SUPREME COURT OF THE UNITED STATES

No. 98–1170

LEONARD PORTUONDO, SUPERINTENDENT, FISHKILL CORRECTIONAL FACILITY, PETITIONER *v.* RAY AGARD

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

[March 6, 2000]

JUSTICE SCALIA delivered the opinion of the Court.

In this case we consider whether it was constitutional for a prosecutor, in her summation, to call the jury's attention to the fact that the defendant had the opportunity to hear all other witnesses testify and to tailor his testimony accordingly.

I

Respondent's trial on 19 sodomy and assault counts and 3 weapons counts ultimately came down to a credibility determination. The alleged victim, Nessa Winder, and her friend, Breda Keegan, testified that respondent physically assaulted, raped, and orally and anally sodomized Winder, and that he threatened both women with a handgun. Respondent testified that he and Winder had engaged in consensual vaginal intercourse. He further testified that during an argument he had with Winder, he struck her once in the face. He denied raping her or threatening either woman with a handgun.

During summation, defense counsel charged Winder and Keegan with lying. The prosecutor similarly focused on

the credibility of the witnesses. She stressed respondent's interest in the outcome of the trial, his prior felony conviction, and his prior bad acts. She argued that respondent was a "smooth slick character . . . who had an answer for everything," App. 45, and that part of his testimony "sound[ed] rehearsed," *id.*, at 48. Finally, over defense objection, the prosecutor remarked:

> "You know, ladies and gentlemen, unlike all the other witnesses in this case the defendant has a benefit and the benefit that he has, unlike all the other witnesses, is he gets to sit here and listen to the testimony of all the other witnesses before he testifies.
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> . . . . .
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> "That gives you a big advantage, doesn't it. You get to sit here and think what am I going to say and how am I going to say it? How am I going to fit it into the evidence?
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> . . . . .
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> "He's a smart man. I never said he was stupid. . . . He used everything to his advantage." *Id.*, at 49.

The trial court rejected defense counsel's claim that these last comments violated respondent's right to be present at trial. The court stated that respondent's status as the last witness in the case was simply a matter of fact, and held that his presence during the entire trial, and the advantage that this afforded him, "may fairly be commented on." *Id.*, at 54.

Respondent was convicted of one count of anal sodomy and two counts of third-degree possession of a weapon. On direct appeal, the New York Supreme Court reversed one of the convictions for possession of a weapon but affirmed the remaining convictions. *People* v. *Agard*, 199 App. Div. 2d 401, 606 N. Y. S. 2d 239 (2d Dept. 1993). The New York Court of Appeals denied leave to appeal. *People* v. *Agard*, 83 N. Y. 2d 868, 635 N. E. 2d 298 (1994).

Respondent then filed a petition for habeas corpus relief in federal court, claiming, *inter alia*, that the prosecutor's comments violated his Fifth and Sixth Amendment rights to be present at trial and confront his accusers. He further claimed that the comments violated his Fourteenth Amendment right to due process. The District Court denied the petition in an unpublished order. A divided panel of the Second Circuit reversed, holding that the prosecutor's comments violated respondent's Fifth, Sixth, and Fourteenth Amendment rights. 117 F. 3d 696 (1997), rehearing denied, 159 F. 3d 98 (1998). We granted certiorari. 526 U. S. 1016 (1999).

II

Respondent contends that the prosecutor's comments on his presence and on the ability to fabricate that it afforded him unlawfully burdened his Sixth Amendment right to be present at trial and to be confronted with the witnesses against him, see *Illinois* v. *Allen*, 397 U. S. 337 (1970); *Pointer* v. *Texas*, 380 U. S. 400 (1965), and his Fifth and Sixth Amendment rights to testify on his own behalf, see *Rock* v. *Arkansas*, 483 U. S. 44 (1987). Attaching the cost of impeachment to the exercise of these rights was, he asserts, unconstitutional.

Respondent's argument boils down to a request that we extend to comments of the type the prosecutor made here the rationale of *Griffin* v. *California*, 380 U. S. 609 (1965), which involved comments upon a defendant's *refusal* to testify. In that case, the trial court instructed the jury that it was free to take the defendant's failure to deny or explain facts within his knowledge as tending to indicate the truth of the prosecution's case. This Court held that such a comment, by "solemniz[ing] the silence of the accused into evidence against him," unconstitutionally "cuts down on the privilege [against self-incrimination] by making its assertion costly." *Id.*, at 614.

We decline to extend *Griffin* to the present context. As an initial matter, respondent's claims have no historical foundation, neither in 1791, when the Bill of Rights was adopted, nor in 1868 when, according to our jurisprudence, the Fourteenth Amendment extended the strictures of the Fifth and Sixth Amendments to the States. The process by which criminal defendants were brought to justice in 1791 largely obviated the need for comments of the type the prosecutor made here. Defendants routinely were asked (and agreed) to provide a pretrial statement to a justice of the peace detailing the events in dispute. See Moglen, The Privilege in British North America: The Colonial Period to the Fifth Amendment, in The Privilege Against Self-Incrimination 109, 112, 114 (R. Helmholz et al. eds. 1997). If their story at trial– where they typically spoke and conducted their defense personally, without counsel, see J. Goebel & T. Naughton, Law Enforcement in Colonial New York: A Study in Criminal Procedure (1664–1776), p. 574 (1944); A. Scott, Criminal Law in Colonial Virginia 79 (1930)– differed from their pretrial statement, the contradiction could be noted. See Levy, Origins of the Fifth Amendment and Its Critics, 19 Cardozo L. Rev. 821, 843 (1997). Moreover, what they said at trial was not considered to be evidence, since they were disqualified from testifying under oath. See 2 J. Wigmore, Evidence §579 (3d ed. 1940).

The pretrial statement did not begin to fall into disuse until the 1830s, see Alschuler, A Peculiar Privilege in Historical Perspective, in The Privilege Against Self-Incrimination, *supra*, at 198, and the first State to make defendants competent witnesses was Maine, in 1864, see 2 Wigmore, *supra*, §579, at 701. In response to these developments, some States attempted to limit a defendant's opportunity to tailor his sworn testimony by requiring him to testify prior to his own witnesses. See 3 J. Wigmore, Evidence §§1841, 1869 (1904); Ky. Stat., ch. 45, §1646

(1899); Tenn. Code Ann., ch. 4, §5601 (1896). Although the majority of States did not impose such a restriction, there is no evidence to suggest they also took the affirmative step of forbidding comment upon the defendant's opportunity to tailor his testimony. The dissent faults us for "call[ing] up no instance of an eighteenth- or nineteenth-century prosecutor's urging that a defendant's presence at trial facilitated tailored testimony." *Post*, at 8 (opinion of GINSBURG, J.). We think the burden is rather upon respondent and the dissent, who assert the unconstitutionality of the practice, to come up with a case in which such urging was held improper. They cannot even produce one in which the practice was so much as *challenged* until after our decision in *Griffin*. See, *e.g.*, *State* v. *Cassidy*, 236 Conn. 112, 126–127, 672 A. 2d 899, 907–908 (1996); *People* v. *Buckey*, 424 Mich. 1, 8–15, 378 N. W. 2d 432, 436–439 (1985); *Jenkins* v. *United States*, 374 A. 2d 581, 583–584 (D. C. 1977). This absence cuts in favor of respondent (as the dissent asserts) only if it is possible to believe that after reading *Griffin* prosecutors suddenly realized that commenting on a testifying defendant's unique ability to hear prior testimony was a *good* idea. Evidently, prosecutors were making these comments all along without objection; *Griffin* simply sparked the notion that such commentary *might* be problematic.

Lacking any historical support for the constitutional rights that he asserts, respondent must rely entirely upon our opinion in *Griffin*. That case is a poor analogue, however, for several reasons. What we prohibited the prosecutor from urging the jury to do in *Griffin* was something *the jury is not permitted to do*. The defendant's right to hold the prosecution to proving its case without his assistance is not to be impaired by the jury's counting the defendant's silence at trial against him– and upon request the court must instruct the jury to that effect. See *Carter* v. *Kentucky*, 450 U. S. 288 (1981). It is reasonable enough to

expect a jury to comply with that instruction since, as we observed in *Griffin*, the inference of guilt from silence is not always "natural or irresistible." 380 U. S., at 615. A defendant might refuse to testify simply out of fear that he will be made to look bad by clever counsel, or fear "'that his prior convictions will prejudice the jury.'" *Ibid.* (quoting *People* v. *Modesto*, 62 Cal. 2d 436, 453, 398 P. 2d 753, 763 (1965) (en banc)). By contrast, it *is* natural and irresistible for a jury, in evaluating the relative credibility of a defendant who testifies last, to have in mind and weigh in the balance the fact that he heard the testimony of all those who preceded him. It is one thing (as *Griffin* requires) for the jury to evaluate all the *other* evidence in the case without giving any effect to the defendant's refusal to testify; it is something else (and quite impossible) for the jury to evaluate the credibility of the defendant's testimony while blotting out from its mind the fact that before giving the testimony the defendant had been sitting there listening to the other witnesses. Thus, the principle respondent asks us to adopt here differs from what we adopted in *Griffin* in one or the other of the following respects: It either prohibits inviting the jury to do what the jury is perfectly entitled to do; or it requires the jury to do what is practically impossible.[1]

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[1]The dissent seeks to place us in the position of defending the proposition that inferences that the jury is free to make are inferences that the prosecutor must be free to invite. *Post*, at 10–11. Of course we say no such thing. We simply say (in the sentence to which this note is appended) that forbidding invitation of a *permissible* inference is one of two alternative respects in which this case is substantially different from respondent's sole source of support, *Griffin*. Similarly, the dissent seeks to place us in the position of defending the proposition that it is more natural to infer tailoring from presence than to infer guilt from silence. *Post*, at 8–10. The quite different point we do make is that inferring *opportunity to tailor* from presence is inevitable, and prohibiting that inference (while simultaneously asking the jury to evaluate

Second, *Griffin* prohibited comments that suggest a defendant's silence is "evidence of *guilt*." 380 U. S., at 615 (emphasis added); see also *United States* v. *Robinson*, 485 U. S. 25, 32 (1988) ("*Griffin* prohibits the judge and prosecutor from suggesting to the jury that it may treat the defendant's silence as substantive evidence of guilt'" (quoting *Baxter* v. *Palmigiano*, 425 U. S. 308, 319 (1976)). The prosecutor's comments in this case, by contrast, concerned respondent's *credibility as a witness*, and were therefore in accord with our longstanding rule that when a defendant takes the stand, "his credibility may be impeached and his testimony assailed like that of any other witness." *Brown* v. *United States*, 356 U. S. 148, 154 (1958). "[W]hen [a defendant] assumes the role of a witness, the rules that generally apply to other witnesses– rules that serve the truth-seeking function of the trial– are generally applicable to him as well." *Perry* v. *Leeke*, 488 U. S. 272, 282 (1989). See also *Reagan* v. *United States*, 157 U. S. 301, 305 (1895).

Respondent points to our opinion in *Geders* v. *United States*, 425 U. S. 80, 87–91 (1976), which held that the defendant must be treated differently from other witnesses insofar as sequestration orders are concerned, since

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the veracity of the defendant's testimony) is demanding the impossible– producing the other alternative respect in which this case differs from *Griffin*.

The dissent seeks to rebut this point by asserting that in the present case the prosecutorial comments went beyond pointing out the opportunity to tailor and actually made an accusation of tailoring. It would be worth inquiring into that subtle distinction if the dissent proposed to permit the former while forbidding the latter. It does not, of course; nor, as far as we know, does any other authority. Drawing the line between pointing out the availability of the inference and inviting the inference would be neither useful nor practicable. Thus, under the second alternative described above, the jury must be prohibited from taking into account the opportunity of tailoring.

sequestration for an extended period of time denies the Sixth Amendment right to counsel. With respect to issues of credibility, however, no such special treatment has been accorded. *Jenkins* v. *Anderson*, 447 U. S. 231 (1980), illustrates the point. There the prosecutor in a first-degree murder trial, during cross-examination and again in closing argument, attempted to impeach the defendant's claim of self-defense by suggesting that he would not have waited two weeks to report the killing if that was what had occurred. In an argument strikingly similar to the one presented here, the defendant in *Jenkins* claimed that commenting on his prearrest silence violated his Fifth Amendment privilege against self-incrimination because "a person facing arrest will not remain silent if his failure to speak later can be used to impeach him." *Id.*, at 236. The Court noted that it was not clear whether the Fifth Amendment protects prearrest silence, *id.*, at 236, n. 2, but held that, *assuming it does*, the prosecutor's comments were constitutionally permissible. "[T]he Constitution does not forbid 'every government-imposed choice in the criminal process that has the effect of discouraging the exercise of constitutional rights.'" *Id.*, at 236 (quoting *Chaffin* v. *Stynchcombe*, 412 U. S. 17, 30 (1973)). Once a defendant takes the stand, he is "'subject to cross-examination impeaching his credibility just like any other witness.'" *Jenkins*, *supra*, at 235–236 (quoting *Grunewald* v. *United States*, 353 U. S. 391, 420 (1957)).

Indeed, in *Brooks* v. *Tennessee*, 406 U. S. 605 (1972), the Court suggested that arguing credibility to the jury– which would include the prosecutor's comments here– is the preferred means of counteracting tailoring of the defendant's testimony. In that case, the Court found unconstitutional Tennessee's attempt to defeat tailoring by requiring defendants to testify at the outset of the defense or not at all. This requirement, it said, impermissibly burdened the defendant's right to testify because it forced him

to decide whether to do so before he could determine that it was in his best interest. *Id.*, at 610. The Court expressed its awareness, however, of the danger that tailoring presented. The antidote, it said, was not Tennessee's heavy-handed rule, but the more nuanced "adversary system[, which] reposes judgment of the credibility of all witnesses in the jury." *Id.*, at 611. The adversary system surely envisions– indeed, it requires– that the prosecutor be allowed to bring to the jury's attention the danger that the Court was aware of.

Respondent and the dissent also contend that the prosecutor's comments were impermissible because they were "generic" rather than based upon any specific indication of tailoring. Such comment, the dissent claims, is unconstitutional because it "does not serve to distinguish guilty defendants from innocent ones." *Post*, at 2. But this Court has approved of such "generic" comment before. In *Reagan*, for example, the trial court instructed the jury that "[t]he deep personal interest which [the defendant] may have in the result of the suit should be considered . . . in weighing his evidence and in determining how far or to what extent, if at all, it is worthy of credit." 157 U. S., at 304. The instruction did not rely on any specific evidence of actual fabrication for its application; nor did it, directly at least, delineate the guilty and the innocent. Like the comments in this case, it simply set forth a consideration the jury was to have in mind when assessing the defendant's credibility, which, *in turn*, assisted it in determining the guilt of the defendant. We deemed that instruction perfectly proper. Thus, that the comments before us here did not, of their own force, demonstrate the guilt of the defendant, or even distinguish among defendants, does not render them infirm.[2]

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[2] The dissent's stern disapproval of generic comment (it "tarnishes the

Finally, the Second Circuit held, and the dissent contends, that the comments were impermissible here because they were made, not during cross-examination, but at summation, leaving the defense no opportunity to reply. 117 F. 3d, at 708, and n. 6. That this is not a constitutionally significant distinction is demonstrated by our decision in *Reagan*. There the challenged instruction came at the end of the case, after the defense had rested, just as the prosecutor's comments did here.[3]

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innocent no less than the guilty," *post*, at 2; it suffers from an "incapacity to serve the individualized truth-finding function of trials," *post*, at 4; so that "when a defendant's exercise of a constitutional fair trial right is 'insolubly ambiguous' as between innocence and guilt, the prosecutor may not urge the jury to construe the bare invocation of the right against the defendant," *post*, at 3) hardly comports with its praising the Court of Appeals for its "carefully restrained and moderate position" in forbidding this monstrous practice only on summation and allowing it during the rest of the trial, *post*, at 2. The dissent would also allow a prosecutor to remark at any time– even at summation– on the convenient "fit" between specific elements of a defendant's testimony and the testimony of others. *Post*, at 2–3. It is only a "general accusation of tailoring" that is forbidden. *Post*, at 3. But if the dissent believes that comments which "invite the jury to convict on the basis of conduct as consistent with innocence as with guilt" should be out of bounds, *ibid.*– or at least should be out of bounds in summation– comments focusing on such "fit" must similarly be forbidden. As the dissent acknowledges, "fit" is as likely to result from the defendant's "sheer innocence" as from anything else. *Post*, at 10.

[3]The dissent maintains that *Reagan* v. *United States*, 157 U. S. 301 (1895), is inapposite to the question presented in this case because it considered the effect of an interested-witness instruction on a defendant's *statutory* right to testify, rather than on his *constitutional* right to testify. See *id.*, at 304 (citing Act of Mar. 16, 1878, 20 Stat. 30, as amended 18 U. S. C. §3481). That is a curious position for the dissent to take. *Griffin*– the case the dissent claims controls the outcome here– relied almost exclusively on the very statute at issue in *Reagan* in defining the contours of the Fifth Amendment right prohibiting comment on the failure to testify. After quoting the Court's description, in an earlier case, of the reasons for the statutory right, see *Wilson* v. *United States*, 149 U. S. 60 (1893), the *Griffin* Court said: "If the words

Our trial structure, which requires the defense to close before the prosecution, regularly forces the defense to predict what the prosecution will say. Indeed, defense counsel in this case explained to the jury that it was his job in "closing argument here to try and anticipate as best [he could] some of the arguments that the prosecution [would] be making." App. 25–27. What *Reagan* permitted– a generic interested-witness instruction, *after the defense has closed*– is in a long tradition that continues to the present day. See, *e.g.*, *United States* v. *Jones*, 587 F. 2d 802 (CA5 1979); *United States* v. *Hill*, 470 F. 2d 361 (CADC 1972); 2 C. Wright, Federal Practice and Procedure §501, and n. 1 (1982). Indeed, the instruction was given in this very case. See Tr. 834 ("A defendant is of course an interested witness since he is interested in the outcome of the trial. You may as jurors wish to keep such interest in mind in determining the credibility and weight to be given to the defendant's testimony").[4] There is absolutely noth-

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'Fifth Amendment' are substituted for 'act' and for 'statute,' the spirit of the Self-Incrimination Clause is reflected." 380 U. S., at 613–614. It is eminently reasonable to consider that a questionable manner of constitutional exegesis, see *Mitchell* v. *United States*, 526 U. S. 314, 336 (1999) (SCALIA, J., dissenting); it is not reasonable to make *Griffin* the very centerpiece of one's case while simultaneously denying that the statute construed in *Reagan* (and *Griffin*) has anything to do with the meaning of the Constitution. The interpretation of the statute in *Reagan* is in fact a much *more* plausible indication of constitutional understanding than the application of the statute in *Griffin:* The Constitution must have allowed what *Reagan* said the statute permitted, because otherwise the Court would have been interpreting the statute in a manner that rendered it void. *Griffin*, on the other hand, relied upon the much shakier proposition that a practice which the statute *prohibited* must be prohibited by the Constitution as well.

[4]It is hard to understand how JUSTICE STEVENS reconciles the unquestionable propriety of the standard interested-witness instruction with his conclusion that comment upon the opportunity to tailor, although it is constitutional, "demean[s] [the adversary] process" and "should be discouraged." *Post*, at 1 (opinion concurring in judgment).

ing to support the dissent's contention that for purposes of determining the validity of generic attacks upon credibility "the distinction between cross-examination and summation is critical," *post*, at 12.

In sum, we see no reason to depart from the practice of treating testifying defendants the same as other witnesses. A witness's ability to hear prior testimony and to tailor his account accordingly, and the threat that ability presents to the integrity of the trial, are no different when it is the defendant doing the listening. Allowing comment upon the fact that a defendant's presence in the courtroom provides him a unique opportunity to tailor his testimony is appropriate– and indeed, given the inability to sequester the defendant, sometimes essential– to the central function of the trial, which is to discover the truth.

III

Finally, we address the Second Circuit's holding that the prosecutor's comments violated respondent's Fourteenth Amendment right to due process. Of course to the extent this claim is based upon alleged burdening of Fifth and Sixth Amendment rights, it has already been disposed of by our determination that those Amendments were not infringed. Cf. *Graham* v. *Connor*, 490 U. S. 386, 395 (1989) (where an Amendment "provides an explicit textual source of constitutional protection . . . that Amendment, not the more generalized notion of 'substantive due process,' must be the guide for analyzing [the] claims").

Respondent contends, however, that because New York

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Our decision, in any event, is addressed to whether the comment is permissible as a constitutional matter, and not to whether it is always desirable as a matter of sound trial practice. The latter question, as well as the desirability of putting prosecutorial comment into proper perspective by judicial instruction, are best left to trial courts, and to the appellate courts which routinely review their work.

law required him to be present at his trial, see N. Y. Crim. Proc. Law §260.20 (McKinney 1993); N. Y. Crim. Proc. Law §340.50 (McKinney 1994), the prosecution violated his right to due process by commenting on that presence. He asserts that our decision in *Doyle* v. *Ohio,* 426 U. S. 610 (1976), requires such a holding. In *Doyle*, the defendants, after being arrested for selling marijuana, received their *Miranda* warnings and chose to remain silent. At their trials, both took the stand and claimed that they had not sold marijuana, but had been "framed." To impeach the defendants, the prosecutors asked each why he had not related this version of events at the time he was arrested. We held that this violated the defendants' rights to due process because the *Miranda* warnings contained an implicit "assurance that silence will carry no penalty." *Id.*, at 618.

Although there might be reason to reconsider *Doyle*, we need not do so here. "[W]e have consistently explained *Doyle* as a case where the government had induced silence by implicitly assuring the defendant that his silence would not be used against him." *Fletcher* v. *Weir,* 455 U. S. 603, 606 (1982) *(per curiam).* The *Miranda* warnings had, after all, specifically given the defendant both the option of speaking and the option of remaining silent– and had then gone on to say that if he chose the former option what he said could be used against him. It is possible to believe that this contained an implicit promise that his choice of the option of silence would *not* be used against him. It is not possible, we think, to believe that a similar promise of impunity is implicit in a statute requiring the defendant to be present at trial.

Respondent contends that this case contains an element of unfairness even worse than what existed in *Doyle:* Whereas the defendant in that case had the ability to avoid impairment of his case by choosing to speak rather than remain silent, the respondent here (he asserts) had

no choice but to be present at the trial. Though this is far from certain, see, *e.g.*, *People* v. *Aiken*, 45 N. Y. 2d 394, 397, 380 N. E. 2d 272, 274 (1978) ("[A] defendant charged with a felony not punishable by death may, by his voluntary and willful absence from trial, waive his right to be present at every stage of his trial"), we shall assume for the sake of argument that it is true. There is, however, no authority whatever for the proposition that the impairment of credibility, if any, caused by mandatory presence at trial violates due process. If the ability to avoid the accusation (or suspicion) of tailoring were as crucial a factor as respondent contends, one would expect criminal defendants– in jurisdictions that do not have compulsory attendance requirements– frequently to absent themselves from trial when they intend to give testimony. But to our knowledge, a criminal trial without the defendant present is a rarity. Many long established elements of criminal procedure deprive a defendant of advantages he would otherwise possess– for example, the requirement that he plead to the charge before, rather than after, all the evidence is in. The consequences of the requirement that he be present at trial seem to us no worse.

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For the foregoing reasons, the judgment of the Court of Appeals for the Second Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.