No. 22-132

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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

This case queues up the question presented with exceptional clarity: The jury affirmatively asked whether they were permitted to consider the defendants' courtroom demeanor; the trial court instructed them that they could do so; and barely an hour after receiving that instruction, the jury convicted petitioner and acquitted his co-defendant. Pet. App. 5a. At respondent's urging, the Appeals Court affirmed the instruction on the ground that it was squarely permitted by binding precedent—namely, *Commonwealth v. Smith*, 444 N.E.2d 374 (Mass. 1983), and *Commonwealth* v. *Watt*, 146 N.E.3d 414 (Mass. 2020), both of which held that juries are free to weigh the courtroom demeanor of non-testifying defendants during deliberations. Pet. App. 6a-7a.

Respondent does not defend the merits of that rule before this Court. Nor does it deny the importance of the question presented. Instead, it opposes certiorari on just two grounds: *First*, it says (BIO 1) that this case does not implicate the split of authority because it involves "a jury question during deliberations" rather than "a prosecutor's reference to demeanor during trial." *Second*, it claims (BIO 1-2) that this case is a poor vehicle because the record is "inadequate," the decision below does not present an opportunity to construe the Federal Rules of Evidence, and any error was harmless (an issue neither briefed nor decided below).

Neither argument is remotely persuasive. There can be no doubt that this case would have come out differently in the many conflicting jurisdictions discussed in the petition. And this case is an exceptionally good vehicle for review, free from factual complications or procedural impediments. The recurring division of authority identified in the petition will persist absent the Court's intervention. The Court should thus grant the petition and bring an end to this frequently recurring conflict.

A. This case squarely implicates the conflict

1. We demonstrated in the petition (at 6-12) that the lower courts are intractably divided on the question presented in the petition.

On the one hand, the Massachusetts Supreme Judicial Court, the Fifth Circuit, and the high courts of Arkansas, Georgia, North Carolina, and Washington have held that it is constitutionally acceptable for a trial court to permit the jury to consider a defendant's courtroom demeanor. See Pet. 8 (citing cases).

On the other hand, the Fourth, Ninth, and Eleventh Circuits and the high courts of New Mexico and Texas have held squarely that a non-testifying defendant's demeanor is not evidence in the record and that the jury's reliance on it in a criminal trial violates the Fifth and Fourteenth Amendment rights to due process and to remain silent. See Pet. 8-12 (collecting cases). The D.C. Circuit, Second Circuit, and the courts in California and Hawaii have expressed support for the same result. See Pet. 10 n.2, 12.

Although respondent attempts to distract from the conflict, it does not disagree that the cases cited in the petition are irreconcilable. Nor could it. Instead, its principal response is to say (BIO 6-8) that none "of the fifteen cases cited in the petition in support of a split conflicts with the decision" in *this* case because the decision below involved a jury instruction following a jury inquiry, rather than a defense objection to a prosecutor's comment during summation.

That is a meaningless distinction. Cases from both sides of the split acknowledge that the question at issue is, at bottom, whether it "constitute[s] a deprivation of the fifth amendment right to a fair trial" for the jury to "consider" in its deliberations "the courtroom behavior of a defendant who has not testified." *United States* v.

Schuler, 813 F.2d 978, 981 (9th Cir. 1987). Courts that have answered *no* generally have done so on the view that "evidence is not only what [the jury] hear on the stand but what they witness in the courtroom." *State* v. *Brown*, 358 S.E.2d 1, 15 (N.C. 1987). Accord *Watt*, 146 N.E.3d at 430 n.22. Courts that have answered *yes* have taken the opposite view: "[A] defendant's off-the-stand behavior" is *not* "evidence adduced at trial" and thus may *not* be considered by the jury in their deliberations. *Schuler*, 813 F.2d at 981-982.

From that perspective, there is no material difference between (1) a judge ruling that it is acceptable to consider off-the-stand conduct after the prosecutor invites it, and (2) the same judge ruling that the jury may consider off-the-stand conduct after the jury explicitly asks whether they may do so. In both cases, the court expressly authorizes the jury to consider the defendant's courtroom demeanor. See *State* v. *Sena*, 470 P.3d 227 (N.M. 2020) (for the "the district court [to] overrule the objection" is to place a "'stamp of judicial approval'" on consideration of the defendant's courtroom demeanor); *Schuler*, 813 F.2d at 981 (a court "overruling the defendant's objection" and "failing to give a curative instruction" conveys to the jury that "the defendant's behavior off the witness stand [is] evidence" that may be considered) (cleaned up) (quoting *United States* v. *Pearson*, 746 F.2d 787, 796 (11th Cir. 1984)).

And the constitutional values at stake are precisely the same either way. The courts that have held that a prosecutor infringes a non-testifying defendant's constitutional rights by commenting on his courtroom behavior have done so because (1) off-the-stand demeanor is not evidence in the record that has been subject to adversarial testing, (2) its consideration gives a toehold to arbitrary bias, (3) and allowing comment on demeanor puts undue pressure on defendants to testify to explain their in-court

conduct. See Pet. 13-18. Those concerns are implicated in identical ways regardless of whether the error arises from a prosecutor's comment and the court's express refusal to correct it, or from an affirmative jury instruction in response to an inquiry from the foreperson.

The Court need not take our word for it. Respondent itself argued below—*successfully* (Pet. App. 6a-7a)—that the outcome here was squarely controlled by *Smith*, which involved a prosecutorial statement concerning the defendant's courtroom demeanor. See Resp. A.C. Br. 25-27. That was respondent's central contention at oral argument. See A.C. Oral Arg. Audio 30:40-31:48.

That is the exact opposite of what respondent now says in its opposition brief. But having prevailed below on the issue of whether cases addressing prosecutorial statements control the outcome in cases addressing jury instructions (they do), respondent cannot now argue that this is a "critical distinction" after all. BIO 1. Nor can it seriously maintain that Massachusetts law is somehow unclear on the question presented. BIO 12-13.

2. Respondent points to other supposed factual distinctions in support of its assertion that the split is "illusory" (BIO 6). First, it observes (BIO 8) that "[t]wo of the cited cases involved a testifying defendant," pointing to decisions of the Texas and Hawaii courts. Even if that were a relevant distinction, it would only narrow the split, not render it "illusory." But it is not a relevant distinction, because if it violates the Constitution to consider the courtroom demeanor of a *testifying* defendant (who can explain on the stand the nature and meaning of his off-the-stand conduct), it surely violates the Constitution to consider the courtroom demeanor of a *non*-testifying defendant (who cannot do those things).

Second, respondent observes (BIO 9) that the cases on the other side of the split all involved "a prosecutor actively point[ing] to an aspect of the defendant's demeanor

during trial, thus arguably drawing on a specific aspect of demeanor as evidence." That is another red herring. The jury in this case indicated that they wished to "take * * * into consideration" the defendants' "body language." Pet. App. 5a. It makes no difference what particular demeanor they wished to consider—*any* element or instance of a defendant's off-the-stand body language, conduct, or general deportment would constitute a matter outside of the record evidence, invite juror bias, and place undue pressure on the defendant to testify to explain his behavior. See Pet. 13-18. The question presented here does not in any way turn on the nature of the defendant's behavior or whether the particular elements that the jury wishes to consider can be identified with particularity.

Finally, respondent declares (BIO 9-10) that "[t]he purported split disintegrates" because some courts on the other side of the conflict rely on the Due Process Clause, while others rely on the Self-Incrimination Clause, and others rely on combinations of these and other constitutional provisions. But all that matters for certiorari is whether, as a function of federal law, the *outcome* here would have been different in other jurisdictions. E. Gressman, et al., *Supreme Court Practice* 241-242 (9th ed. 2007). The Court reviews judgments and not opinions, after all. See *Jennings* v. *Stephens*, 574 U.S. 271, 277 (2015). That the lower courts have used divergent reasoning to reach their conflicting outcomes only confirms that this Court's guidance is desperately needed.

In the end, the opposition brief cannot distract from what remains an essentially uncontested point: There is an entrenched, recognized "split among courts on how to consider non-testifying defendant's courtroom demeanor" under the Federal Constitution (*State* v. *Novotny*, 307 P.3d 1278, 1289 (Kan. 2013)), and only this Court's intervention can resolve the conflict.

B. This is an unusually clean vehicle

Respondent offers a scattershot of additional vehicle arguments, none of which is persuasive.

1. Respondent repeatedly notes (BIO 13) that "the decision below is an unpublished ruling of Massachusetts' intermediate appellate court." See also BIO 1, 5, 12. But this Court regularly grants certiorari to review unpublished decisions in circumstances like these, where they reflect continued and entrenched application of earlier precedents that conflict with the law of other courts.[1] For the same reasons, the Court regularly grants certiorari to review decisions of intermediate state appellate courts,[2] including when they are unpublished.[3]

The same outcome is warranted here. The court below applied a long line of binding holdings of the Massachusetts Supreme Judicial Court, beginning with *Smith* (decided in 1984) and culminating most recently in *Watt* (decided in 2020, reaffirming *Smith*). Pet. App. 6a-7a.

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[1] *E.g.*, *Lora* v. *United States*, No. 22-49 (cert. granted Dec. 9, 2022); *Coinbase* v. *Bielski*, No. 22-105 (cert. granted Dec. 9, 2022); *MOAC Mall Holdings LLC* v. *Transform Holdco LLC*, No. 21-1270 (cert. granted June 27, 2022); *Bartenwerfer* v. *Buckley*, No. 21-908 (cert. granted May 2, 2022); *Kemp* v. *United States*, No. 21-5726 (cert. granted Jan. 10, 2022); *Cassirer* v. *Thyssen-Bornemisza Collection Foundation*, No. 20-1566 (cert. granted Sept. 30, 2021); *Johnson* v. *Arteaga-Martinez*, No. 19-896 (cert. granted Aug. 23, 2021); and *Thompson* v. *Clark*, No. 20-659 (cert. granted Mar. 8, 2021).

[2] E.g., *Texas Department of Public Safety* v. *Torres*, No. 20-603 (cert. granted Dec. 21, 2021); *Viking River Cruises, Inc.* v. *Moriana*, No. 20-1573 (cert. granted Dec. 15, 2021); *Lange* v. *California*, No. 20-18 (cert. granted Oct. 19, 2020); and *Jones* v. *Mississippi*, No. 18-1259 (cert. granted Mar. 9, 2020).

[3] Recent grants of certiorari to review unpublished decisions of intermediate state appellate courts include *Viking River Cruises, Inc.* v. *Moriana*, No. 20-1573 (cert. granted Dec. 15, 2021), and *Lange* v. *California*, No. 20-18 (cert. granted Oct. 19, 2020).

The court noted its discomfort with *Smith*, but also its belief that *Smith* controlled and that it was up to a higher court to decide "whether to revisit" its holding. See *Ibid*. This Court should take that invitation.

2. Respondent says (BIO 14-17) that the record is underdeveloped and inadequate. In fact, the record shows with remarkable clarity that the jury wished to consider the defendants' courtroom demeanor in reaching a verdict, and they were told explicitly by the judge that they could do so. Pet. App. 5a; see also 3 Trial Tr. 46:10-55:18. They in turn convicted petitioner and acquitted his co-defendant. Pet. App. 1a; 3 Trial Tr. 56.

No other facts are relevant to the question presented. It makes no difference whether the jury wished to consider petitioner's conduct or his co-defendant's conduct, or "what element of demeanor they were interested in." BIO 15-16. The body language of either defendant could have biased the jury against petitioner. And as the courts on the other side of the conflict uniformly hold, off-the-stand behavior of any kind is outside the record and may not constitutionally be considered.

It also makes no difference "for what purpose" the jury wished to consider the defendants' courtroom demeanor or "*how* they considered it" (BIO 16). It is plain from the jury's inquiry that they wished to "consider" "defendants body language" in their deliberations. Pet. App. 5a. That is all that matters; consideration of any extra-record, untested facts for any purpose in deliberations of guilt or innocence is categorically an offense to the Due Process Clause.

Moreover, to countenance respondent's arguments on this score would effectively bar review in every case presenting the question posed in the petition. It isn't as though, in a case involving improper prosecutorial commentary on body language, the Court could be any more

certain whether, how, or for what purpose the jury actually considered the demeanor that the prosecutor called out—whether the jury found the comment pertinent and why, or instead whether they declined to rely on it. Here, at least, the case comes to the Court with a clear and undeniable indication that the jury affirmatively *did* intend to consider the defendants' demeanor, which the trial court told them in plain terms they were welcome to do. That makes this case an exceptionally good vehicle, not the other way around.

3. Respondent suggests (BIO 15) that "the jury, in asking about 'body language,' [may] actually [have been] interested in demeanor that they observed on [a] video" that was entered as an exhibit into the record. That is not plausible. The jury were instructed to "consider all the facts and circumstances in evidence," expressly including "the two DVDs with the video recording of the apartment." 3 Trial Tr. 15:4-5, 13-14. They needed no further instruction as to whether they could consider what they saw in the video. That is why, over petitioner's strenuous objection, the trial judge—citing *Smith*—ruled that she would instruct the jury that they were "entitled to consider any observations you made of the defendants' demeanor *during the trial*." 3 Trial Tr. 54:18-20 (emphasis added). No other understanding of the jury's inquiry would have made sense.

4. Finally, respondent makes the puzzling assertion (BIO 17) that "a petition arising from a federal, rather than a state, prosecution would present a more appropriate vehicle" for review because it would allow the Court to consider the Federal Rules of Evidence. But the split at issue here implicates a question of federal *constitutional* law that has been resolved in conflicting ways by *state* high courts. A decision concerning the Federal Rules of Evidence would have no bearing on a case like this one, arising from state court and subject to state rules. In other

words, granting review of a federal case concerning the Federal Rules of Evidence would neither answer nor obviate resolution of the constitutional question presented in the petition.

C. The error was not harmless beyond a reasonable doubt, which is at most an issue for remand

In a final gambit, respondent opposes certiorari with an argument neither briefed before nor addressed by the lower court: It contends that any instructional error was harmless beyond a reasonable doubt.

This contention is doubly flawed. First, it is wrong on its own terms. Respondent's burden on this point is extraordinarily high—it must show that it is clear "beyond a reasonable doubt" (*Chapman* v. *California*, 386 U.S. 18, 23 (1967)) that the verdict did *not* "hinge" (BIO 20) on the defendants' body language. Respondent cannot possibly make that showing. The jury's affirmative question asking the judge whether it could consider petitioner's off-the-stand body language is strong evidence that the jury *did* in fact consider it in deciding petitioner's guilt—or else why ask the question? Moreover, the jury's inquiry was the very last event before it reached its verdict just one hour later. And any prior equivocation would have been understandable, because the record evidence establishing that petitioner lived in the apartment was mixed. The utilities for the apartment were all in his co-defendant's name, not his. 1 Trial Tr. 225:10-18; 2 Trial Tr. 158:10-12. And petitioner's driver license and other paperwork recovered from the scene showed that he lived at a different address. 2 Trial Tr. 144:7-19.

Regardless, even if it were plausible, respondent's newfound argument would not be a basis to deny review. Respondent's only contention before the Appeals Court was that the instruction was constitutionally permissible. And that was the sole ground on which the Appeals Court

ruled. Whether respondent might win on an alternate ground not previously briefed before or decided by any lower court is at most a question for remand. This Court routinely grants certiorari to resolve important questions that controlled a lower court's decision notwithstanding a respondent's assertion that, on remand, it might prevail for a different reason. See, *e.g.*, *Kisor* v. *Wilkie*, 139 S. Ct. 2400, 2424 (2019) (reserving alternative arguments for remand); *Department of Transportation* v. *Association of American Railroads*, 135 S. Ct. 1225, 1234 (2015) (same); *Fitzgerald* v. *Barnstable School Committee*, 555 U.S. 246, 260 (2009) (same). It should do so here.

Respectfully submitted.

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