No. 98-1170

In the Supreme Court of the United States

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether it violates the Constitution for the prosecution to comment during closing argument that the defendant's opportunity to hear the testimony of all other witnesses before taking the stand enhanced his ability to fabricate testimony.

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INTEREST OF THE UNITED STATES

The question presented is whether it is unconstitutional for the prosecution to observe, during closing argument, that the defendant's opportunity to hear the testimony of all other witnesses before testifying enhanced his ability to fabricate his own testimony. This Court's resolution of that question, and its treatment of the "penalty" analysis on which the court of appeals relied, see *Griffin* v. *California*, 380 U.S. 609 (1965), will affect federal as well as state prosecutions. The United States accordingly has an interest in the proper resolution of the question presented.

STATEMENT

1. On Friday, April 27, 1990, respondent met Nessa Winder and Breda Keegan at a Manhattan bar and nightclub. At respondent's invitation, Winder accompanied him to his apartment, where she spent the night and had sex with him. The next week, on May 6, Winder and Keegan met respondent at the same nightclub. Both ultimately returned with him and two of his friends to his apartment. The State presented evidence that respondent committed an assault on Keegan and, after Keegan had left, threatened Winder's life with a handgun, raped her, and subjected her to repeated acts of forcible anal and oral sodomy. He also struck her so badly in the eye that it began to seal shut. Pet. App. 15a-22a; Tr. 88.[1]

The next day, May 7, 1990, Winder found a message from respondent on her answering machine. In that message, respondent remarked that "this entire situation" was his "fault" and that he would "never bother you again." Pet. App. 21a. On May 8, 1990, the police executed a search warrant at respondent's apartment and seized a .45 caliber automatic handgun and two magazines containing shells. Following his arrest, respondent first denied that he had a gun, then admitted having it but claimed that it was not real, did not work, or belonged to a friend. *Id.* at 21a-22a.

2. Respondent's defense at trial was that Winder and Keegan had falsely accused him, that he and

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[1] After leaving respondent's apartment, Winder called Keegan and the two proceeded to the police station. Pet. App. 21a. Later that day, when Winder arrived at the emergency room of a hospital, the examining physician found no vaginal or anal trauma. *Ibid.* He did, however, find that Winder had bruises, a cut lip, and a black eye. *Id.* at 66a.

Winder had engaged only in consensual sex, and that he had struck Winder only as a reflex after she slapped and scratched him. Pet. App. 22a-24a. In its opening argument, the defense urged the jury to find that Winder had cleverly fabricated her story by "mix[ing] in as much truth as possible" among her "lies" to "make the lies more effective." Tr. 29, 31.

After the close of the State's evidence, respondent took the stand in his defense. His testimony largely squared with that of Winder and Keegan concerning the events of the first weekend, although their stories diverged somewhat on the nature of their sexual relationship. See Pet. App. 15a. Respondent's version of the events of May 6, 1990, however, contrasted sharply with that of the State's witnesses. Respondent testified that he and Winder woke up in his apartment after a night on the town, engaged in consensual vaginal intercourse, and fell back asleep. Upon reawakening, he said, they quarreled over the lateness of the hour, Winder slapped him and scratched his lip, and he struck her reflexively. *Id.* at 22a-24a; Tr. 670-672, 722. Then, he claimed, he let Winder leave the apartment. Pet. App. 23a.

During summation, the defense repeatedly charged that the prosecution witnesses were lying and added: "[A] good or an effective lie often mixes in elements of truth, and Miss Winder's script was effective." J.A. 17. The prosecutor then presented the State's final argument. She began by noting that respondent's essential defense was that Winder and Keegan "were lying" and that respondent himself was "[t]he victim of all the lies." J.A. 30. The prosecutor then exhaustively summarized the facts of the case and identified a variety of respects in which the testimony of the complaining witnesses, and in particular Winder's testimony, was

more believable than respondent's testimony. J.A. 30-49.[2] Toward the end of her closing argument, the prosecutor observed that "[a] lot of what [respondent] told you corroborates what the complaining witnesses told you. The only thing that doesn't is the denials of the crimes. Everything else fits perfectly." J.A. 46-47. She added, over defense objection:

> You know, ladies and gentlemen, unlike all the other witnesses * * * 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.
>
> 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?
>
> He's a smart man. I never said he was stupid. * * * He used everything to his advantage.

J.A. 49 (objections omitted). The prosecutor then continued to review the factors that lent credibility to Winder's testimony and reminded the jury of its obligation to decide the case on the evidence. J.A. 49-52. After the closing, respondent moved for a mistrial on numerous grounds. One of those grounds was the claim

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[2] The prosecutor focused on the details of Winder's recollection and on the implausibility of her having fabricated a story that involved such humiliating experiences. See J.A. 36-40. The prosecutor also challenged respondent's claim that he struck Winder reflexively, reminded the jury of the taped message in which respondent acknowledged fault, and noted that respondent was a convicted felon who had admitted to lying repeatedly on various job applications. See, *e.g.*, J.A. 31, 44-48.

that "[i]t is improper to make comments to the jury that they should not believe [respondent] due to his exercise of his constitutional rights to be present at his trial." J.A. 54. The court denied the motion. J.A. 54-56.

Nineteen sodomy and assault counts against respondent were submitted to the jury; 14 of the counts concerned Winder, and two concerned Keegan. The remaining three counts were weapons charges. The jury convicted respondent on one count of sodomy, on one count of felony assault in which rape was the underlying felony, and on two counts of third-degree weapons possession; he was acquitted on the remaining charges. The trial court dismissed the assault conviction as repugnant to respondent's rape acquittal. Pet. App. 23a-24a. The New York Supreme Court affirmed respondent's sodomy conviction, but reversed one of the three weapons possession convictions. *Id.* at 14a, 24a. The New York Court of Appeals denied leave for further appeal. *Id.* at 14a.

3. Respondent filed a habeas corpus petition in federal district court, claiming that the prosecutor's comments had violated his Sixth and Fourteenth Amendment rights. The district court denied the petition but granted a certificate of probable cause allowing respondent to appeal. Pet. App. 1a-11a.

a. In its initial decision, a split panel of the Second Circuit found that respondent's sodomy conviction was invalid and ordered that he be "release[d] after he has served his sentence on the weapons possession conviction, unless the state affords him a new trial within sixty days from the issuance of our mandate." Pet. App. 54a. Judge Oakes, writing only for himself (*id.* at 13a-54a; compare *id.* at 67a-69a), analogized the case to *Griffin* v. *California*, 380 U.S. 609 (1965), in which this Court held it unconstitutional for a trial court or the

prosecution to invite the jury to infer the truth of the prosecution's evidence from a defendant's failure to testify. Here, Judge Oakes found, the prosecutor's remarks imposed an unconstitutional "penalty" on respondent's exercise of several different constitutional rights: due process, the right to testify on one's own behalf, and, most important, the right of a criminal defendant to be present at trial, which is ultimately derived from the Confrontation Clause of the Sixth Amendment. See generally *Illinois* v. *Allen*, 397 U.S. 337, 338 (1970). In his view, such comments "force defendants either to forgo the right to be present at trial, forgo their Fifth Amendment right to testify on their own behalf, or risk the jury's suspicion," in violation of the Sixth Amendment. Pet. App. 41a.

Judge Oakes rejected the State's argument that the prosecutor's need to attack a testifying defendant's credibility justified the remarks in question. Pet. App. 44a. He found that while it is proper for a prosecutor to cross-examine a witness about parts of his testimony that "have indicia of fabrication," it is improper for a prosecutor to "raise[] the specter of fabrication 1) for the first time on 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." *Id.* at 46a; *id.* at 44a n.11 (*Griffin* "maintains the opportunity of a defendant to fabricate or conform testimony without comment"). Finally, applying the harmless-error standard of *Brecht* v. *Abrahamson*, 507 U.S. 619, 637-638 (1993), Judge Oakes held that the prosecutor's comments warranted habeas relief on the ground that they directly impaired respondent's credibility, which was the primary issue at trial, and could have been the sole reason that the jury

credited the victim's version of events. Pet. App. 53a-54a.

Judge Winter concurred in the result on narrower grounds. Pet. App. 67a-69a. He relied on the following factors: that "the only evidence supporting the inference that [respondent] tailored his testimony to the prosecution's case was his presence in the courtroom and that testimony itself"; that "New York prohibits criminal defendants from introducing prior consistent statements to demonstrate that their version of evidence was not fabricated after learning of the prosecution's evidence"; and that "the prosecutor's argument was not harmless." *Id.* at 68a-69a.

Judge Van Graafeiland dissented. Pet. App. 54a-67a. He first observed that, as the jury must have known, respondent was in the courtroom the whole time because defendants are required to attend their trials. Thus, he explained, the prosecutor's remarks could not have "penalized" respondent's exercise of his right to attend trial; no juror would "ris[e] to his feet in the jury room and say[], 'If [respondent] is innocent, he would not have sat in the courtroom during the entire trial.'" *Id.* at 61a. Further, in Judge Van Graafeiland's view, the issue of fabrication was not raised for the first time in summation; rather, the specter of fabrication had permeated the entire trial. Thus, the majority was wrong in concluding that there were no facts in evidence to support the inference of fabrication. Moreover, Judge Van Graafeiland concluded, if the prosecutor's comments were as improper and harmful as Judge Oakes found, defense counsel could have requested permission to put respondent back on the witness stand. *Id.* at 65a.

b. On rehearing, the panel stood by its original result but, in an opinion by Judge Winter, "retreat[ed]

from any language in our prior opinions suggesting that it is constitutional error for a prosecutor to make a factual argument that a defendant used his familiarity with the testimony of the prosecution witnesses to tailor his own exculpatory testimony." Pet. App. 72a; see also *United States* v. *Chacko*, 169 F.3d 140 (2d Cir. 1999) (adopting narrow view of the court's holding in this case). But, the majority added,

> [t]he prosecutor in the present case did something quite different, * * * arguing that "unlike all the other witnesses in this case [respondent] 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 . . . . That gives you a big advantage, doesn't it." This was not a factual argument based on [respondent's] testimony in this particular case but a generic argument that a defendant's credibility is less than that of prosecution witnesses solely because he attended the entire trial while they were present only during their own testimony. The prosecutor's argument was not based on the fit between the testimony of [respondent] and other witnesses. Rather, it was an outright bolstering of the prosecution witnesses' credibility vis-a-vis [respondent's] based solely on [respondent's] exercise of a constitutional right to be present during trial.

Pet. App. 72a. The majority concluded that "the constitutional issue here is somewhat similar to that in *Griffin*." *Id.* at 73a.[3] Judge Van Graafeiland again dis-

[3] The majority held that the State had waived (and could waive) its argument, which it raised for the first time on rehearing, that respondent's constitutional claims were barred under *Teague*

sented, on grounds similar to those set forth in his first dissent. *Id.* at 75a-78a.

SUMMARY OF ARGUMENT

Any witness's familiarity with the testimony of other witnesses gives him a natural advantage: it enables him, if he wishes to fabricate a story, to tailor his version of events to avoid unnecessary conflict with the testimony of those other witnesses. That consideration is relevant to his credibility, and counsel may fairly bring it to the attention of the jury. Respondent's essential claim here is that the Constitution prohibits such comment when the witness in question is a criminal defendant. That position, however, violates the basic principle, established in more than one hundred years of this Court's precedent, that a defendant who elects to testify in his own defense is subject, as a witness, to the same fair comment on his credibility as any other witness.

In reaching its contrary conclusion, the majority below relied on the "penalty" analysis of *Griffin* v. *California*, 380 U.S. 609 (1965). That reliance is unsound. In *Griffin*, this Court held that, as a corollary to the Fifth Amendment right against compelled self-incrimination, the prosecution may not comment on the defendant's silence at trial, and the court may not instruct that a defendant's failure to testify is evidence of guilt. The Court reasoned that such adverse comment would "penalize" a defendant's right not to testify by encouraging the jury to believe that the defendant had exercised the right because he is guilty. No analogous concern arises here, because no juror would find a defendant's presence at trial even remotely suspicious.

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v. *Lane*, 489 U.S. 288 (1989). The State has not petitioned for certiorari on that issue.

The prosecutor's comments in this case invited the jury to consider respondent's presence at trial not as substantive evidence of his guilt, but as a factor relevant to his credibility *as a witness*. *Griffin*'s "penalty" analysis has no application in that setting.

In its decision on reconsideration, the majority below limited its *Griffin* analysis to cases in which the prosecution makes "not a factual argument based on the defendant's testimony in this particular case[,] but a generic argument that a defendant's credibility is less than that of prosecution witnesses solely because he attended the entire trial while they were present only during their own testimony." Pet. App. 72a. As an initial matter, the proposed distinction between impermissibly "generic" and permissibly "factual" comments is indeterminate and unworkable, as this case itself illustrates. Moreover, nothing in the Constitution bars the prosecution from making fair generalizations about the credibility of a testifying defendant. Indeed, this Court itself has upheld jury instructions (similar to those given in this case) that identify any criminal defendant as an inherently interested witness whose testimony should be viewed with commensurate skepticism. Such instructions are at least as "generic," and potentially more influential, than the prosecutorial comments at issue here.

More fundamentally, the majority's narrowing of its earlier decision did nothing to resolve the decision's underlying conceptual problem: *Griffin*'s "penalty" analysis is simply inapplicable in this context, no matter how "generic" the prosecutor's comment may be. There may be cases, unlike this one, in which official comment on a testifying defendant's presence at trial is unfair because it is irrelevant to his credibility. Such comment, however, would be subject to challenge on

the same basis as any other irrational attack on a testifying defendant; it is not properly subject to special scrutiny under a "penalty" analysis.

ARGUMENT

THE PROSECUTOR'S COMMENT ON RESPONDENT'S UNIQUE OPPORTUNITY TO HEAR THE TESTIMONY OF OTHER WITNESSES BEFORE TAKING THE STAND WAS NOT UNCONSTITUTIONAL

The trial in this case was a contest between two competing accounts of the underlying events. From the opening argument, the defense argued that "the complaining witnesses"—and particularly Nessa Winder—were "lying." Tr. 29. The defense further insisted that Winder's lies were clever ones: that she had "mixe[d] in as much truth as possible" in her account "to make the lies more effective." Tr. 29, 31; see also J.A. 17. In that respect the defense's argument was analogous to the State's; the prosecutor observed that "[a] lot of what [respondent] told you corroborates what the complaining witnesses told you. The only thing that doesn't is the denials of the crimes. Everything else fits perfectly." J.A. 46-47. The issue in this case is whether respondent's conviction should be vacated because, as part of the same argument, the prosecutor asked the jury to consider, as one factor in evaluating these mutually contradictory accounts, respondent's opportunity to hear the complete testimony of the State's witnesses before offering his own version of events. There are two steps to the inquiry: was that factor *relevant* to the jury's deliberations; and, if so, does the Constitution nonetheless prohibit the government from encouraging the jury to consider it?

A. The Constitution Does Not Prohibit Official Comment Relevant To A Defendant's Credibility As A Witness

1. The factor that the prosecutor asked the jury to consider—the advantage to respondent of taking the stand only after the State's witnesses had testified—was plainly relevant to the jury's evaluation of respondent's testimony and, therefore, to its ultimate determination of his guilt or innocence. It is broadly accepted that witnesses will be more truthful, or at least less successful in fabricating testimony, if they do not first learn how other witnesses have testified. See *Perry* v. *Leeke*, 488 U.S. 272, 281-282 (1989). That is why both the federal system and many state courts provide for the sequestration of witnesses at trial, thereby insulating them from the testimony of other witnesses. See, *e.g.*, Fed. R. Evid. 615; *People* v. *Medure*, 683 N.Y.S.2d 697, 699 (N.Y. Sup. 1998) (under New York law, a "motion for exclusion of witnesses is addressed to the sound discretion of the court"). "The process of sequestration consists merely in preventing one prospective witness from being taught by hearing another's testimony. * * * If the hearing of an opposing witness were permitted, the listening witness could thus ascertain the precise points of difference between their testimonies, and could shape his own testimony to better advantage for his cause." 6 *Wigmore on Evidence* § 1838, at 461 (Chadbourn rev. 1976) (emphasis omitted) (quoted in *Medure*, 683 N.Y.S.2d at 699); accord *Perry*, 488 U.S. at 281-282.

Respondent could not have been sequestered, because, as a defendant, he had both the constitutional right and, under New York law, the legal obligation to attend the entirety of his trial. See p. 21, *infra*. Precisely because he was not sequestered, however, he

enjoyed the advantage that sequestration is designed to foreclose: the ability to adjust his testimony to fit, so far as possible, the facts established in the prosecution's case-in-chief. If he had been kept ignorant of the testimony of the State's witnesses before he testified, it would have been more difficult for him to have fabricated a successful but false story: *i.e.*, a story that would both exonerate him from wrongdoing and simultaneously avoid inaccurate details that could betray the story as a whole by unnecessarily conflicting with aspects of the truthful accounts offered by other witnesses. That consideration was of course not dispositive to respondent's ultimate credibility as a witness, but it was at least a relevant factor for the jury to bear in mind.

2. The question presented here is thus whether, *despite* the relevance of this factor to respondent's credibility as a witness, the Sixth Amendment right of a criminal defendant "to be present in the courtroom at every stage" of trial, *Illinois* v. *Allen*, 397 U.S. 337, 338 (1970), barred the prosecution from inviting the jury to consider that factor. If the subject of the prosecutor's remark had been any witness other than a criminal defendant, the Constitution plainly would have allowed it. When two witnesses tell mutually contradictory accounts of the same underlying events, and one witness has the advantage of listening to the details of the other witness's testimony before venturing his own, that advantage is obviously relevant to his credibility, and the jury therefore should be able to consider it.[4]

[4] It is common for counsel or the court to invite the jury to take a witness's violation of a sequestration order into account when considering the witness's credibility. See, *e.g.*, *Holder* v. *United States*, 150 U.S. 91, 92 (1893) (such a witness "may be proceeded against for contempt, and his testimony is open to comment to the

Respondent's essential position in this case, therefore, is that criminal defendants should be treated differently from other witnesses in this respect and shielded from relevant comments concerning their credibility *as witnesses*.

That position is inconsistent with the settled principle that when a defendant "takes the stand and testifies in his own defense, 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). This Court has reaffirmed that principle in a variety of contexts over a span of more than a century.

In *Reagan* v. *United States*, 157 U.S. 301 (1895), the trial court had instructed the jury, after the defendant had taken the stand in his own defense, that "[t]he deep personal interest which he 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." *Id.* at 304. This Court upheld the conviction on the ground that, "if [a defendant] avail himself of this privilege [of testifying on his own behalf], his credibility may be impeached, his testimony may be assailed, and is to be weighed as that of any other witness. Assuming the position of a witness,

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jury"); *United States* v. *Cropp*, 127 F.3d 354, 363 (4th Cir. 1997) (remedies for violation include "instructions to the jury that they may consider the violation toward the issue of credibility"), cert. denied, 522 U.S. 1098 (1998); 4 Jack B. Weinstein, et al., *Weinstein's Federal Evidence* § 615.07[2][c], at 615-30 to 615-31 (2d ed. 1999) (same). Such comment is appropriate not only (or even primarily) because it sanctions the party on whose behalf the witness has testified, but also because it identifies a relevant factor that any jury should consider in assessing the ease with which the witness might have fabricated testimony.

he is entitled to all its rights and protections, and is subject to all its criticisms and burdens." *Id.* at 305.[5]

Similarly, in *Raffel* v. *United States*, 271 U.S. 494 (1926), this Court held that a defendant who took the stand at his second trial after an initial mistrial could be cross-examined about his failure to testify at the first trial, even though it had by then become firmly established that in the federal system a prosecutor was barred from commenting on a defendant's silence (see 18 U.S.C. 3481; *Wilson* v. *United States*, 149 U.S. 60 (1893)). Relying on *Reagan*, the Court reasoned that,

[5] The recent trend in some jurisdictions has been to direct the use of more generic instructions about "interested witnesses" that do not specifically identify the defendant as such. See, *e.g.*, 1 Edward J. Devitt, Charles B. Blackmar, et al., *Federal Jury Practice & Instructions* § 15.01, at 465-466, § 15.12, at 528-531 (4th ed. 1992); *United States* v. *Dwyer*, 843 F.2d 60 (1st Cir. 1988); compare *United States* v. *Hill*, 470 F.2d 361, 364-365 (D.C. Cir. 1972) (approving instruction similar to the one at issue in *Reagan*, reasoning that "[i]f any witness has a special interest in the case it is within the sound discretion of the trial judge to call that interest to the specific attention of the jury"); Tr. 834 (instructing jury in this case that "[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."). But this Court has never questioned the continuing validity of *Reagan*, much less suggested that the instruction approved there (and employed, in various forms, in a number of state and federal courts) is unconstitutional. Significantly, even jurisdictions that favor "interested witness" instructions that do not specifically mention the defendant have reaffirmed that a *prosecutor* may nonetheless challenge a testifying defendant's credibility based on his "interest in the outcome of the trial." *McGrier* v. *United States*, 597 A.2d 36, 46 (D.C. 1991). Indeed, Judge Oakes himself acknowledged in his opinion below that the prosecutor was "free, of course, to point out" that respondent had a "motive to lie in order to escape incarceration." Pet. App. 46a-47a.

"[w]hen [a defendant] takes the stand in his own behalf, he does so as any other witness, and within the limits of the appropriate rules he may be cross-examined as to the facts in issue. * * * His failure to deny or explain evidence of incriminating circumstances of which he may have knowledge, may be the basis of adverse inference, and the jury may be so instructed." 271 U.S. at 497.[6]

More recently, in *Brown*, the Court held that when a defendant exercises his right to take the stand, "[h]e cannot reasonably claim that the Fifth Amendment gives him not only this choice but, if he elects to testify, an immunity from cross-examination on the matters he has himself put in dispute." 356 U.S. at 155-156. To the contrary, "his credibility may be impeached and his testimony assailed like that of any other witness," lest the Constitution become "a positive invitation to mutilate the truth." *Id.* at 154, 156.

The Court followed a similar rationale in *Harris* v. *New York*, 401 U.S. 222 (1971), in which it held that, when a defendant elects to become a witness, he may be cross-examined with any statements the police may have elicited from him in violation of *Miranda* v. *Arizona*, 384 U.S. 436 (1966). The Court reasoned: "Having voluntarily taken the stand, petitioner was under an obligation to speak truthfully and accurately, and the prosecution here did no more than utilize the traditional

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[6] In his initial opinion below, Judge Oakes suggested that it is "unclear whether *Raffel* principles remain good law." Pet. App. 43a n.9. In *Jenkins* v. *Anderson*, 447 U.S. 231 (1980), however, this Court specifically reaffirmed the validity of *Raffel* and relied heavily upon it in holding that a testifying defendant may be impeached with evidence of prearrest silence. *Id.* at 235-237 & nn. 2, 4; see p. 17, *infra*.

truth-testing devices of the adversary process." 401 U.S. at 225.[7]

The Court revisited and reaffirmed this line of precedent in *Jenkins* v. *Anderson*, 447 U.S. 231 (1980), in which it held that the Fifth Amendment does not bar the prosecution from using a defendant's prearrest silence to impeach his credibility once he takes the stand. Relying on *Raffel*, *Brown*, and *Harris*, the Court reasoned that "[o]nce a defendant decides to testify, '[t]he interests of the other party and regard for the function of courts of justice to ascertain the truth become relevant, and prevail in the balance of considerations determining the scope and limits of the privilege against self-incrimination.'" *Id.* at 238 (quoting *Brown*, 356 U.S. at 156).

Finally, in *Perry*, this Court held that, even though the Sixth Amendment generally entitles a defendant to consult with counsel during trial, "when a defendant becomes a witness, he has no constitutional right to consult with his lawyer while he is testifying." 488 U.S. at 281. The Court explained that cross-examination of any witness "is more likely to elicit truthful responses if it goes forward without allowing the witness an opportunity to consult with third parties," a central premise of sequestration and "nondiscussion" orders. *Id.* at 281-282. Similarly, the Court concluded, "when [a defendant] assumes the role of a witness, the rules that generally apply to other witnesses—rules that serve

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[7] The Court has similarly held that a testifying defendant may be impeached by evidence seized in violation of the Fourth Amendment, *Walder* v. *United States*, 347 U.S. 62 (1954); by proof of prior convictions, see *Spencer* v. *Texas*, 385 U.S. 554, 561-562 (1967); and by co-defendant confessions that would otherwise be inadmissible under *Bruton* v. *United States*, 391 U.S. 123 (1968), see *Tennessee* v. *Street*, 471 U.S. 409 (1985).

the truth-seeking function of the trial—are generally applicable to him as well." *Id.* at 282.

These cases each affirm a central principle of law: when a defendant elects to testify, he may not invoke his status as a defendant to avoid fair scrutiny as a witness. Rather, his credibility will be subject to the same comment, the same cross-examination, and the same jury instructions that any nonparty witness would face in analogous circumstances. That principle controls this case.[8] Just as it would be fair comment to note that a nonparty witness may have used access to other witnesses' testimony to fabricate his own, see p. 13, *supra*, it was fair comment here for the prosecution to observe that respondent enjoyed a unique opportunity to tailor his testimony, so far as possible, to the facts established during the prosecution's case-in-chief. And, because the "central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence," *United States* v. *Robinson*, 485 U.S. 25, 33 (1988), it was fair comment that the jury was entitled to consider.

B. The "Penalty" Analysis of *Griffin* v. *California* Is Inapplicable To The Constitutional Question Presented Here

In its decision on rehearing, the majority below reasoned that, because the prosecutor had sought to "bolster[] * * * the prosecution witnesses' credibility vis-a-vis the defendant's based solely on the defendant's exercise of a constitutional right to be present during the trial," the "constitutional issue here is somewhat

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[8] For that reason, there is no basis for the suggestion of Judges Oakes and Winter, in their initial opinions below (see Pet. App. 48a-49a, 69a), that the prosecutor's comments in this case unconstitutionally burdened respondent's right to testify in his own behalf.

similar to that in *Griffin* v. *California*, 380 U.S. 609, 613-615 (1965)." Pet. App. 72a-73a. That reasoning is unsound.

1. In *Griffin*, this Court held that the Fifth Amendment right against compelled self-incrimination bars the court and the prosecution from inviting the jury to draw an inference unfavorable to a defendant when he fails to testify in response to the State's case. Official comment on a defendant's refusal to testify, the Court held, "is a penalty imposed * * * for exercising a constitutional privilege. It cuts down on the privilege by making its assertion costly." 380 U.S. at 614. Last Term this Court reaffirmed *Griffin*'s bar on drawing an adverse factual inference from a nontestifying defendant's exercise of his right to remain silent in a criminal proceeding. See *Mitchell* v. *United States*, 119 S. Ct. 1307 (1999). As the Court observed, the rule was originally deemed necessary because of concerns that "[t]oo many, even those who should be better advised, view this privilege as a shelter for wrongdoers. They too readily assume that those who invoke it are either guilty of crime or commit perjury in claiming the privilege." *Id.* at 1315 (quoting *Ullmann* v. *United States*, 350 U.S. 422, 426 (1956)).

Although the *Griffin* rule has now "become an essential feature of our legal tradition," 119 S. Ct. at 1316, the Court has declined invitations to extend that rule—or, more generally, *Griffin's* "penalty" analysis—beyond the context of official comment on a defendant's silence at a criminal proceeding, and sometimes it has declined to apply it even in that context. For example, the Court recognized that its holding in *Jenkins*, *supra*, could discourage a criminal suspect from exercising his right to remain silent before his arrest, since that silence could later be used to impeach him if he takes

the stand. The Court explained, however, 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.'" 447 U.S. at 236 (quoting *Chaffin* v. *Stynchcombe*, 412 U.S. 17, 30 (1973)). Similarly, in *Robinson*, the Court found *Griffin's* "penalty" analysis inapplicable where defense counsel had suggested that the government had precluded the defendant from explaining his side of the story and the prosecutor had then told the jury, in his rebuttal summation, that the defendant "could have taken the stand and explained it to you." 485 U.S. at 26. The Court acknowledged that the prosecutor's comment imposed "some 'cost' to the defendant in having remained silent," but it nonetheless "decline[d] to expand *Griffin* to preclude a fair response by the prosecutor in situations such as the present one." *Id.* at 34.

Invocation of *Griffin*'s "penalty" analysis is even less appropriate here than it was in *Jenkins* and *Robinson*. Unlike those cases, this case does not even involve prosecutorial comment on a defendant's silence. Instead, it involves prosecutorial comment on the defendant's attendance at trial and his resulting unique familiarity with the testimony of other witnesses. For several reasons, such comment poses none of the concerns that gave rise to *Griffin*'s rule.

First, *Griffin* holds that a court or prosecutor may not ask the jury to infer that a defendant is guilty *because* he has exercised a particular constitutional right: the right to remain silent. Here, the prosecutor obviously did not ask the jury to infer that respondent was guilty *because* he attended trial. To the contrary, she asked the jury to bear in mind (as it might well have done in any event) that respondent's attendance

throughout trial, while completely unsuspicious in its own right, would nonetheless make it easier for him to tailor any fabricated testimony to the facts established during the prosecution's case-in-chief.

Put another way, whereas the *Griffin* rule originated in response to an empirical concern that jurors "too readily assume" that those who invoke the Fifth Amendment are for that very reason guilty, *Mitchell*, 119 S. Ct. at 1315, there is no analogous concern here. Few jurors would draw *any* connection, much less an exaggerated one, between a defendant's attendance at his own trial and the likelihood of his guilt. Indeed, the law in most jurisdictions compels a defendant's presence at trial (see, *e.g.*, Pet. App. 59a), and even if it did not, most jurors would understand that even innocent defendants would take a criminal trial seriously enough to attend.[9] For similar reasons, whereas prosecutorial

[9] The prosecutor observed not just that respondent was in fact present throughout trial, but that, as a normal "benefit" of being a defendant, he "*gets to* sit here and listen to the testimony of all the other witnesses before he testifies." J.A. 49 (emphasis added). Despite the district court's contrary view (Pet. App. 8a), there was nothing problematic about the suggestion that respondent had a right to be present in the courtroom. Indeed, if anything, that observation would tend to dispel any conceivable question about whether that presence itself was somehow improper or deserving of suspicion. And if respondent had thought that the jury might have inferred that he had elected to be present during the prosecution's case for an improper purpose, he could have sought a jury instruction that state law compelled his attendance at trial and that he had the opportunity to present his defense and testify only after the prosecution had presented its case and rested. Respondent requested no such instruction in response to the comments at issue. Cf. Tr. 3 (instructing jury, at beginning of trial: "After the People have concluded the calling of their witnesses and the introduction of any exhibits which are admissible into evidence, the defendant may offer evidence in his defense.").

comment on a defendant's refusal to testify puts pressure on defendants to surrender their right to remain silent, it is inconceivable that the prospect of comments like those at issue here could ever induce any defendant to remain absent from trial (even if he were legally free to do so).

Finally, the majority's reliance on *Griffin* overlooks the basic distinction, discussed above, between the defendant as defendant and the defendant as witness. The comment at issue in *Griffin* encouraged the jury to construe a nontestifying defendant's silence as substantive evidence of his guilt. In contrast, the comment at issue here asked the jury to consider a *testifying* defendant's familiarity with the testimony of other witnesses as a factor in assessing his credibility *as a witness*. See generally *Robinson*, 485 U.S. at 32-34; see also Tr. 827 (instructing jury on distinction between evidence and arguments of counsel). Because a testifying defendant's "credibility may be impeached and his testimony assailed like that of any other witness," *Brown*, 356 U.S. at 154, *Griffin* simply has no application to this case.[10]

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[10] The panel majority's opinion on rehearing attributed no significance to the fact that the prosecutor made the disputed "argument" during summation rather than on cross-examination. See Pet. App. 72a. To the extent that the majority thus abandoned Judge Oakes' prior emphasis on that factor as central to the constitutional analysis (see *id.* at 39a-40a, 46a), it was correct to jettison that factor. The prosecutor's comment in argument was not "evidence" in its own right but a common-sense observation about the structure of the trial, and she was as free to make it during summation as she would have been if the witness in question had been someone other than the defendant. See p. 13, *supra*; see also note 13, *infra*.

2. In its decision on rehearing, the panel majority "retreat[ed] from any language in [its] prior opinions suggesting that it is constitutional error for a prosecutor to make a factual argument that a defendant used his familiarity with the testimony of the prosecution witnesses to tailor his own exculpatory testimony." Pet. App. 72a. The majority sought to confine its *Griffin* analysis to cases in which the prosecution makes "not a factual argument based on the defendant's testimony in this particular case[,] but a generic argument that a defendant's credibility is less than that of prosecution witnesses solely because he attended the entire trial while they were present only during their own testimony." *Ibid.* That distinction is unworkable in practice and is in any event doctrinally unsound.

The majority's analysis would turn on the specificity of the factual elaboration that accompanies the prosecutor's observation that a defendant's presence at trial enables him to tailor his testimony to that of other witnesses. As an initial matter, that analysis would be highly indeterminate, as this case itself illustrates. The prosecutor here did not make the comments at issue in isolation or "generic[ally]" (Pet. App. 72a); she made them amid a lengthy factual exposition of reasons why the jury should ultimately find the complaining witnesses more credible than respondent. See J.A. 28-52; pp. 3-4, *supra*. The dissent below was thus correct in observing that "the prosecutor was not disinterestedly discussing 'a' defendant. She was challenging the testimony given by 'the' defendant in the instant case. * * * The issue in the case was credibility, and con-

scientious counsel could not avoid discussing it in their summations." Pet. App. 75a-76a.[11]

Moreover, even if the prosecutor's comments here were in some sense "generic," nothing in the Constitution bars the government from making fair generalizations at the close of trial. Indeed, the jury instruction that this Court approved in *Reagan*—which encouraged the jury to consider "[t]he deep personal interest" of any testifying defendant "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)—was far more "generic," and potentially more unfavorable to any defendant, than the prosecutor's comments at issue here.[12]

Most fundamentally, the panel majority's proposed distinction between permissibly specific and impermissibly "generic" prosecutorial comments answers the wrong question. For the reasons discussed above, *Griffin*'s "penalty" analysis is conceptually inapposite to any comment on a defendant's presence at trial, whether specific or generic. That is not to say that official comment on a defendant's attendance at trial during the testimony of other witnesses is invariably permissible. The defense might object to such comment

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[11] Further, as the dissent added, respondent's counsel had "argued to the jury that the prosecution witnesses had fabricated the allegations," and the prosecutor's comments "were addressed squarely to [respondent] and his counsel's open-the-door, invite-a-response argument." Pet. App. 76a.

[12] See also note 5, *supra*. "Generic" observations concerning the credibility of categories of witnesses are in fact very common in modern jury instructions. See 1 Devitt & Blackmar, *supra*, § 15.02 *et seq.* (discussing instructions drawing into question the credibility of, *inter alia*, informants, immunized witnesses, accomplices, drug or alcohol abusers, and convicted felons); *Hill*, 470 F.2d at 365 & n.10.

just as the defense could object to any other argument: *i.e.*, as an unfair, irrelevant, or arbitrary attack on a defendant.[13] If improper on those grounds, such comment might require reversal if it "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Donnelly* v. *DeChristoforo*, 416 U.S. 637, 643 (1974).[14] But there is no doctrinal

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[13] In his initial opinion (Pet. App. 68a), but not in his opinion on rehearing (*id.* at 71a-75a), Judge Winter expressed a separate concern about the fairness of the prosecutor's comment, stating that, "[u]nder New York law, absent a claim of recent fabrication, appellant could not have introduced evidence of prior consistent statements." He thus concluded that "[s]o long as New York prohibits criminal defendants from introducing prior consistent statements to demonstrate that their version of evidence was not fabricated after learning of the prosecution's evidence, its prosecutors may not, in my view, argue that such fabrication occurred." *Id.* at 68a-69a. That argument is unsound. As an initial matter, the prosecutor's comments appeared in fact to constitute "a claim of recent fabrication." As Judge Van Graafeiland observed, respondent could have sought, but did not seek, to reopen the presentation of evidence for the limited purpose of rebutting the prosecutor's comments with any prior consistent statements he may have made. See *id.* at 65a. In any event, the proper response to Judge Winter's concern is to ensure that hearsay rules do not impair a defendant's constitutional right to introduce appropriate evidence in his defense, not to impose federal restrictions (which, under Judge Winter's analysis, would apparently vary with state law) on the proper scope of prosecutorial comment.

[14] That standard is considerably more difficult for a defendant to satisfy than the standard for errors impairing specific constitutional rights. See *Greer* v. *Miller*, 483 U.S. 756, 765 n.7 (1987). Because the prosecutorial comment at issue here was neither erroneous nor unfair, this Court need not address whether it "so infected the trial" as to justify vacating respondent's state conviction. See generally Pet. App. 52a-53a & n.20; see also Pet i (presenting only question of whether court of appeals erred in extending *Griffin*).

basis for challenging the type of comment that was made in this case on the theory that it unconstitutionally "burdens" or "penalizes" a defendant's right to attend trial, and the panel majority erred in approaching the case from that perspective.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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