Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

PORTUONDO, SUPERINTENDENT, FISHKILL CORRECTIONAL FACILITY *v.* AGARD

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

No. 98–1170. Argued November 1, 1999– Decided March 6, 2000

Respondent was convicted on New York criminal charges after a trial that required the jury to decide whether it believed the testimony of the victim and her friend or the conflicting testimony of respondent. The prosecutor challenged respondent's credibility during summation, calling the jury's attention to the fact that respondent had the opportunity to hear all other witnesses testify and to tailor his own testimony accordingly. The trial court rejected respondent's objection that these comments violated his right to be present at trial. After exhausting his state appeals, respondent filed a petition for habeas corpus 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, and his Fourteenth Amendment right to due process. The District Court denied his petition, but the Second Circuit reversed.

Held:

1. The prosecutor's comments did not violate respondent's Fifth and Sixth Amendment rights. The Court declines to extend to such comments the rationale of *Griffin* v. *California*, 380 U. S. 609, in which it held that a trial court's instruction about a defendant's refusal to testify unconstitutionally burdened his privilege against self-incrimination. As a threshold matter, respondent's claims find no historical support. *Griffin*, moreover, is a poor analogue for those claims. *Griffin* prohibited the prosecution from urging the jury to do something the jury is not permitted to do, and upon request a court must instruct the jury not to count a defendant's silence against him. It is reasonable to expect a jury to comply with such an instruction because inferring guilt from silence is not always "natural or irre-

sistible," *id.*, at 380; but 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 has heard the testimony of those who preceded him. In contrast to the comments in *Griffin*, which suggested that a defendant's silence is "evidence of guilt," *id.*, at 615, the prosecutor's comments in this case concerned respondent's credibility as a witness. They were therefore in accord with the Court's longstanding rule that when a defendant takes the stand, his credibility may be assailed like that of any other witness—a rule that serves the trial's truth-seeking function, *Perry* v. *Leeke*, 488 U. S. 272, 282. That the comments here were generic rather than based upon a specific indication of tailoring does not render them infirm. Nor does the fact that they came at summation rather than at a point earlier in the trial. In *Reagan* v. *United States*, 157 U. S. 301, 304, the Court upheld the trial court's recitation of an interested-witness instruction that directed the jury to consider the defendant's deep personal interest in the case when evaluating his credibility. The instruction in *Reagan*, like the prosecutor's comments in this case, did not rely on any specific evidence of actual fabrication for its application, nor did it come at a time when the defendant could respond. Nevertheless, the Court considered the instruction to be perfectly proper. Pp. 3–12.

2. The prosecutor's comments also did not violate respondent's right to due process. To the extent his due process claim is based upon an alleged burdening of his Fifth and Sixth Amendment rights, it has been disposed of by the determination that those Amendments were not directly infringed. Respondent also argues, however, that it was improper to comment on his presence at trial because New York law requires him to be present. Respondent points to the Court's decision in *Doyle* v. *Ohio*, 426 U. S. 610, for support. The Court held in *Doyle* that the prosecution may not impeach a defendant with his post-*Miranda* warnings silence because those warnings carry an implicit "assurance that silence will carry no penalty." *Id.*, at 618. No promise of impunity is implicit in a statute requiring a defendant to be present at trial, and there is no authority whatever for the proposition that the impairment of credibility, if any, caused by mandatory presence at trial violates due process. Pp. 12–14.

117 F. 3d 696, reversed and remanded.

SCALIA, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and O'CONNOR, KENNEDY, and THOMAS, JJ., joined. STEVENS, J., filed an opinion concurring in the judgment, in which BREYER, J., joined. GINSBURG, J., filed a dissenting opinion, in which SOUTER, J., joined.