartment, where they discovered drugs. App., *infra*, 2a. Their search included two closets, one of which held men's clothes and the other of which held women's clothes. *Ibid*. They found a lease to the apartment in one of the closets, which bore Ruiz's name and signature. *Ibid*. The line under the space for Ruiz's signature on the lease appeared to have been whited out. 2 Trial Tr. 58:15-59:3. The utility bills for the apartment were in Delacruz's name. 1 Trial Tr. 224:13-225:17.

2. Both Ruiz and Delacruz were indicted on charges of trafficking heroin in an amount between eighteen and thirty-six grams. App., *infra*, 1a; 1 Trial Tr. 9:3-8.

The case proceeded to trial. Ruiz and Delacruz were tried together in a single, consolidated trial. App., *infra*, 2a. By the time of the trial, Ruiz and Delacruz were no longer romantically involved, and Ruiz's new girlfriend was present in the gallery most days. 3 Trial Tr. 61:4-5. The trial was uneventful, and no one observed any outbursts from either defendant. App., *infra*, 10a-11a. Neither defendant testified. App., *infra*, 2a.

The case was submitted to the jury for a verdict. 3 Trial Tr. 41:1-4. During its deliberations, the jury submitting the following question to the judge: "Can we take the defendants['] body language into consideration? As evidence?" App., *infra*, 10a.

Ruiz's counsel objected, arguing that instructing the jurors that they could consider Ruiz's demeanor would

violate his right to remain silent and that a non-testifying defendant's demeanor is not evidence. App., *infra*, 10a-11a. He further expressed concern that allowing consideration of demeanor would permit jurors to convict on the basis of otherwise impermissible "preconceptions." App., *infra*, 13a.

Relying on the Massachusetts Supreme Judicial Court's opinion in *Commonwealth* v. *Smith*, 444 N.E.2d 374, 380 (Mass. 1983), the court instructed that "[w]hile not evidence, the jury is entitled to consider any observations you made of the defendants' demeanor during the trial." App., *infra*, 16a. Ruiz's counsel again contemporaneously objected. *Ibid.*

The jury convicted Ruiz of trafficking heroin in violation of Mass. Gen. Laws ch. 94C, § 32E(c) but acquitted Delacruz of all charges. 3 Trial Tr. 56:8-16. The court sentenced Ruiz to three years and six months' imprisonment. C.A. App. 20.

3. Ruiz appealed, arguing that the trial judge's instructions violated his Fifth and Fourteenth Amendment rights to due process, his Fifth Amendment right to remain silent, his Sixth Amendment right to counsel, and his rights under the Massachusetts state constitution.[1] Specifically, Ruiz argued on appeal that "his body language was irrelevant to his guilt or innocence, and * * * it encouraged improper speculation on the part of the jury." C.A. Br. 17-18. Relying on this Court's precedents, he argued that the trial court violated his right to due process—specifically, his right "to be found guilty only on the basis of the evidence presented"—under the Fourteenth Amendment. *Id.* at 28. Additionally, he argued

[1] Ruiz also argued on appeal that the district court erred in refusing to issue a jury instruction on the lesser included offense of simple possession. C.A. Br. 11. This argument was limited to Massachusetts law and it is not renewed here.

that the district court's response constituted a "violation of his Fifth Amendment right to remain silent, or * * * his Sixth amendment right to counsel." *Id.* at 26-27.

The Massachusetts Appeals Court affirmed. App., *infra*, 1a-7a. The court expressed "sympath[y]" for Ruiz's arguments. App., *infra*, 6a. It explained that "body language, especially when it is ambiguous, is fraught with the potential for misinterpretation" and that "such concerns are potentially amplified where jurors and defendants have different racial, ethnic, or cultural backgrounds from one another, or when defendants have mental or physical disabilities that may affect their demeanor." *Ibid*. The court of appeals acknowledged that Ruiz's arguments found "support in * * * cases outside" of Massachusetts. *Ibid.* (citing *United States* v. *Schuler*, 813 F.2d 978, 981 (9th Cir. 1987) and *Cunningham* v. *Perini*, 655 F.2d 98, 100 (6th Cir. 1981)). Nonetheless, the court held that the trial court's response was "consistent with what the Supreme Judicial Court said in *Commonwealth* v. *Smith*." *Ibid.* And the court confirmed that *Smith* remained good law whose holdings "the Supreme Judicial Court recently expressly reaffirmed." *Ibid.* (citing *Commonwealth* v. *Watt*, 146 N.E.3d 414, 430 n.22 (Mass. 2020)). The court of appeals concluded that it would be "up to the Supreme Judicial Court whether to revisit the language set forth in *Smith*." App., *infra*, at 7a.

Ruiz filed a petition for further appellate review to the Massachusetts Supreme Judicial Court. That court denied review on March 17, 2022.

REASONS FOR GRANTING THE PETITION

The trial court in this case instructed members of the jury that they could consider Ruiz's demeanor in determining his guilt. The court thus allowed the jury to base their verdict on factors outside of the evidence adduced

and tested at trial. That was a direct offense to Ruiz's due process rights and his right to remain silent.

To be sure, the trial court's answer was a faithful application of settled Massachusetts law. And courts in several other states and two federal circuits likewise permit juries to base their verdicts on the courtroom behavior of non-testifying criminal defendants. But the Fourth, Ninth, and Eleventh Circuits, along with several state high courts, all have held that a prosecutor's or judge's invitation to the jury to consider a non-testifying defendant's demeanor is a constitutional violation. This case presents a suitable vehicle for resolving the split, which implicates constitutional concerns of the highest order. The petition should be granted.

A. The question presented has intractably divided the lower courts

This Court's intervention is warranted because the lower courts are deeply divided on a question of federal constitutional law. The longstanding "split among courts on how to consider non-testifying defendant's courtroom demeanor" has been expressly and repeatedly acknowledged by courts and commentators alike. *State* v. *Novotny*, 307 P.3d 1278, 1289 (Kan. 2013). See also Laurie L. Levenson, *Courtroom Demeanor: The Theater of the Courtroom*, 92 Minn. L. Rev. 573, 598-614 (2008) ("Today's courts are divided on how to consider a defendant's non-testifying demeanor in the courtroom."). The meaning of the Fifth and Fourteenth Amendments should not vary based on geography like this.

1. Both the trial judge and the intermediate appellate court below resolved the question against Ruiz. App., *infra*, 6a-7a. In doing so, each relied on the Massachusetts Supreme Judicial Court's decision in *Smith*, where it held that "[t]he jury [is] entitled to observe the demeanor of

the defendant during the trial" and take that demeanor into account in reaching a verdict. 444 N.E. 2d at 380.

The Fifth Circuit reached a similar conclusion *United States* v. *Mendoza*, 522 F.3d 482 (5th Cir. 2008). There, the district court allowed the prosecutor to rely in his closing argument on the non-testifying defendant's calmness throughout the trial. *Id.* at 490. The court of appeals surveyed the precedents from other circuits and found that they "agree[d] that courtroom demeanor of a non-testifying criminal defendant is an improper subject for comment by a prosecuting attorney." *Id.* at 491. The court also acknowledged that a defendant's "courtroom demeanor was not 'in any sense legally relevant to the question of his guilt or innocence of the crime charged.'" *Ibid.* (quoting *United States* v. *Wright*, 489 F.2d 1181, 1186 (D.C. Cir. 1973)). And it concluded that "the prosecutor's comments were error." *Ibid.* Although "[t]he remarks were error," however, they were "of less than constitutional dimension" and thus "did not violate any constitutional rights." *Id.* at 497.

A variety of state courts have joined Massachusetts and the Fifth Circuit in permitting juror consideration of a non-testifying defendant's courtroom demeanor. In one recent case, a jury in a Washington criminal trial sent a written question to the court during its deliberations asking: "Can we use as 'evidence' for deliberations our observations of the defendant's actions-demeanor during the court case?" *State* v. *Barry*, 352 P.3d 161, 164 (Wash. 2015) (en banc). The court responded that "evidence includes what is witnessed in the courtroom." *Ibid.* Over the dissents of two Justices, the Washington Supreme Court upheld the verdict, concluding that the response did not violate the defendant's Due Process rights or right against self-incrimination. *Id.* at 169-71.

Recent decisions from other states are in accord. See *Smith* v. *State*, 669 S.E.2d 98, 104 & n.8 (Ga. 2008) ("it is not improper for the prosecutor to comment in closing argument on a non-testifying defendant's appearance and facial expressions"); *Armstrong* v. *State*, 233 S.W.3d 627, 638-39 (Ark. 2006) (similar); *State* v. *Hill*, 661 N.E.2d 1068, 1078 (Ohio 1996) ("An accused's face and body are physical evidence, and a prosecutor can comment on them."); *State* v. *Brown*, 358 S.E.2d 1, 16 (N.C. 1987) (similar).

2. In diametric conflict with the holdings of the foregoing courts, several federal circuit courts and other state high courts have ruled that neither judges nor prosecutors may encourage juries to consider a non-testifying defendant's courtroom demeanor or body language. In any of these other jurisdictions, this case would have turned out differently.

a. In *United States* v. *Schuler*, 813 F.2d 978 (1987), the **Ninth Circuit** held that a prosecutor's reference to a non-testifying defendant's courtroom behavior constituted reversible error. *Id.* at 979. At closing, the prosecutor had said to the jury, "I noticed a number of you were looking at Mr. Schuler" and "a number of you saw him laugh" during certain testimony. *Ibid.* Despite defense counsel's objection, the trial court declined to issue a curative instruction. *Ibid.*

On later appeal, the Ninth Circuit acknowledged that other courts "have rejected a challenge to a prosecutor's comments on the [defendant's] courtroom demeanor" but declined to "accept" the implication of those cases "that references to a non-testifying defendant's demeanor or behavior present no constitutional issue." 813 F.2d at 980 n.1. The court went on to identify three areas of constitutional protection implicated by the reference to a non-testifying defendant's demeanor.

First, it held that "in the absence of a curative instruction from the court, a prosecutor's comment on a defendant's off-the-stand behavior constitutes a violation of the due process clause of the fifth amendment" which "encompasses the right not to be convicted except on the basis of evidence adduced at trial." 813 F.2d at 981.

Second, the court held that "prosecutorial comment on a defendant's non-testimonial behavior * * * will tend to eviscerate the right to remain silent by forcing the defendant to take the stand in reaction to or in contemplation of the prosecutor's comments." 813 F.2d at 981-82.

Finally, the Ninth Circuit concluded that the Sixth Amendment right to trial by jury means that the mere fact of a defendant's "presence and his nontestimonial behavior in the courtroom could not be taken as evidence of his guilt." *Id.* at 982. The court thus reversed the defendant's conviction.

The **Eleventh Circuit** reached a similar conclusion in *United States* v. *Pearson*, 746 F.2d 787 (11th Cir. 1984). There, it held that a prosecutor's comment in closing on a non-testifying defendant's courtroom behavior amounts to an "indirect comment on [defendant's] failure to testify," in violation of the Fifth Amendment. *Id.* at 796. The court noted further that "the defendant's behavior off the witness stand in this instance was not evidence" on which the jury could be asked to rely, because "a prosecutor may not seek to obtain a conviction by going beyond the evidence before the jury." *Ibid.* (quoting *United States* v. *Vera*, 701 F.2d 1349, 1361 (11th Cir. 1983)). It thus concluded that the district court's decision not to strike the prosecutor's comments concenring the non-testifying defendant's demeanor was reversible error. *Ibid.* (the error "deprive[d] [the defendant] of a fair trial" by violating the "right not to be convicted except on the basis of the evidence admitted at trial").

The **Fourth Circuit** has held similarly in *United States* v. *Carroll*, 678 F.2d 1208 (4th Cir. 1982). According to the court in *Carroll*, "[w]hen, as here, the prosecutor describes the courtroom behavior of a defendant who has not testified" and then invites the jury to "consider that behavior" in its deliberations—and when the judge, in turn, "implie[s] that the [prosecutor's] remarks [are] unobjectionable"—the state "violates" the Fifth and Sixth Amendments. *Id.* at 1210. Under settled rules of due process and testimonial silence, when a defendant has "elected not to testify, the fact of his presence and his non-testimonial behavior in the courtroom [may] not be taken as evidence of his guilt." *Ibid.* In that case—even though the judge later issued curative instructions telling the jury not to consider the information—the Fourth Circuit vacated the defendant's conviction.[2]

b. The federal courts have been joined by several state supreme courts, which likewise have recognized the constitutional problems that arise when a jury is invited to consider a non-testifying defendant's demeanor in its deliberations.

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[2] Two other federal appellate decisions touch on the split. In *United States* v. *Zemlyansky*, 908 F.3d 1 (2d Cir. 2018), "[t]he government concede[d] that the prosecutor's comments * * * were improper" in that they violated the defendant's "rights to a fair trial by undermining his right 'to have his guilt or innocence determined solely on the basis the evidence introduced at trial.'" *Id.* at 15 (quoting *Taylor* v. *Kentucky*, 436 U.S. 478, 485 (1978)). The Second Circuit ultimately affirmed the conviction only because "the District Court not only immediately responded to the impropriety by directing the prosecution to move on, but it also later sustained the objection and gave a strong curative instruction." *Id.* at 17. None of that took place here. And although not expressly basing its decision on constitutional grounds, the D.C. Circuit has held that even where a defendant has engaged in unruly courtroom behavior, "the proper course for the trial court * * * is to instruct the jury to ignore the defendant's behavior in its deliberations." *United States* v. *Wright*, 489 F.2d 1181, 1186 (1973).

In *State* v. *Sena*, 470 P.3d 227 (N.M. 2020), for example, the **New Mexico Supreme Court** held that a prosecutor's encouragement of the jury to consider the defendant's courtroom demeanor violated the right to a fair trial and against self-incrimination. *Id.* at 235. Such an invitation, according to the court, can have "no purpose other than to invite the jury to draw an adverse conclusion from Defendant's failure to get on the stand." *Ibid.* In this way, "[r]eference to a nontestifying defendant's courtroom demeanor is not merely a reference to something not in evidence, it is an attack on a defendant's Fifth Amendment right not to testify." *Id.* at 236. (citing *Carroll*, 678 F.2sd at 1209, and *Schuler*, 813 F.2d at 979).

What is more, the court reasoned, "[a] prosecutor's arguments during summation regarding a nontestifying defendant's courtroom demeanor are irrelevant as it is not evidence that is in the record." *Sena*, 470 P.3d at 236. "[T]he practice is pregnant with potential prejudice" and violates the general rule that "[a] guilty verdict must be based upon the evidence and the reasonable inferences therefrom, not on an irrational response which may be triggered if the prosecution unfairly strikes an emotion in the jury." *Ibid.* (quoting *Hughes* v. *State*, 437 A.2d 559, 568 (Del. 1981)). The court was particularly troubled that the trial court had overruled the defense's objection in front of the jury, "plac[ing] the 'stamp of judicial approval' on the improper argument." *Id.* at 236. Thus, the court concluded, the reference to the defendant's courtroom demeanor and the court's approval of it "violated Defendant's Fifth and Fourteenth Amendment rights and deprived Defendant of a fair trial, resulting in reversible error." *Id.* at 238.

The **Texas Court of Criminal Appeals**—Texas's highest criminal court—has similarly held that "[a] defendant's nontestimonial demeanor is irrelevant to the issue of his guilt." *Good* v. *State*, 723 S.W.2d 734, 737 (Tex.

Crim. App. 1986). A prosecutor's reliance on such thus "offends both [the] State and Federal Constitutions." *Dickenson.* v. *State*, 685 S.W.2d 320, 323 (Tex. Crim. App. 1984). **California** and **Hawaii** have reached similar conclusions. *See People* v. *Heishman*, 753 P.2d 629, 662-63 (Cal. 1988), *abrogated on other grounds by People* v. *Diaz*, 60 Cal. 4th 1176 (2015); *State* v. *Smith*, 91 Haw. 450, 460 (Ct. App. 1999); *State* v. *Sisneros*, 59 P.3d 931 (Haw. 2002) (citing *Smith* approvingly).

* * *

The split is longstanding and expressly acknowledged. See *Novotny*, 307 P.3d at 1289; *Schuler*, 813 F.2d 980 at n.1; *Smith*, 669 S.E.2d at 104 n.8; App., *infra*, 6a. It also has produced the particularly untoward result of divergent applications of constitutional provisions by federal and state courts within the same geographic regions, splitting the North Carolina Supreme Court from the Fourth Circuit and the Georgia Supreme Court from the Eleventh Circuit.

Nor is there any realistic possibility that the conflict will resolve itself. Indeed, the conflict is deepening. *Sena*, which conflicts with the decision below, was decided in 2020; *Barry*, which accords with the decision below, was decided in 2015. Only this Court can restore uniformity on this frequently recurring issue of constitutional law.

B. The lower court's resolution of the question presented is doubly wrong

Review is further warranted because the decision below breaks from more than a century of this Court's precedents. Justice Holmes long ago observed that "[t]he theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court." *Patterson* v. *State of Colorado ex rel. Attorney General*, 205 U.S. 454, 462 (1907). Encouraging the jury to rely on a defendant's deportment as evidence of

guilt or innocence, despite that the defense has no opportunity to confront, examine, or rebut any inferences that the jury might draw from those facts, violates both due process and the right not to have to testify in one's own defense.

1. Due process requires that verdicts be based only on evidence in the record

a. In a criminal trial, "[d]ue process means a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences." *Smith* v. *Phillips*, 455 U.S. 209, 217 (1982). "The requirement that a jury's verdict 'must be based upon the evidence developed at the trial' goes to the fundamental integrity of all that is embraced in the constitutional concept of trial by jury." *Turner* v. *Louisiana*, 379 U.S. 466, 472 (1965). It is deeply rooted in our nation's tradition, dating to the English common law. *See Irvin* v. *Dowd*, 366 U.S. 717, 722 (1961). And it is "the very heart of our criminal justice system." *United States* v. *Ash*, 413 U.S. 300, 329 (1973) (Brennan, J., dissenting). As such, "courts must carefully guard against dilution of the principle that guilt is to be established by probative evidence." *Estelle* v. *Williams*, 425 U.S. 501, 503 (1976). The decision below breaks from these and other precedents.

When a jury relies on facts external to the evidence duly admitted and cross-examined at trial to reach its verdict, the verdict is unlawfully tainted—a consideration that has special force with respect to a jury's biases against the defendant personally. This truism is reflected many forms. Courts, for example, undertake *voir dire* to prevent jurors from being seated with biases that will prevent them from rendering a verdict based on the evidence. *See Skilling* v. *United States*, 561 U.S. 358, 369 (2010). They also carefully police extra-record influences

on jurors once seated. "Parties can * * * challenge jury verdicts based on improper extraneous influences such as prejudicial information not admitted into evidence." *Dietz* v. *Bouldin*, 579 U.S. 40, 48 (2016).

Extraneous facts are presumed prejudicial because only evidence duly admitted or taken on "the witness stand in a public courtroom" is subject to "full judicial protection of the defendant's right of confrontation, of cross-examination, and of counsel." *Turner*, 379 U.S. at 472-473. In a narrow exception to the rule against verdict impeachment, the Federal Rules of Evidence even permit a juror to testify about whether "extraneous prejudicial information was improperly brought to the jury's attention" or "an outside influence was improperly brought to bear on any juror." Fed. R. Evid. 606(b).

Applying these principles, the Court has held that circumstances in the courtroom but outside the record may "undermine the fairness of the factfinding process" such that they violate a defendant's right to due process. *Williams*, 425 U.S. at 503. In *Williams*, for example, the Court held that a "State cannot, consistently with the Fourteenth Amendment, compel an accused to stand trial before a jury while dressed in identifiable prison clothes." *Id.* at 512. So too for shackles and other restraints. *Deck* v. *Missouri*, 544 U.S. 622, 633 (2005). Because "the defendant's clothing is so likely to be a continuing influence throughout the trial, * * * an unacceptable risk is presented of impermissible factors" influencing the jury's decision. *Williams*, 425 U.S. at 505.

In each of these contexts, the Constitution requires courts to carefully safeguard the accused's right to a fair trial. Whatever the source of outside influence—whether it be media bias, preexisting bias, external communications, or the defendant's courtroom appearance—it is impermissible for the jury to base its determination on

factors not contained in the record. The Due Process Clause, in turn, forbids courts and prosecutors from actively encouraging reliance on facts outside the record and not tested through adversarial cross-examination.

b. The decisions below cannot be squared with these basic rules of constitutional criminal procedure. The court explicitly instructed jurors that they could use their perceptions of Ruiz's demeanor in reaching their verdict. App., *infra*, 16a. It would indisputably violate a defendant's due process rights for a court to give a similar instruction permitting consideration of media coverage, prosecutorial comments that were objected to and excluded, or other facts or evidence not admitted at trial.

There is no basis for permitting such an instruction with respect to Ruiz's demeanor. "In the constitutional sense, trial by jury in a criminal case necessarily implies at the very least that the 'evidence developed' against a defendant shall come from the witness stand in a public courtroom where there is full judicial protection of the defendant's right of confrontation, of cross-examination, and of counsel." *Turner*, 379 U.S. at 472-73. Like other kinds of extra-record evidence and information, a defendant's appearance and demeanor have not undergone rule-bound adversarial testing, which constitutes "the 'greatest legal engine ever invented for the discovery of truth.'" *California* v. *Green*, 399 U.S. 149, 158 (1970) (quoting 5 J. Wigmore, Evidence § 1367 (3d ed. 1940)).

Nor, as many courts have noted, is a defendant's courtroom demeanor "in any sense legally relevant to the question of his guilt or innocence of the crime charged." *United States* v. *Wright*, 489 F.2d 1181, 1186 (D.C. Cir. 1973); *see Hughes* v. *State*, 437 A.2d 559, 572 (Del. 1981). It was in 1817, decades before adoption of the Fourteenth Amendment, when Daniel Webster declared "miserable indeed is the reasoning which would infer any

man's guilt from his agitation." 2 Daniel Webster, Speeches and Forensic Arguments 436 (8th Ed. 1848).

Indeed, "it is not at all clear that jurors are equipped to properly evaluate the significance of a defendant's demeanor in the courtroom." Laurie L. Levenson, *Courtroom Demeanor: The Theater of the Courtroom*, 92 Minn. L. Rev. 573, 616 (2008). In the absence of an objective and consistent ability by jurors to interpret conduct, courtroom demeanor serves as a backdoor for the introduction of character evidence and other biases, leading to a verdict based on whether the defendant seems like a remorseful or "good person," rather than actual evidence he committed or did not commit the crime. *See Rules of Evidence for United States Courts & Magistrates: Amendments to the Federal Rules of Civil Procedure*, 56 F.R.D. 183, 221 (Nov 20., 1972) ("It tends to distract the trier of fact from the main question of what actually happened on the particular occasion."). See also *United States* v. *Pearson*, 746 F.2d 787, 796 (11th Cir. 1984); Scott E. Sundby, *The Capital Jury and Absolution: The Intersection of Trial Strategy, Remorse, and the Death Penalty*, 83 Cornell L. Rev. 1557, 1561-66 (1998) (discussing juror statements indicating that jurors consider a defendant's flat or nonchalant behavior as evidence of lack of remorse).

Basing a verdict on the defendant's physical appearance also opens the door for prejudice against defendants whose appearances do not meet juror expectations, such as defendants with different cultural backgrounds or sexual orientations. *See* Bennett Capers, *Evidence Without Rules*, 94 Notre Dame L. Rev. 867, 883 (2018). The Court has been explicit that the Constitution forbids jurors to consider facts with no relevance and high chance of abuse. "Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant * * * denies

the latter due process of law." *Tumey* v. *Ohio*, 273 U.S. 510, 532 (1927).

In all events, if demeanor is relevant to a jury's determination of guilt or innocence, it must be introduced as evidence through the adversarial process. *E.g.*, *United States* v. *Gatto*, 995 F.2d 449 (3d Cir. 1993) (allowing commentary on courtroom demeanor when actually relevant to the case and discussed by a witness on the record). Not otherwise.

2. Permitting a jury to convict based upon untested impressions of the defendant's demeanor offends the right to remain silent

A court's invitation to the jury to consider a defendant's demeanor further violates the Fifth Amendment right to avoid testifying in one's own defense.

The Fifth Amendment forbids any instruction by the court or argument by the prosecution that the defendant's constitutionally-protected silence may be taken as evidence of guilt. *Griffin* v. *California*, 380 U.S. 609 (1965). The rationale is simple: Under the Fifth Amendment, "a defendant must pay no court-imposed price for the exercise of his constitutional privilege not to testify." *Carter* v. *Kentucky*, 450 U.S. 288, 301 (1981).

A judge's instruction to the jury that it may consider the defendant's courtroom behavior and demeanor violates that basic rule. That is because an invitation to consider the "defendant's non-testimonial behavior" at trial "will tend to eviscerate the right to remain silent by forcing the defendant to take the stand in reaction to or in contemplation of" the jury's consideration of his demeanor. *United States* v. *Schuler*, 813 F.2d 978, 981-982 (9th Cir. 1987). It will be untenable for a defendant to accept that the jury might draw an adverse inference equally from his neutral affect *or* is emotional response.

For just that reason, inviting the jury to consider demeanor not only "introduce[s] character evidence for the sole purpose of proving guilt, and violate[s] [the defendant's] right not to be convicted except on the basis of the evidence admitted at trial," but it also amounts to "indirect comment on his failure to testify at trial." *United States* v. *Pearson*, 746 F.2d 787, 796 (11th Cir. 1984). That is a plain violation of the Fifth Amendment.

C. This is a particularly clean vehicle for resolving the question presented

1. The question presented is undeniably important. This Court has described the right to a fair trial as "a fundamental liberty." *Williams*, 425 U.S. at 503. "The theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court." *Patterson*, 205 U.S. at 462. The modern rules of evidence and the Court's due process jurisprudence are themselves reflections of the "historically grounded rights of our system, developed to safeguard men from dubious and unjust convictions, with resulting forfeitures of life, liberty and property." *Brinegar* v. *United States*, 338 U.S. 160, 174 (1949).

Apart from the critical constitutional principles that it touches, the question presented is frequently recurring, arising many times every year. At the same time, it is intolerable that criminal defendants should receive such profoundly divergent treatment on such an important issue based on the arbitrariness of geography.

2. This case is also an ideal vehicle. The issue was fully preserved. See *Commonwealth* v. *Ruiz*, 137 N.E.3d 1124 (Table) at *2 (Mass. App. Ct. 2020) ("The alleged error was preserved by a timely objection."). Additionally, the circumstances here present the question with unusual crispness. Sometimes the question presented arises in the context of a prosecutor's comment, and the trial

court issues a curative instruction, potentially mitigating any harm. *E.g.*, *Zemlyansky*, 908 F.3d at 17. Other times, it is doubtful that the jury considered the defendant's demeanor at all, despite some invitation to do so. Other times still, the defendant's guilt is obvious beyond reasonable doubt, and any error is harmless.

None of these issues arises here. First, the question is presented in the context of the jury's prompt for an instruction, indicating clearly that the jurors wished to consider Ruiz's demeanor. And the judge gave an express instruction permitting such consideration, leaving no ambiguity as to whether the jury believed it to be permissible. Beyond that, there are compelling reasons to believe that the lower courts would not find the constitutional error here to have been harmless. The jury acquitted Ruiz's codefendant, with one obvious explanation being their request to consider his demeanor.

Such clean vehicles are rare. Because the question implicates a conflict on a critically important constitutional issue, the Court should grant review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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