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A Right to Confrontation or Insinuation? The Supreme Court's Holding in Portuondo v. Agard

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A RIGHT TO CONFRONTATION OR INSINUATION? THE SUPREME COURT'S HOLDING IN *PORTUONDO V. AGARD*

I. INTRODUCTION

Imagine that you are charged with a crime that you did not commit. Forced to attend your own trial, you choose to testify on your own behalf. The prosecutor conducts his best spin to discredit you, but his attempts are largely unsuccessful. Not only is your story consistent with that of other witnesses, but it is a plausible accounting of the disputed facts. The reason: your story is the truth. Nevertheless, in summation, the prosecutor attacks your credibility. His argument, however, addresses no inconsistencies, no physical evidence, and no concrete reason to cast doubt on your story. Instead, he argues that your presence in the courtroom provided you with an opportunity to tailor your own testimony to meet the facts presented at trial. The jury believes his argument and sends you to prison. Have you received a fair trial?

The above hypothetical addresses two competing considerations. The first is a prosecutor's ability to effectively argue his case. The second is a defendant's constitutional right to confront the witnesses against him,[1] to testify on his own behalf,[2] and to receive a fair trial.[3] This conflict derives from the fact that while a defendant has the right to tell his side of the story, he does not have the right to do so unchallenged. He may be impeached,[4] his prior bad acts may be brought to the jury's attention,[5] and his credibility may be attacked

1. *See* U.S. CONST. amend. VI. The Sixth Amendment states: "the accused shall enjoy the right . . . to be confronted with the witnesses against him." *Id.*

2. *See* U.S. CONST. amend. V; Rock v. Arkansas, 483 U.S. 44, 51 (1987) (stating that "[t]he right to testify on one's own behalf at a criminal trial . . . is one of the rights that 'are essential to due process of law in a fair adversary process'") (quoting Faretta v. California, 422 U.S. 806, 819 n.15 (1975)).

3. *See* U.S. CONST. amend. XIV. The Fourteenth Amendment states: "[No state] shall deprive any person of life, liberty, or property without due process of law . . . ."

4. *See* Brown v. United States, 356 U.S. 148, 155 (1958) (stating "'[a defendant] has no right to set forth to the jury all the facts which tend in his favor without laying himself open to a cross-examination upon those facts'") (quoting Fitzpatrick v. United States, 178 U.S. 304, 315 (1900)).

5. *See* FED. R. EVID. 609.

in equal measure with that of other witnesses.[6] The narrow but important question is whether the insinuation made by the prosecutor for the first time in summation is a fair commentary on the defendant's credibility or an impermissible use of the defendant's constitutional rights as evidence against him.

In *Portuondo v. Agard*,[7] the Supreme Court decided it was the former, concluding that a New York prosecutor's argument identical to the above hypothetical violated neither the Fifth, the Sixth, nor the Fourteenth Amendments.[8] This decision reversed the Second Circuit, which held that it was unconstitutional for a prosecutor to insinuate for the first time in summation that a defendant's presence in the courtroom provided him an opportunity to tailor his testimony to meet the facts presented at trial.[9] The Second Circuit's holding was based on the Supreme Court's decision in *Griffin v. California*.[10] Justice Scalia, writing for the majority, reasoned that *Griffin* was a "poor analogue" to *Agard*.[11] Unlike *Griffin*, in which the jury was asked to infer guilt from the defendant's refusal to testify at trial,[12] the Court believed that the prosecutor's argument in this case attacked the defendant's credibility as a witness, notwithstanding the fact that the remarks were first made in summation and lacked any supporting evidence.[13] The Court also concluded that the remarks were not a violation of due process, reasoning that there is not an implicit promise of impunity associated with compelling a defendant's presence in the courtroom.[14]

This note addresses the Supreme Court's holding in *Agard* and argues that within the confines of the narrow question presented, the Court should have affirmed the Second Circuit. Before doing so, this note first surveys the decisions that had an impact on the Court's decision. It then focuses briefly on the Second Circuit's holding before turning its attention to Justice Scalia's majority opinion and Justice Ginsburg's dissent. This note then argues that the Court's holding in *Griffin* and the cases that have followed its

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6. *See, e.g.*, Jenkins v. Anderson, 447 U.S. 231, 235-36 (1980) (citing numerous decisions regarding a defendant's decision to testify on his own behalf).
7. 120 S. Ct. 1119 (2000).
8. *See id.* at 1120-25.
9. *See* Agard v. Portuondo, 117 F.3d 696, 709 (2d Cir. 1997), *rev'd*, 120 S. Ct. 1119 (2000).
10. 380 U.S. 609 (1965).
11. *Agard*, 120 S. Ct. at 1121.
12. *See Griffin*, 380 U.S. at 615.
13. *See Agard*, 120 S. Ct. at 1126-27.
14. *See id.* at 1128 (assuming that the defendant is required to attend his trial).

rationale provide both the precedent to support the Second Circuit's conclusion and the appropriate interpretation of the Constitutional rights of the accused. Finally, this note suggests that the Court's holding tips the balance too far in the favor of prosecutors by allowing the guilty and the innocent alike to have their credibility assailed at a point too late to effectively rebut the accusation.

II. BACKGROUND

A. *The Penalty Analysis*

In *Griffin v. California*,[15] the Supreme Court concluded that the Fifth Amendment's prohibition against compelled testimony also includes the implied right to be free from adverse inferences associated with the defendant's decision to remain silent.[16] The Court reasoned that adverse inferences exact a penalty on the defendant for exercising a right guaranteed him by the Constitution.[17]

Griffin was charged with first degree murder.[18] After the evidence was presented, and consistent with California law,[19] the jury was instructed that in its deliberations, it could consider any unfavorable inference arising from the defendant's failure to deny or explain the evidence against him, regardless of whether the defendant testified at trial.[20] Griffin was convicted, and the California Supreme Court affirmed.[21] The U.S. Supreme Court overturned Griffin's conviction.[22] Despite the jury instruction that the failure to deny or explain facts for which the defendant had knowledge did not create a presumption of guilt, the Court held that California's comment law imposed a penalty on the defendant for exercising his Fifth Amendment right to remain silent.[23] The Court reasoned that

15. 380 U.S. 609 (1965).

16. *See Griffin*, 380 U.S. at 609. The Fifth Amendment states that "No person . . . shall be compelled in any criminal case to be a witness against himself." U.S. CONST. amend. V.

17. *See Griffin*, 380 U.S. at 609.

18. *See id.*

19. At the time of Griffin's trial, the California Constitution permitted comment by both the court and counsel. *See* CAL. PENAL CODE § 1127 (West 2000) (stating that "in any criminal case, whether the defendant testifies or not, his failure to explain or to deny by his testimony any evidence or facts in the case against him may be commented on by the court").

20. *See id.*

21. *See* People v. Griffin, 383 P.2d 432 (Cal. 1963).

22. *See Griffin*, 380 U.S. at 609.

23. *See id.* at 610, 614.

"the Fifth Amendment, in its direct application to the Federal Government, and in its bearing on the States by reason of the Fourteenth Amendment, forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt."[24]

Later in *Doyle v. Ohio*,[25] the Court followed *Griffin*'s rationale, holding that cross-examination designed to impeach a defendant's exculpatory story outlined for the first time at trial by use of the defendant's postarrest, post-*Miranda* silence was a due process violation.[26] While the state argued that the prosecutor's questions were justified by way of necessity,[27] the Court reasoned that the defendant's silence proved nothing since the defendant was advised by police that he did not have to speak.[28] As illustrated by the Court's later holding in *Jenkins v. Anderson*,[29] the government's inducement of the defendant's silence was the deciding factor.[30]

In *Jenkins*, the Court concluded that a defendant's prearrest silence may be used by the prosecution for impeachment purposes.[31] The defendant advanced a self-defense claim in response to charges

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24. *Id.* at 609. *Griffin* was premised on the Court's earlier holding in *Wilson v. United States*, 149 U.S. 60 (1893). At issue in *Wilson* was an act of Congress that simultaneously granted competency to defendants in federal courts, but forbade a defendant's refusal to testify to be used as evidence against him. *See Wilson*, 149 U.S. at 65 (analyzing 18 U.S.C. § 3481 (1985)). The Court in *Griffin* concluded that "[i]f the words 'Fifth Amendment' are substituted for 'act' and for 'statute,' the spirit of the Self-Incrimination Clause is reflected." *Griffin*, 380 U.S. at 614.

25. 426 U.S. 610 (1976).

26. *See id.* at 611.

27. *See id.* at 629. The state argued that an exculpatory story at trial and silence at the time of arrest implied that the story was fabricated at some point, and justified inquiry into the silence for the limited purpose of impeachment. *See id.*

28. *See id.* at 617 (concluding that "[s]ilence in the wake of these warnings may be nothing more than the arrestee's exercise of these *Miranda* rights"). The Court went on to state:

> "When a person under arrest is informed, as *Miranda* requires, that he may remain silent, that anything he says may be used against him, and that he may have an attorney if he wishes, it seems to me that it does not comport with due process to permit the prosecution during the trial to call attention to his silence at the time of arrest and to insist that because he did not speak about the facts of the case at that time, as he was told he need not do, an unfavorable inference might be drawn as to the truth of his trial testimony. . . ."

Id. at 619 (quoting United States v. Hale, 422 U.S. 171, 182-83 (1975) (White, J., concurring)).

29. 447 U.S. 231 (1980).

30. *See id.* at 247.

31. *See id.* at 238 (concluding that "[t]he Fifth Amendment is not violated by the use of prearrest silence to impeach a criminal defendant's credibility").

that he committed murder.[32] During cross-examination the prosecutor asked why the defendant did not go directly to the police with his story, and then insinuated during summation that the defendant's actions were inconsistent with his self-defense claim.[33] While the defendant argued that *Doyle* prohibited the prosecutor's questions, the Court concluded that "impeachment follow[ed] the defendant's own decision to cast aside his cloak of silence and advance[ ]the truthfinding function of the criminal trial."[34] The distinguishing factor was that "no governmental action induced [the defendant] to remain silent."[35]

Griffin's reasoning was also expanded to situations in which the government unnecessarily chilled the defendant's exercise of his constitutional rights. For example, in *Brooks v. Tennessee*,[36] the Court held that a Tennessee statute requiring a criminal defendant to testify before any other defense evidence was presented,[37] violated his Fifth Amendment right to testify on his own behalf.[38] Citing *Griffin*, Justice Brennan concluded that the statute "'cut[ ] down on the privilege [to remain silent] by making its assertion costly.'"[39] In an argument similar to that made in *Agard*, Tennessee contended that the statute reflected the legitimate state interest of reducing perjury.[40] Justice Brennan rejected this contention, concluding that the government's interest in furthering the truth seeking process did not outweigh the accused's right to testify.[41] This conclusion was

32. *See id.* at 231.

33. *See id.* at 234 (arguing that it took the defendant two weeks to go to the police).

34. *Id.* at 238; *see also* Raffel v. United States, 271 U.S. 494, 497 (1926) (holding a defendant's waiver is not partial, and once it is cast aside a defendant may not reassume its protections).

35. *Id.* at 240.

36. 406 U.S. 605 (1972).

37. *See id.* at 611. The statute at issue was TENN. CODE ANN. § 40-2403 (1955). Section 40-2403 provided that "[a] defendant desiring to testify shall do so before any other testimony for the defense is heard by the court trying the case." *Id.* Section 40-2403 is also cited in its entirety in the opinion. *See Brooks*, 406 U.S. at 606.

38. *See Brooks*, 406 U.S. at 611.

39. *Id.* (quoting Griffin v. California, 380 U.S. 609, 614 (1965)).

40. *See id.* at 607 ("The rule that a defendant must testify first is related to the ancient practice of sequestering prospective witnesses in order to prevent their being influenced by other testimony in the case.").

41. *See id.* at 611 (acknowledging a defendant's increased ability to tailor testimony if he is not required to testify first). The Court stated that "[a]lthough the Tennessee statute [did] reflect a state interest in preventing testimonial influence . . . that interest [is not] sufficient to override the defendant's right to remain silent at trial." *Id.*

based on the premise that a defendant might not know at the outset of trial whether his testimony will be needed.[42]

Most recently, in *Mitchell v. United States*,[43] the Court concluded that because a guilty plea is not a waiver of a defendant's Fifth Amendment privilege against self-incrimination,[44] the government may not make use of adverse inferences associated with the defendant's choice to remain silent at a later sentencing hearing.[45] Citing *Griffin*, Justice Kennedy concluded that "[t]he normal rule in a criminal case is that no negative inference from the defendant's failure to testify is permitted."[46] While the government argued that the defendant waived all protection by pleading guilty, the majority believed this reasoning "turn[ed the Fifth Amendment's] constitutional shield into a prosecutorial sword."[47]

In *Mitchell*, the defendant pled guilty to conspiracy to distribute cocaine and reserved her right to contest the quantity at sentencing.[48] At the sentencing hearing, the government sought to elicit the amount through cross-examination,[49] so the defendant attempted to invoke her Fifth Amendment right to remain silent.[50] The district court ruled that she waived this right by pleading guilty.[51] The Supreme Court disagreed, believing that this would allow the government to indict a suspect without specifying the quantity of drugs, to obtain a guilty plea, and then to put the defendant on the witness stand to fill in the missing amount.[52] This tactic, the Court perceived, used the defendant "as an instrument in his or her own condemnation, undermining the long tradition and vital principle that criminal proceedings rely on accusations proved by the Government, not on inquisitions conducted to enhance its own prosecutorial power."[53]

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42. *See id.* at 612.
43. 526 U.S. 314 (1999).
44. *See id.* at 315.
45. *See id.* at 329 (stating "[t]he concerns which mandate the rule against negative inferences at a criminal trial apply with equal force at sentencing").
46. *Id.* at 327-28 (citing *Griffin*, 380 U.S. at 614).
47. *Id.* at 322.
48. *See id.* at 319.
49. *See id.*
50. *See id.*
51. *See id.*
52. *See id.* at 324-25.
53. *Id.* at 325 (citing Rogers v. Richmond, 365 U.S. 534, 541 (1961)).

Griffin's logic, however, has not been universally heralded. For example, when the decision was handed down, Justice Stewart dissented, complaining that California's comment law did not actually compel the defendant to do anything.[54] Justice Stewart reasoned that "whatever compulsion may exist derives from the defendant's choice not to testify, not from any comment by court or counsel."[55] Arguing that the Fifth Amendment was designed to protect against trial by inquisition,[56] Justice Stewart reasoned that California's comment rule did nothing more than highlight facts that bore on the defendant's credibility.[57]

Stewart's arguments have persevered. Most recently, in *Mitchell*, decided a mere six months before the Court heard oral argument in *Agard*, Justice Scalia, joined by Chief Justice Rehnquist and Justices O'Connor and Thomas wrote a vigorous dissent in response to the Court's continued expansion of *Griffin*.[58] Justice Scalia attacked *Griffin*'s basic constitutional premise, arguing that it was "a wrong turn–which is not cause enough to overrule it, but is cause enough to resist its extension."[59] Justice Thomas agreed, but wrote

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54. *See* Griffin v. California, 380 U.S. 609, 621 (1965) (Stewart, J., dissenting).

55. *Id.* at 620.

56. *See id.* (Stewart, J., dissenting) (discussing the history of the Fifth Amendment).

> When a suspect was brought before the Court of High Commission or the Star Chamber, he was commanded to answer whatever was asked of him, and subjected to a far reaching and deeply probing inquiry in an effort to ferret out some unknown and frequently unsuspected crime. He declined to answer on pain of incarceration, banishment, or mutilation. And if he spoke falsely, he was subject to further punishment. Faced with this formidable array of alternatives, his decision to speak was unquestionably coerced.

Id. (Stewart, J., dissenting).

57. *See id.* (Stewart, J., dissenting). Justice Stewart argued that "if any compulsion be detected in the California procedure, it is of a dramatically different and less palpable nature than that involved in the procedures which historically gave rise to the Fifth Amendment guarantee." *Id.* Moreover, Justice Stewart argued that the jury will realize that the defendant has not testified regardless of whether the prosecutor brings it to their attention. *See id.* at 621; *see also* Agard v. Portuondo, 117 F.3d 696, 718 (2d Cir. 1997) (arguing that jurors expect the defendant to be present at trial).

58. *See Mitchell*, 526 U.S. at 331 (Scalia, J., dissenting). Like Justice Stewart before him, *see supra* notes 56-57 and accompanying text, Justice Scalia also believes that the historical pretext of *Griffin* is inaccurate. *See id.* at 332 (Scalia, J., dissenting) (stating "*Griffin*'s pedigree is equally dubious").

59. *Id.* at 336 (Scalia, J., dissenting). Moreover, Justice Scalia argued that whatever social utility is provided through restraint of a prosecutor's comments regarding a defendant's exercise of her Fifth Amendment rights, there is no constitutional guarantee of restraint. *See id.* at 335 (Scalia, J., dissenting) ("Whatever the merits of prohibiting adverse inferences as a legislative policy, . . . the text and history of the Fifth Amendment give no indication that there is a federal *constitutional* prohibition on the use of a defendant's silence as demeanor evidence.").

separately, indicating his willingness to revisit the decision under appropriate circumstances.[60]

B. *Impeachment*

While the Court is protective of an individual's constitutional rights, it has also sought to achieve fairness in the adversarial process by not instilling an unfair litigation advantage in defendants. For example, in *Brown v. United States*,[61] the Court concluded that a testifying defendant may be impeached and his testimony assailed like that of any other witness.[62] The defendant testified on her own behalf in a denaturalization proceeding, asserting she did not further Communism in this country during the ten-year period prior to her naturalization.[63] She then sought to invoke her Fifth Amendment rights in response to questions put forth to her on cross-examination.[64] The defendant argued that a witness does not waive her Fifth Amendment rights through "denials and partial disclosures, but only through testimony that itself incriminates."[65] The Court disagreed, stating that "'[a defendant] has no right to set forth to the jury all the facts which tend in his favor without laying himself open to a cross-examination upon those facts.'"[66]

Moreover, in *Reagan v. United States*,[67] the Court concluded that when a defendant testifies, the jury may be instructed that the defendant's interest in the trial creates an incentive to lie.[68] *Reagan* involved a different provision of the same act at issue in *Wilson v. United States*.[69] The Court opined that while a defendant's choice to

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60. Justice Thomas was much harsher in his criticism, advocating the overruling of *Griffin* at an appropriate time. *See id.* at 341 (Thomas, J., dissenting) ("*[S]tare decisis* is 'at its weakest when we interpret the Constitution because our interpretation can be altered only by constitutional amendment or by overruling our prior decisions.'" (quoting Agostini v. Felton, 521 U.S. 203, 235 (1997))).

61. 356 U.S. 148 (1958).

62. *See id.* at 154-55.

63. *See id.* at 150.

64. *See id.* at 152.

65. *Id.* at 154.

66. *Id.* at 155 (quoting Fitzpatrick v. United States, 178 U.S. 304, 315 (1900)).

67. 157 U.S. 301 (1895).

68. *See id.* at 305-06 (stating that while it is the "province of the court" to point out matters that effect credibility, it is improper to charge the jury directly that a particular witness is not credible).

69. 149 U.S. 60, 65 (1893).

remain silent could not be brought to the attention of the jury, a defendant who elects to take the witness stand may have his credibility attacked like any other witness.[70] The Court reasoned that a jury may "properly consider his manner of testifying, the inherent probabilities of his story, the amount and character of the contradictory testimony, the nature and extent of his interest in the trial, and the impeaching evidence in determining how much of [sic] credence he is entitled to."[71] The premise was that all testifying witnesses were to be treated the same.[72] Moreover, while the Court concluded that the defendant's interest in the outcome of the trial may properly be considered,[73] it specifically stated that the defendant's testimony may not be singled out and denounced as false.[74]

III. THE CASE

A. *The Testimony and Evidence Presented at Trial*

Ray Agard and Nessa Winder met at a Manhattan night club on April 27, 1990, and later that evening had sexual relations.[75] The following weekend Winder and her roommate, Breda Keegan, again met Agard, who was accompanied by his roommate, Freddy, and another friend, Albert Kiah.[76] During the evening, the group consumed vast quantities of alcohol, and several, including Winder, also used cocaine.[77] After visiting several other nightclubs, the group returned to Agard's apartment early the next morning.[78] The events that took place at the apartment that morning were disputed. Winder claimed that the following morning Agard raped and

70. *See Reagan*, 157 U.S. at 305 (stating the defendant may be fully cross-examined and impeached).

71. *Id.*

72. *See id.* ("[T]he limits of suggestion are the same in respect to him as to others.").

73. *See id.* at 306 (stating that while the defendant's interest no longer prohibits him from testifying, his interest is to be considered in judging his credibility).

74. *See id.* at 305 (stating "[t]he fact that he is a defendant does not condemn him as unworthy of belief").

75. *See* Agard v. Portuondo, 117 F.3d 696, 698-99 (2d Cir. 1997), *rev'd*, 120 S. Ct. 1119 (2000).

76. *See id.* at 699.

77. *See id.*

78. *See id.*

sodomized her.[79] Agard claimed the couple engaged in consensual sex, as they had the previous weekend.[80]

Agard corroborated major portions of Keegan's and Winder's testimony, yet disputed several key facts. First, while Keegan testified that Agard erupted violently in reaction to her suggestion that she take Winder home shortly after the group arrived at his apartment,[81] Agard denied the violent outburst and claimed that he was merely "annoyed" with Keegan because her boisterous demands had disturbed his landlady.[82] Moreover, while both Keegan and Winder testified that Winder was asleep before the party returned to Agard's apartment,[83] both Agard and Kiah testified that Winder was overtly affectionate during a car ride from one nightclub to another.[84] Agard also testified that Winder consented to anal intercourse the first weekend they met and that she consented to vaginal intercourse the morning of the alleged assault.[85]

In contrast, Winder testified that she awoke the following morning wearing only a vest.[86] She claimed that Agard made advances toward her that morning, and that after she refused, he held her at gunpoint and raped and sodomized her multiple times.[87] Agard denied brandishing the weapon, maintaining that Winder found his gun when she borrowed his robe.[88] Moreover, while Winder left the apartment with a black eye that she claimed was inflicted during the struggle,[89] Agard claimed the blow was an instinctive reaction to Winder first striking him.[90] Agard testified that Winder was nervous that her boyfriend might discover her infidelity.[91] In order to comfort her, he approached Winder from behind and put his hands on her shoulders.[92] Winder then turned

79. *See id.* at 701.
80. *See id.*
81. *See id.* at 699-700.
82. *See id.* at 701.
83. *See id.* at 699.
84. *See id.* at 701-02.
85. *See id.* at 701. In contrast, Winder claimed that Agard showed her pornographic movies depicting anal intercourse, and "motion[ed] that way" while the couple engaged in other sexual acts, but that she had refused. *Id.* at 699.
86. *See id.* at 700.
87. *See id.* at 700-01 (describing in detail the events of the alleged assault).
88. *See id.* at 701.
89. *See id.* at 700.
90. *See id.* at 702.
91. *See id.* at 701.
92. *See id.*

and scratched his lip, resulting in him "mushing" her face.[93] Finally, Agard claimed he telephoned to apologize for striking Winder.[94] Winder, however, claimed the call was a reaction to the rape.[95]

The physical evidence was equally inconclusive. Winder's medical examination revealed no trauma to her anus or vagina.[96] Moreover, while samples for a rape kit were taken from Winder's mouth, vagina and anus, only the vaginal specimen tested positive for spermatozoa.[97] Tending to discredit Agard's testimony, a search of his apartment did result in recovery of a handgun and shells.[98] Agard first denied to police that he owned a gun, but later recanted this statement and claimed the weapon did not work.[99] To his credit, however, in his statements to police Agard was adamant that he and Winder had engaged in consensual sexual relations.[100]

B. *Procedural History*

1. State Court

Agard was convicted in New York state court of one count of anal sodomy, felony assault in which rape was the underlying felony, and two counts of third degree weapons possession.[101] As the evidence was inconclusive, the jury's decision ultimately hedged on credibility. Perhaps anticipating this, the prosecutor argued in summation:

> You know, ladies and gentlemen, unlike all the other witnesses [in this case] the defendant has a benefit and the benefit that he has . . . is he gets to sit here and listen to the testimony of all the other witnesses before he testifies. . . . That gives [him] a big advantage, doesn't it. [He]

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93. *See id.* at 701-02.
94. *See id.* at 702.
95. *See id.* at 701.
96. *See id.* Winder was examined on the afternoon of the alleged assault. *See id.*
97. *See id.*
98. *See id.*
99. *See id.*
100. *See id.*
101. *See id.* at 702. At trial, nineteen counts were submitted to the jury. Two concerned Keegan, fourteen involved Winder, and three were weapons charges. *See id.* The assault conviction was dismissed as "repugnant to the rape acquittal." *Id.* Additionally, one of the weapons convictions was reversed on appeal. *See* People v. Agard, 606 N.Y.S.2d 239, 240 (N.Y. App. Div. 1993) (explaining that under New York law, third degree possession of a weapon is a continuing offense for which a defendant could not be convicted twice when under each conviction he possessed the same weapon).

> get[s] 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?[102]

Agard objected to the argument and later moved for a mistrial, claiming the remarks violated his Sixth Amendment right to be present in the courtroom and to confront the witnesses against him.[103] The trial court disagreed, concluding that the prosecutor merely commented on a matter of fact.[104] The appellate division affirmed, finding Agard's constitutional claim "without merit."[105]

2. Federal Court

Agard filed a habeas corpus petition in the district court for the Eastern District of New York. The district court denied the petition, concluding that while it was "troubled" by these comments and that they came "'dangerously close to commenting on the exercise of a [constitutional] right,'" they were not prejudicial enough to warrant granting habeas relief.[106] The Second Circuit reversed, concluding that the comments implied that a truthful defendant would either stay out of the courtroom while other witnesses testified or testify before other evidence was presented.[107] This choice, it reasoned, saddled Agard's confrontation rights and his right to testify.[108]

Paying particular attention to a pair of Washington state cases,[109] the Second Circuit distinguished between comments made during

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102. *Agard*, 117 F.3d at 707.

103. *See id.*

104. *See id.* (citing the trial court transcript).

105. People v. Agard, 606 N.Y.S.2d at 241. The brief opinion does not even address Agard's constitutional claim, stating simply that "[the court] has examined the defendant's remaining contentions and finds them to be without merit." *Id.*

106. *Agard*, 117 F.3d at 707 (quoting the district court transcript). The court commented that it had difficulty deciphering whether the district court viewed the remarks as appropriate or whether they were harmless error. *See id.* at 707 n.4.

107. *See id.* at 709.

108. *See id.* at 709 & n.8.

109. *See id.* at 711 (comparing State v. Johnson, 908 P.2d 900 (Wash. Ct. App. 1996), with State v. Smith, 917 P.2d 1108 (Wash. Ct. App. 1996)). In *Smith*, the defendant was convicted of second degree rape. *See Smith*, 917 P.2d at 1109. The defendant testified and on cross-examination was confronted by the prosecutor with pictures of the crime scene. *See id.* at 1111-12. The prosecutor asked whether, before testifying, the defendant looked at the photographs, read the discovery materials, and heard the testimony of others. *See id.* The defendant claimed that the questions impermissibly focused on his right to be present in the courtroom. *See id.* at 1112. The appellate court disagreed, holding that the questions "raised an inference from Smith's testimony; they were not 'focused on the exercise of the constitutional right itself.'" *Id.* (quoting *Johnson*, 908 P.2d at 900).

cross-examination and those made first during summation.[110] Concluding that each warrants a distinct constitutional analysis, the court limited its holding to remarks brought forth for the first time during summation.[111] The Second Circuit's limited holding was that "it is constitutional error for a prosecutor to insinuate to the jury for the first time during summation that the defendant's presence in the courtroom at trial provided him with a unique opportunity to tailor his testimony to match the evidence."[112]

The court also concluded that the prosecutor's comments violated Agard's Fifth Amendment right to testify on his own behalf "by forcing [him] to choose between having his testimony viewed without unfair comment or exercising his constitutional rights to testify and to be present at trial."[113] Finally, the court reasoned that because the comments violated both Agard's Fifth and Sixth Amendment rights, his trial was fundamentally unfair in violation of his Fourteenth Amendment right to due process.[114]

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110. *See Agard,* 117 F.3d at 708-09.

111. *See id.* at 708 & n.6 (stating summation remarks occur too late for rebuttal).

112. *Id.* at 709. By analogy to *Griffin v. California,* the Second Circuit reasoned that the prosecutor's summation remarks punished the defendant for exercising his constitutional right to be present in the courtroom by "invit[ing] the jury to consider the defendant's exercise of his right to confrontation as evidence of guilt." *Id.* at 709. "The remarks are analogous to the tactic of suggesting to juries that guilt can be implied from a defendant's decision to exercise his Fifth Amendment right *not* to testify . . . ." *Id.*

The holding distinguished between a prosecutor's argument that a defendant in fact tailored his testimony and one in which the prosecutor argues that the defendant's presence in the courtroom provided him the opportunity to tailor his testimony. *See id.* at 711. Reasoning that the prosecutor's remarks here were analogous to the latter, the court limited its analysis to situations in which the prosecutor argued that the defendant's presence in the courtroom throughout the trial provided him a unique opportunity to tailor his testimony. *See id.* In determining whether this occurred, the court offered a generic three part test:

> When . . . a prosecutor raises the specter of fabrication 1) for the first time in summation; 2) without facts in evidence to support the inference; or 3) in a manner which directly attacks the defendant's right to be present during his entire trial, our alarm bells begin to ring. When all three circumstances are present, the bells become shrill sirens.

Id. Where all three are satisfied, the court reasoned the remarks raise suspicion from "the shadows of unlitigated facts" that are not probative on the issue of credibility. *Id.*

113. *Id.* at 712. The court raised the Fifth Amendment issue *sua sponte. See id.* at 712 n.16.

114. *See id.* at 714. The dissent argued that a *Griffin* error does not automatically require reversal of a defendant's conviction. *See id.* at 716-17 (Van Graafeiland, J., dissenting) (citing Chapman v. California, 386 U.S. 18, 22 (1966)). In *Chapman,* the Court stated: "[w]e conclude that there may be some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless, not requiring the automatic reversal of the conviction." *Chapman,* 386 U.S. at 22. Instead, the dissent urged that the fundamental question is still whether the error prejudiced the defendant. *See Agard,* 117 F.3d at 717 (Van Graafeiland, J., dissenting).

IV. THE SUPREME COURT

A. *The Majority Opinion*

Justice Scalia begins the majority opinion with a historical overview of the Fifth Amendment, asserting that the process by which a defendant was first brought to justice "obviated the need for comments of [this sort]."[115] Justifying this conclusion on two theories, Justice Scalia reasoned that the widespread use of pretrial statements, which were compared to the defendant's statements at trial, coupled with the fact that a defendant's testimony was not evidence made arguments such as those seen in this case unnecessary.[116] As states began to recognize defendants as competent witnesses, a tailoring insinuation was not commanded in those states that required the defendant to testify before other evidence was presented.[117] Justice Scalia observed that even in states that did not require the defendant to testify first, there is no evidence that these jurisdictions "took the affirmative step of forbidding

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Arguing that it was obvious to the jury that Agard was present throughout the trial, the dissent claimed to "search in vain for constitutional error." *Id.* at 718 (Van Graafeiland, J., dissenting). Moreover, the dissent accused the majority of "belittl[ing] the common sense of jurors," by assuming that they could not distinguish between a defendant and a normal witness. *Id.* at 719 (Van Graafeiland, J., dissenting). In a sarcastic play on the majority's reasoning, the dissent argued that it is difficult to visualize any juror concluding that if the defendant was innocent "he would not have sat in the courtroom during the entire trial." *Id.* at 719 (Van Graafeiland, J., dissenting). Moreover, the dissent took issue with the majority's characterization that the prosecutor "raise[d] innuendo . . . from the shadows of unlitigated facts for the first time in [summation]," arguing that the fabrication "pervaded the trial from its opening day." *Id.* at 720 (Van Graafeiland, J., dissenting). Finally, the dissent concluded that the evidence presented at trial, coupled with the fact that Agard was convicted of only three of nineteen counts, illustrated that the trial was not fundamentally unfair. *See id.* at 721 (Van Graafeiland, J., dissenting).

In response to the decision, the state filed a motion for rehearing. The court denied the motion, but used the opportunity to clarify its holding, concluding that a prosecutor's argument based on evidence that a defendant used his familiarity with the testimony of other witnesses to tailor his own exculpatory story is acceptable. *See* Agard v. Portuondo, 159 F.3d 98, 99 (2d Cir. 1998). This argument, it reasoned, permissibly focuses on testimony related to important events rather than the defendant's mere presence in the courtroom. *See id.* Despite the clarification, the court concluded that the prosecutor's arguments were nevertheless improper. *See id.*

115. Portuondo v. Agard, 120 S. Ct. 1119, 1123 (2000).

116. *See id.*

117. *See id.* For an example of the type of statute to which Justice Scalia is referring, see the statute at issue in *Brooks v. Tennessee*, 406 U.S 605 (1972).

comment on the defendant's opportunity to tailor his testimony."[118] Sparring with Justice Ginsburg over who has the burden to drum up authority, Justice Scalia argued that neither Agard nor the dissent could come up with a single case predating *Griffin* that supports the contention that the remarks are unconstitutional.[119] Thus, he reasoned that comments similar to those in *Agard* were made without objection until *Griffin* was decided.[120] In turn, he concluded that Agard's claim depended solely on the Court's willingness to expand *Griffin*'s rationale.[121]

The Court viewed *Griffin* as a "poor analogue" to the question presented in *Agard*.[122] Reasoning that *Griffin* forbade a prosecutor from inviting the jury to do something it was prohibited from doing, Justice Scalia viewed the prosecutor's comments in this case as inviting the jury to consider something to which it was completely entitled.[123] The assumption is that it is reasonable to expect a jury to comply with an instruction to disregard a defendant's silence because the inclination to equate silence with guilt "is not always 'natural or irresistible.'"[124] In contrast, Justice Scalia assumed that in assessing the defendant's credibility, "it *is* natural and irresistible" for the jury to consider the defendant's ability to hear the testimony of other witnesses and the corresponding opportunity for him to tailor his own testimony.[125] As such, Justice Scalia reasoned that it is logical to instruct the jury not to consider the defendant's silence as it looks at the *other* evidence presented in the case, but illogical to simultaneously ask the jury to evaluate the defendant's credibility, yet not consider a factor that weighs directly upon it.[126]

The majority reasoned that *Griffin* was distinguishable because in that case the prohibited inference related to the jury's ultimate determination of guilt, while the prosecutor's comments in *Agard*

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118. *Agard*, 120 S. Ct. at 1123.

119. *See id.* at 1123-24 (stating "[w]e think the burden is rather upon the respondent and the dissent, who assert the unconstitutionality of the practice, to come up with a case in which such [urging] was held improper").

120. *See id.* at 1124.

121. *See id.*

122. *Id.*

123. *See id.*

124. *Id.* (quoting *Griffin*, 380 U.S. at 615, for reasons as to why a defendant might legitimately refuse to testify, including prejudice arising from prior convictions or a fear that clever counsel will make him look bad).

125. *Id.*

126. *See id.*

applied only to the defendant's credibility as a witness.[127] The Court believed that the prosecutor's comments in *Agard* were consistent with "[the] longstanding rule" that a testifying defendant may have his credibility assailed like that of any other witness.[128] While Agard pointed to *Geders v. United States*,[129] claiming that sequestration orders affect defendants differently than other witnesses,[130] the majority instead pointed to *Jenkins v. Anderson*,[131] which stated that "the Constitution does not forbid 'every government-imposed choice in the criminal process that has the effect of discouraging the exercise of constitutional rights.'"[132] The Court reasoned that defendants are not afforded special treatment for issues pertaining to credibility.[133] It also reasoned that the prosecutor's comments were in line with Justice Brennan's conclusion in *Brooks v. Tennessee*[134] that "'the adversary system reposes judgment of the credibility of all witnesses in the jury.'"[135]

The majority was also not persuaded that the "generic" nature of the prosecutor's remarks levied them unconstitutional.[136] The Court reasoned that the comments in *Agard* were no more generic than the interested witness instruction upheld in *Reagan v. United States*.[137] Similar to the charge that a defendant has an interest in the outcome of the trial, the comments in *Agard* set forth "a consideration" for the jury in assessing the credibility of the defendant that then affects the determination of guilt.[138] Moreover, Justice Scalia used *Reagan* to dispose of the Second Circuit's and Justice Ginsburg's conclusion that there is a constitutional distinction between comments raised for the first time during summation and those first elicited during cross-examination.[139] While *Reagan* referenced a defendant's statutory right to testify, Justice Scalia used *Griffin*'s logic to attach constitutional significance to its

127. *See id.* at 1125.
128. *Id.*
129. 425 U.S. 80 (1976).
130. *See Agard*, 120 S. Ct. at 1125.
131. 447 U.S. 231 (1980).
132. *Id.* at 236 (quoting Chaffin v. Stynhcombe, 412 U.S. 17, 30 (1973)).
133. *See Agard*, 120 S. Ct. at 1125.
134. 406 U.S. 605 (1970).
135. *Agard*, 120 S. Ct. at 1126 (quoting *Brooks*, 406 U.S. at 610). *Brooks* held that requiring a defendant to testify first was not an appropriate means of securing the truth at trial. *See Brooks*, 406 U.S. at 611.
136. *See Agard*, 120 S. Ct. at 1126.
137. 157 U.S. 301 (1895).
138. *Agard*, 120 S. Ct. at 1126.
139. *See id.* at 1126.

holding.[140] He then concluded that because the interested witness instruction in *Reagan* also occurred near the end of the trial, it was of no constitutional consequence that the prosecutor's remarks in *Agard* occurred first during summation.[141]

Finally, the Court dismissed Agard's due process claim, first arguing that, to the extent it was premised on a violation of Agard's Fifth and Sixth Amendment rights, the contention was incorrect.[142] Moreover, the Court rejected Agard's assertion that the holding in *Doyle v. Ohio*[143] prohibited the prosecutor's comments.[144] The Court reasoned that a statute requiring a defendant's presence in the courtroom does not contain "a similar promise of impunity" as the giving of *Miranda* warnings.[145] Justice Scalia argued that there is "no authority whatever for the proposition that the impairment of credibility, if any, caused by mandatory presence at trial violates due process."[146] In support of this proposition, he reasoned that if the threat to defendants was as significant as Agard claims, one would expect defendants charged in jurisdictions without compulsory attendance policies to be absent from trial when they intended to testify.[147]

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140. *See id.* n.3 (responding to the dissent's position that *Reagan* is not constitutionally based). While Justice Ginsburg argued in dissent that *Reagan* dealt exclusively with a defendant's statutory right to testify, *see infra* notes 160-62 and accompanying text (discussing the dissent's position), Justice Scalia reasoned that because *Griffin* relied on the same statute in concluding that a defendant's silence may not be used as evidence against him, it is unreasonable "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." *Agard*, 120 S. Ct. at 1126 n.3.

141. *See id.* at 1127 (arguing that there is no constitutional distinction between remarks made first during cross-examination and those made first during summation).

142. *See id.*

143. 426 U.S. 610 (1976).

144. *See Agard*, 120 S. Ct. at 1128; Brief of the Respondent, 1998 U.S. Briefs 1170, at *42, Portuondo v. Agard, 120 S. Ct. 1119 (2000) (No. 98-1170) (arguing that "since the government imposes an affirmative duty on the defendant to be present at trial, it [is] fundamentally unfair to then punish him for his compliance").

145. *Agard*, 120 S. Ct. at 1128 (citing Fletcher v. Weir, 455 U.S. 603, 606 (1982) (per curiam) for the proposition that *Doyle* is "consistently explained . . . as a case where the government had induced silence by implicitly assuring the defendant that his silence would not be used against him").

146. *Id.*

147. *See id.*

B. *Justice Stevens's Concurrence*

While Justice Stevens believed that the comments did not "cross [ ] the high threshold that separates trial error–even serious trial error–from the kind of fundamental unfairness for which the Constitution requires that a state criminal conviction be set aside," he disagreed with the Court's tacit approval of the prosecutor's comments.[148] He reasoned that such comments should be discouraged, asserting that nothing in the Court's opinion deprives the states of their ability to prohibit this line of argument or to explain to juries the necessity of the defendant's presence at trial.[149]

C. *Justice Ginsburg's Dissent*

Justice Ginsburg concluded that the majority's rationale "transforms a defendant's presence at trial from a Sixth Amendment right into an automatic burden on his credibility."[150] She reasoned that both *Griffin* and *Doyle* stand for the proposition "that where the exercise of constitutional rights is 'insolubly ambiguous' as between innocence and guilt, a prosecutor may not unfairly encumber those rights by urging the jury to construe the ambiguity against the defendant."[151] According to Justice Ginsburg, the majority's holding fails to advance the search for the truth, because it does not consider the fact that testimony is often consistent because it is truthful.[152] If all defendants have the right to attend their own trial, and in many instances are required to attend their own trial, the majority's holding "tarnishes" the guilty and innocent alike by allowing a "generic accusation . . . tied only to the defendant's presence in the courtroom."[153] Moreover, the jury is unable to measure the defendant's response to the accusation because the remarks occur after the defendant has rested his case.[154]

In contrast, she believed that the Second Circuit's holding was "a carefully restrained and moderate position," because it simply

148. *Id.* at 1128-29 (Stevens, J., concurring).
149. *See id.* at 1129 (Stevens, J., concurring).
150. *Id.* (Ginsburg, J., dissenting).
151. *Id.* (Ginsburg, J., dissenting) (quoting Doyle v. Ohio, 426 U.S. 610, 617 (1976)).
152. *See id.* (Ginsburg, J., dissenting).
153. *Id.* (Ginsburg, J., dissenting).
154. *See id.* (Ginsburg, J., dissenting).

limited a prosecutor from making a tailoring argument for the first time during summation.[155] While she agreed that a defendant's constitutional rights sometimes give way to competing concerns, Justice Ginsburg argued that a tailoring insinuation made for the first time during summation burdens the defendant's constitutional rights without providing a compensating benefit.[156] In a jurisdiction that limits the defendant's ability to introduce prior consistent statements to bolster his own credibility–like New York, the jurisdiction in which Agard was charged–she suggested that the problem with this line of argument was particularly pronounced.[157] If the tailoring insinuation was presented during cross-examination, the defendant would have the opportunity to prove that he gave a similar version of the facts on a previous occasion.[158] When the argument is presented first during summation, however, the prosecutor "can avert such rebuttal."[159]

Justice Ginsburg also argued that *Reagan* provided no support for the majority's contention that remarks made first during summation are not constitutionally distinguishable from those made first during cross-examination.[160] Justice Ginsburg reasoned that the *Reagan* majority viewed a defendant's right to testify as deriving from a statute.[161] Thus, she concluded that *Reagan* is not a constitutional decision and *Griffin* "provides no support for the Court's

155. *Id.* at 1130 (Ginsburg, J. dissenting). Justice Ginsburg read the Second Circuit's opinion as allowing a prosecutor to argue that the defendant's testimony "fit" with that of other witnesses at any stage during the trial. *See id.* (Ginsburg, J., dissenting). Moreover, she reasoned that the Second Circuit would also allow a prosecutor to make the same argument as presented in this case during cross-examination. *See id.* (Ginsburg, J., dissenting). Thus, she reasoned that the Second Circuit "reign[ed] in" a prosecutor's argument only when it came too late for the defendant to have the opportunity to rebut the inference. *Id.* (Ginsburg, J., dissenting).

156. *See id.* (Ginsburg, J., dissenting). Justice Ginsburg distinguished remarks made for the first time during summation from those made during cross-examination, arguing that the latter might actually signal the jury that the defendant was lying. *See id.* (Ginsburg, J., dissenting). She reasoned that remarks brought forth for the first time during summation also prohibit the defendant from answering the charges brought against him. *See id.* (Ginsburg, J., dissenting).

157. *See id.* at 1131 (Ginsburg, J., dissenting).

158. *See id.* (Ginsburg, J., dissenting).

159. *Id.* (Ginsburg, J., dissenting).

160. *See id.* (Ginsburg, J., dissenting).

161. *See id.* (Ginsburg, J., dissenting) (stating that while *Reagan* did uphold the trial judge's instruction as it related to credibility, the Court did not perceive the instruction as burdening the defendant's Constitutional rights).

unorthodox contention that *Reagan*'s statutory holding was actually of constitutional dimension."[162]

Justice Ginsburg also took issue with the majority's historical perspective and its determination that the comments in *Agard* are distinguishable from those made in *Griffin*.[163] In response to the former, she argued that if such comments were not needed, then they probably were not made.[164] If the comments were not made, then courts probably never had the opportunity to decide whether or not they were appropriate.[165] Thus, an absence of case law provides no support for the contention that an unfounded tailoring insinuation has been historically regarded as unproblematic.[166] In regard to the latter proposition, she argued that the majority misconstrued the *Griffin* opinion.[167] Citing Justice Scalia's dissent in *Mitchell v. United States*,[168] she reasoned that inferring guilt from silence is at least as "'natural or irresistible'" as inferring that the defendant had the opportunity to tailor his testimony by virtue of his presence in the courtroom.[169] She then went an additional step, claiming that to infer guilt from silence is actually more direct, because unlike a tailoring inference "something beyond the simple innocence of the defendant must be hypothesized in order to explain the defendant's behavior."[170] Justice Ginsburg reasoned that "[i]t makes little sense to maintain that juries able to avoid drawing adverse inferences from a defendant's silence would be unable to

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162. *Id.* at 1132 (Ginsburg, J., dissenting) (responding to the majority's argument that because *Griffin* and *Reagan* addressed the same statute, *Reagan* must have a constitutional dimension); *see also supra* note 140 and accompanying text.

163. *See id.* at 1133 (Ginsburg, J., dissenting).

164. *See id.* (Ginsburg, J., dissenting).

165. *See id.* (Ginsburg, J., dissenting).

166. *See id.* (Ginsburg, J., dissenting).

167. *See id.* (Ginsburg, J., dissenting). While Justice Scalia argued that an instruction from the court that a defendant's silence is not to be used as evidence against him is appropriate because the inference "is not always 'natural or irresistible,'" *id.* at 1124 (quoting Griffin v. California, 380 U.S. 609, 615 (1965)), Justice Ginsburg pointed out that *Griffin* actually stated that the inference is "not *always* so natural or irresistible." *Id.* at 1133 (Ginsburg, J., dissenting). Thus, she reasoned that because the majority in *Griffin* stated that the inference is not always natural, it realized "that [it] is indeed natural or irresistible in many, perhaps most cases." *Id.* (Ginsburg, J., dissenting).

168. 526 U.S. 314 (1999).

169. *Agard*, 120 S. Ct. at 1133 (Ginsburg, J., dissenting) (quoting *Griffin*, 380 U.S. at 615). In *Mitchell*, Justice Scalia stated that "[the *Griffin* rule] runs exactly counter to the normal evidentiary inferences: If I ask my son whether he saw a movie I had forbidden him to watch, and he remains silent, the import of his silence is clear." *Mitchell*, 526 U.S. at 332 (1999) (Scalia, J., dissenting).

170. *Agard,* 120 S. Ct. at 1134 (Ginsburg, J., dissenting).

avoid thinking that only a defendant's opportunity to spin a web of lies could explain the seamlessness of his testimony."[171]

Justice Ginsburg also argued that the Second Circuit did not actually tell the jury to refrain from doing anything.[172] She reasoned that if the majority is correct and the inference of tailoring is so natural that a jury would automatically consider it, then the search for the truth is not hampered by prohibiting a prosecutor from inviting it to do so.[173] Pointing to *Doyle*, Justice Ginsburg concluded that it is "unproblematic to hold that a prosecutor's latitude for argument is narrower than a jury's latitude for assessment."[174]

Finally, Justice Ginsburg argued that where credibility of the witness is the only factor for the jury to consider, an inference that reflects negatively on the defendant's credibility may be used to determine his guilt.[175] Moreover, she reasoned that the majority's reliance on *Brooks* and *Jenkins* was also misplaced, as both cases stand for the proposition that a defendant may be impeached through cross-examination.[176]

V. ANALYSIS

As indicated, the question presented in *Agard* pits the constitutional rights of the accused against a prosecutor's ability to argue that the defendant is not credible. The Court concluded that the prosecutor's comments in *Agard* advanced the search for the truth at trial without punishing the defendant in the process.[177] Reviewing the Court's historical analysis first, it is difficult to reconcile the Court's assertion that an absence of judicial decisions translates to an endorsement of the propriety of the prosecutor's remarks. By Justice Scalia's own admission, comments like these were made

171. *Id.* (Ginsburg, J., dissenting).

172. *See id.* n.7 (Ginsburg, J., dissenting).

173. *See id.* nn. 6-7 (Ginsburg, J., dissenting). This argument is a response to Justice Scalia's assertion that the defendant's opportunity to tailor his testimony is a natural conclusion for the jury to reach in evaluating the defendant's credibility. *See id.* at 1124; *supra* note 125 and accompanying text.

174. *Agard*, 120 S. Ct. at 1134 (Ginsburg, J., dissenting).

175. *See id.* (Ginsburg, J., dissenting) ("[I]t is dominantly in cases where the physical evidence is inconclusive that prosecutors will concentrate all available firepower on the credibility of the testifying defendant.").

176. *See id.* (Ginsburg, J., dissenting) (stating that these decisions are in accordance "with the moderate restriction" the majority rejects).

177. *See id.* at 1127 (stating the comments are "appropriate . . . to the central function of the trial, which is to discover the truth").

largely unnecessary due to historical trial procedure.[178] Thus, as Justice Ginsburg pointed out, if the comments were not necessary then it is quite likely that they were not made.[179] If they were not made, it is likely that courts did not have the opportunity to decide whether or not they were constitutional.[180] More importantly, if the issue was not addressed then it is logical to assume that the issue was open for debate.[181]

The majority criticizes the dissent for failing to drum up any pre-*Griffin* case that supports the contention that the prosecutor's remarks in *Agard* are unconstitutional.[182] The opinion asserts that "[e]vidently, prosecutors were making these comments all along without objection; *Griffin* simply sparked the notion that such commentary *might* be problematic."[183] Supposing that this insinuation is true, it does not appear helpful to the constitutional analysis. Apparently, at least in several states, prosecutors were making inferences regarding a defendant's refusal to testify long before the practice was found unconstitutional by the Court in *Griffin*.[184] A lack of judicial interpretation of any kind is simply not an adequate indication that the argument is constitutional.[185] Moreover, because the inference in this case also derives from the defendant's choice to exercise a constitutional right, *Griffin* itself is the historical framework that the majority claims is lacking.

The Court, however, distinguished the inference made in *Agard* from that made in *Griffin*.[186] Reasoning that *Griffin* prohibited an inference that went to the defendant's guilt, the Court concluded that an unfounded tailoring insinuation only goes to his credibility.[187] *Griffin*, however, was premised on the idea that using a defendant's Fifth Amendment right to refrain from testifying as evidence against him was unconstitutional because it *penalized the*

178. *See id.* at 1123-24.
179. *See id.* at 1133 (Ginsburg, J., dissenting).
180. *See id.* (Ginsburg, J., dissenting).
181. *See id.* at 1134 (Ginsburg, J., dissenting).
182. *See id.* at 1123-24.
183. *Id.* at 1124.
184. The Court in *Griffin* noted that six states allowed for such comments. *See* Griffin v. California, 380 U.S. 609, 611 n.3 (1965).
185. *See Agard*, 120 S. Ct. at 1133 (Ginsburg, J., dissenting). The point is simply that if the Supreme Court is the final interpreter of the Constitution, it is illogical to argue that it can be assumed that a given practice is indeed constitutional until the Court has examined the practice in question.
186. *See id.* at 1124-25.
187. *See id.* at 1125.

defendant for asserting that right.[188] The Court specifically stated that "[the inference] is a penalty imposed by courts for exercising a constitutional privilege. It cuts down on the privilege by making its assertion *costly*."[189] One point of contention with the majority's holding is its failure to reconcile this reasoning with its decision. A defendant has both the constitutional right to remain silent and the constitutional right to confront the witnesses against him. When the defendant's right to confrontation is used to impeach him, *Griffin*'s plain language is implicated because assertion of that right is made "costly." The "cost" to the defendant is that he is forced to forgo his right to testify or risk comment by the prosecutor.[190]

Even if the comments go directly to the defendant's credibility, this distinction is not as significant as the majority contends. In many, if not most, cases credibility is the only issue for the jury to resolve.[191] Thus, credibility is often synonymous with guilt.[192] While it might be illogical to ask a jury to assess a testifying defendant's credibility while disregarding a factor bearing directly upon it,[193] an unfounded tailoring insinuation does not reveal any evidence of fabrication. Therefore, the insinuation might have a profound effect on the wrongly accused.[194]

In support of its credibility distinction, the Court cites cases that reference cross-examination.[195] For example, the Court cites *Brooks v. Tennessee,*[196] asserting that the adversary process demands that a defendant's opportunity to tailor his testimony be brought to the jury's attention.[197] Because the Court in *Brooks*, recognized that a defendant's presence in the courtroom created a greater opportunity

188. *See Griffin*, 380 U.S. at 614.
189. *Id.* (emphasis added).
190. *See* Agard v. Portuondo, 117 F.3d 696, 709 & n.8 (2d Cir. 1997) (arguing the same).
191. *See Agard*, 120 S. Ct. at 1133 (Ginsburg, J., dissenting) (arguing that credibility is so often the only issue for the jury to resolve).
192. *See id.* (Ginsburg, J., dissenting).
193. *See id.* at 1124.
194. *See id.* at 1131 (Ginsburg, J., dissenting).
195. *See, e.g.*, Jenkins v. Anderson, 447 U.S. 231, 235-36 (1980) (stating that defendant may be cross-examined); Brooks v. Tennessee, 406 U.S. 605, 609 (1972) (stating that a defendant's choice to take the stand bears risk of cross-examination); Brown v. United States, 356 U.S. 148, 154-55 (1958) (stating that breadth of waiver of right to remain silent is the scope of cross-examination); Reagan v. United States, 157 U.S. 301, 305 (1895) (stating that testifying witness may have credibility assailed).
196. 406 U.S. 605 (1972).
197. *See Agard*, 120 S. Ct. at 1126 ("The adversary system surely envisions–indeed it requires–that the prosecutor be allowed to bring to the jury's attention the danger [risk of perjury] that the Court was aware of.").

for perjury, and that the credibility of all witnesses is an issue for the jury,[198] the majority reasoned that the comments in *Agard* were a legitimate attack.[199] The Court failed to consider, however, that an increased opportunity to commit perjury does not justify a wholesale invasion of a defendant's constitutional rights.[200]

In contrast, Justice Ginsburg contends that *Brooks* merely stands for the proposition that "cross-examination can expose a defendant who tailors his testimony."[201] This seems a more plausible argument given that *Brooks*'s reasoning was based on *Griffin*.[202] Since *Griffin* prohibits an inference of guilt derived from a defendant's decision to remain silent, it is a stretch to assume that *Brooks* somehow endorses the inference upheld in this case. Justice Ginsburg's interpretation is also consistent with the longstanding notion that "cross-examination[] [is] 'the greatest legal engine ever invented for the discovery of truth.'"[203] When a witness is questioned, the jury is able to listen to his response and evaluate his demeanor.[204] These observations provide the jury with something more concrete to judge the defendant's credibility than a prosecutor's mere speculation.[205] Thus, the jury is able not only to assess the credibility of the defendant, but to assess the legitimacy of the prosecutor's contentions as well. This opportunity is lost when the remarks are made for the first time in summation.

Nevertheless, the majority reasoned that *Reagan* allows for a generic attack on a defendant's credibility, even when the attack occurs first during summation.[206] This proposition, however, is flawed. As a preliminary matter, *Reagan* concerned a federal statute

198. *See Brooks*, 406 U.S. at 611.

199. *See Agard*, 120 S. Ct. at 1125.

200. *See Brooks*, 406 U.S at 611 ("Pressuring the defendant to take the stand, by foreclosing later testimony if he refuses, is not a constitutionally permissible means of ensuring his honesty.").

201. *Agard*, 120 S. Ct. at 1135 (Ginsburg, J., dissenting) (citing *Jenkins*, 447 U.S. at 233, 238 and *Brooks*, 406 U.S. at 609-12).

202. *See Brooks*, 406 U.S. at 611 (citing Griffin v. California, 380 U.S. 609, 614 (1965) and asserting that Tennessee's statute made assertion of the right to testify costly).

203. California v. Green, 399 U.S. 149, 158 (1970) (quoting 5 WIGMORE, EVIDENCE § 1367 (1940)).

204. *See Agard*, 120 S. Ct. at 1130 (Ginsburg, J., dissenting) (arguing the same).

205. *See* Brief of the Respondent, 1998 U.S. Briefs 1170, at *15, Portuondo v. Agard, 120 S. Ct. 1119 (2000) (No. 98-1170) (arguing that without evidence of tailoring the prosecutor's comments amounted to speculation and innuendo).

206. *See Agard*, 120 S. Ct. at 1126, 1133 (arguing that there is no constitutional distinction between comments made during cross-examination and those made first in summation).

and has no bearing on the constitutional question in *Agard*.[207] Moreover, even if *Reagan* was a constitutional decision, the holding does not support the propriety of the prosecutor's comments in *Agard*. *Reagan* concluded that when a defendant chooses to testify, the jury may be instructed that his interest in the trial creates an incentive to lie.[208] The conclusion stemmed from a belief that a defendant who chooses to take the witness stand may have his credibility assailed like that of any other witness.[209] As a corollary, the Court also concluded that a defendant is not subject to harsher treatment.[210] For example, the Court stated that "[a] court is not at liberty to charge directly or *indirectly* that the defendant is to be disbelieved because he is a defendant."[211]

When a tailoring insinuation based solely on the defendant's presence in the courtroom is made, the jury is told, indirectly, that the defendant is not to be believed simply because he is a defendant. Since the defendant is, ordinarily, the only witness entitled to remain in the courtroom, attacking his testimony based solely on his presence at trial provides the jury a reason to doubt the defendant's story that is not possible with regard to other witnesses. In general, the interest of any witness may be exposed to the jury.[212] Therefore, unlike an insinuation that the defendant had the opportunity to lie, the focus of the interested witness doctrine does not reflect the defendant's status per se.[213] This distinction reveals the difference between a proper attack on credibility and a penalty imposed on a defendant for exercising his constitutional rights. When the attack ceases to treat all witnesses the same, it becomes a penalty.

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207. *See id.* at 1131 (Ginsburg, J., dissenting) (arguing that *Reagan* relied on a statute, "not on any constitutional prescription").

208. *See* Reagan v. United States, 157 U.S. 301, 305 (1985) (stating that while "[i]t is within the province of the court" to point out matters that affect credibility, it is improper to charge the jury directly that a particular witness is not credible).

209. *See id.* (stating the defendant may be fully cross-examined and impeached). "The jury [may] properly consider his manner of testifying, the inherent probabilities of his story, the amount and character of the contradictory testimony, the nature and extent of his interest in the result of the trial, and the impeaching evidence." *Id.*

210. *See id.* (stating "the limits of suggestion are the same in respect to [the defendant] as to others").

211. *Id.* at 310 (emphasis added).

212. *See* Brief of the Respondent, 1998 U.S. Briefs 1170, at *27, Portuondo v. Agard, 120 S. Ct. 1119 (2000) (No. 98-1170) (arguing that "comments on a defendant's interest, and attendant motive to lie, do not concomitantly convert the defendant's exercise of a constitutional right into an unfair litigation advantage").

213. *See id.* (stating "all trial witnesses, by definition, testify, and the interest of any witness is an appropriate subject for comment").

The majority also contends that the insinuation did not violate Agard's right to due process.[214] In so doing, the Court cites *Jenkins v. Anderson*[215] for the proposition that a defendant's constitutional rights may sometimes give way to competing concerns,[216] while rejecting the argument that the prosecutor's insinuation in *Agard* paralleled the due process violation recognized in *Doyle v. Ohio*.[217] The majority saw a similarity between the argument rejected in *Jenkins* and the argument made by Agard in this case.[218] In *Jenkins*, the defendant claimed that a person facing arrest will be less likely to exercise his Fifth Amendment right to remain silent if his failure to speak can later be used to impeach his testimony.[219] By the same token, both Agard and the Second Circuit reasoned that if a defendant knows that he will be subject to a tailoring insinuation, he will be less likely to testify at trial or confront the witnesses against him.[220] Having rejected the former argument, the Court in *Agard* found it easier to reject the latter. An interesting note, however, is that the Court in *Jenkins* distinguished between *prearrest* and *postarrest* silence.[221] Whereas, in *Doyle*, the defendant's due process rights were violated because the defendant was told he could remain silent,[222] the Court in *Jenkins* reasoned that the defendant's Fifth Amendment rights were not applicable because he was not yet under arrest.[223] Since the government had not induced his prearrest silence, it was not a due process violation to use his silence against him.[224]

The Constitution not only grants a defendant the right to confront the witnesses against him, but the defendant's presence at trial is often required.[225] Thus, whether the defendant chooses or is compelled to be present at trial, *Doyle* must be applicable. If the defendant chooses to be present in the courtroom, then the scenario mirrors *Doyle* in that the defendant is offered a privilege and then

214. *See Agard*, 120 S. Ct. at 1127-28.
215. 447 U.S. 231 (1980).
216. *See Agard*, 120 S. Ct. at 1124 (citing Jenkins v. Anderson, 447 U.S. 231, 236 (1980)).
217. *See id.* at 1128.
218. *See id.* at 1125 (stating that the arguments are "strikingly similar").
219. *See Jenkins*, 447 U.S. at 236.
220. *See* Agard v. Portuondo, 117 F.3d 696, 712 (2d Cir. 1997); Brief of the Respondent, 1998 U.S. Briefs 1170, at *29, Portuondo v. Agard, 120 S. Ct. 1119 (2000) (No. 98-1170).
221. *See Jenkins*, 447 U.S. at 238-40.
222. *See* Doyle v. Ohio, 426 U.S. 610, 619 (1976).
223. *See Jenkins*, 447 U.S. at 239-40.
224. *See id.* at 240.
225. *See, e.g.*, FED R. CRIM. P. 43 (with limited exceptions defendant shall attend and has a duty to remain at trial); N.Y. CRIM. PROC. LAW 260 §§ 210, 340.50 (Consol. 1996).

has it used against him. When the defendant is compelled to be present in the courtroom, the scenario is in fact worse, because his only opportunity to avoid the insinuation is to forfeit his right to testify.[226] The majority attempts to counter this argument by suggesting that it has "'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.'"[227] The Court stated that "a similar promise of impunity is [not] implicit in a statute requiring the defendant to be present at trial."[228] What the majority does not explain, however, is why an implicit promise of impunity is a necessary prerequisite to a due process violation. Whereas the defendant in *Doyle* was induced by a promise, Agard was induced by a legal command. As such, this method of impeachment seems closer to trial by inquisition than a legitimate attack on credibility.[229]

VI. RAMIFICATIONS

This note invites the reader to consider a factual scenario. In that scenario, an innocent person is charged with a crime that he did not commit. He is forced to attend his own trial and he chooses to testify on his own behalf. He is cross-examined and no evidence of fabrication is revealed. The other evidence presented at the trial is also inconclusive. Nevertheless, the prosecutor is able to successfully attack the person's credibility and attain a conviction. He is able to do so because of the argument upheld in *Agard*. Moreover, he is able to do so without demonstrating any factual basis for his contention. While the conviction of an innocent person is, admittedly, an extreme example, the increased possibility that this will occur is the most troubling aspect of the Court's holding.

While the Court attempts to advance the fight against crime, it fails to consider the effect that this holding will have on the improperly accused. In its rush to defend the prosecutor, the Court forgets that a defendant's testimony will be consistent with that of

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226. *See* Brief of the Respondent, 1998 U.S. Briefs 1170, at *12, Portuondo v. Agard, 120 S. Ct. 1119 (2000) (No. 98-1170).

227. *Agard*, 120 S. Ct. at 1128 (quoting Fletcher v. Weir, 445 U.S. 603, 606 (1982) (per curium)).

228. *Id.*

229. *See supra* notes 54-57 and accompanying text; Mitchell v. United States, 526 U.S. 314, 325 (1999) (condemning proceedings designed to enhance the government's prosecutorial power).

other witnesses when he is telling the truth.[230] Moreover, while the Court offers reasons as to why a prosecutor *can* be allowed to make this argument, it never once offers a reason as to why she *should* be allowed.[231]

In large measure, the Court bases its conclusion on a one hundred-year-old case[232] that dealt with a defendant's statutory right to testify at a time when it was widely presumed that a defendant did not have a constitutional right to testify.[233] Ironically, even in that case the Court did not allow the defendant to be directly accused of fabricating his testimony.[234] Not so in *Agard*. The Court makes it clear that a prosecutor may actually accuse the defendant of tailoring his testimony based solely on his presence in the courtroom.[235]

The ramifications of the *Agard* decision are best understood when viewed from the perspective of what the Second Circuit's holding actually forbade. The Second Circuit only prohibited a prosecutor from making a tailoring insinuation *for the first time* during summation.[236] The prosecutor could still argue that the defendant's testimony "fit," and the prosecutor could still cross-examine the defendant about his opportunity to hear the testimony of others.[237] In essence, the Second Circuit's holding implied nothing more than a defendant should have the opportunity to rebut a charge that he is lying. As Justice Ginsburg described it, the Second Circuit's holding was "restrained," and appropriately so.[238]

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230. *See Agard*, 120 S. Ct. at 1129 (Ginsburg, J., dissenting); Brief of Respondent, 1998 U.S. Briefs 1170, at *13, Portuondo v. Agard, 120 S. Ct. 1119 (2000) (No. 98-1170).

231. *Cf. Agard*, 120 S. Ct. at 1127 n.4 ("Our decision . . . 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.").

232. Reagan v. United States, 157 U.S. 301 (1895).

233. *See Agard*, 120 S. Ct. at 1131 (Ginsburg, J., dissenting) ("[N]o one in [*Reagan*] suggested that the trial court's comment exacted a penalty for the exercise of any constitutional right."). For a discussion of the transition from a defendant's presumed incompetency to the modern view that a defendant is competent to testify, see *Ferguson v. Georgia*, 365 U.S. 570, 573-82 (1961).

234. *See Reagan*, 157 U.S. at 305 (stating that the court may not "arbitrarily single out [defendant's] testimony and denounce it as false").

235. *See Agard*, 120 S. Ct. at 1124 n.1 ("Drawing the line between pointing out the availability of the inference and inviting the inference would be neither useful or practicable.").

236. *See* Agard v. Portundo, 117 F.3d 696, 711 (2d Cir. 1997) ("Lawyers may not raise innuendo relating to bias or credibility . . . for the first time in their closing arguments.").

237. *See id.*

238. *Agard*, 120 S. Ct. at 1130 (Ginsburg, J., dissenting).

While the Court's opinion does not necessarily mean that the prosecutor's arguments in *Agard* will become common, it does mean that they are likely to become more frequent. With the Court's endorsement, any time a prosecutor is faced with the real possibility of an acquittal, he can now turn to an unfounded tailoring insinuation in hopes of swaying the jury. Regardless of the latitude given individual courts to prohibit such attacks, the Court's holding ensures that this argument will be used more frequently, if for no other reason than it is constitutional and likely to be effective. As states seek to increase criminal convictions, even fair-minded legislators and judges will find it difficult to prohibit an argument that furthers this goal.

VII. CONCLUSION

Just last year, Justice Kennedy, writing for the Court in *Mitchell v. United States*, concluded that "[t]he rule against adverse inferences is a vital instrument for teaching that the question in a criminal case is not whether the defendant committed the acts of which he is accused.... [but] whether the Government has carried its burden to prove its allegations while respecting the defendant's individual rights."[239] The argument upheld in *Agard* is directly counter to this assertion. Legitimizing an unfounded tailoring insinuation means that the government must prove nothing in order to argue that the defendant is lying. In fact, under the Court's holding, a prosecutor is almost better off if the defendant's testimony is consistent with that of other witnesses, because consistent testimony provides him a legitimate and greater means of attacking the defendant's credibility. In a system that commands a standard of "beyond a reasonable doubt" in criminal trials, this is an odd proposition.

A defendant's constitutional rights are designed to ensure that he is provided a fair trial. While a defendant is by no means entitled to a perfect trial, the penalty analysis at least assures a defendant that his constitutional rights will not be used against him. The Court's decision in *Agard* takes this a step backward.

J. Fielding Douthat, Jr.

239. *Mitchell*, 526 U.S. at 330.