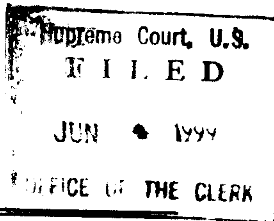
Supreme Court, U.S.
FILED
JUN 4 1999
OFFICE OF THE CLERK

No. 98-1170

IN THE

Supreme Court of the United States

LEONARD PORTUONDO, Superintendent,
Fishkill Correctional Facility,

Petitioner,

vs.

RAY AGARD,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Second Circuit

BRIEF *AMICUS CURIAE* OF THE
CRIMINAL JUSTICE LEGAL FOUNDATION
IN SUPPORT OF PETITIONER

KENT S. SCHEIDEGGER
CHARLES L. HOBSON
Attorney of Record
Criminal Justice Legal Fdn.
2131 L Street
Sacramento, CA 95816

Phone: (916) 446-0345
Fax: (916) 446-1194
E-mail: cjlf@cjlf.org

Attorneys for Amicus Curiae
Criminal Justice Legal Foundation

QUESTION PRESENTED

Does the Constitution forbid a prosecutor to mention to the jury the fact that the defendant has had the advantage of listening to the other witnesses testify before he testifies?

TABLE OF CONTENTS

Question presented i

Table of authorities v

Interest of *amicus curiae* 1

Summary of facts and case 2

Summary of argument 5

Argument 8

I

The People's closing argument did not violate due process 8

II

Griffin is a limited decision closely tied to the policies supporting the self-incrimination privilege 9

III

The Confrontation Clause's basis in the accuracy of the fact-finding process does not support an extension of *Griffin* 15

A. Confrontation and the truth 15

B. The right choice 18

1. Choice and accuracy 18

2. Finding the truth 20

IV

Attacking defendant's credibility as a witness does not violate the right to testify 23

Conclusion 26

TABLE OF AUTHORITIES

Cases

Adamson v. California, 332 U. S. 46, 91 L. Ed. 1903, 67 S. Ct. 1672 (1947) 8, 9, 11

Agard v. Portuondo, 117 F. 3d 696 (CA2 1997) ..... Passim

Albright v. Oliver, 510 U. S. 266, 127 L. Ed. 2d 114, 114 S. Ct. 807 (1994) 8

Baxter v. Palmigiano, 425 U. S. 308, 47 L. Ed. 2d 810, 96 S. Ct. 1551 (1976) 9, 10, 11

Brogan v. United States, 522 U. S. 398, 139 L. Ed. 2d 830, 118 S. Ct. 805 (1998) 13

Brooks v. Tennessee, 406 U. S. 605, 32 L. Ed. 2d 358, 92 S. Ct. 1891 (1972) 13, 21, 25

Carter v. Kentucky, 450 U. S. 288, 67 L. Ed. 2d 241, 101 S. Ct. 1112 (1981) 13

Corbitt v. New Jersey, 439 U. S. 212, 58 L. Ed. 2d 466, 99 S. Ct. 492 (1978) 14

Coy v. Iowa, 487 U. S. 1012, 101 L. Ed. 2d 857, 108 S. Ct. 2798 (1988) 15, 16

Crampton v. Ohio, 402 U. S. 183, 28 L. Ed. 2d 711, 91 S. Ct. 1454 (1971) 14

Crampton v. Ohio, 408 U. S. 941, 33 L. Ed. 2d 765, 92 S. Ct. 2873 (1970) 14

Delaware v. Fensterer, 474 U. S. 15, 88 L. Ed. 2d 15, 106 S. Ct. 292 (1985) 17

Donnelly v. De Christoforo, 416 U. S. 637, 40 L. Ed. 2d 431, 94 S. Ct. 1868 (1974) 8, 22

Furman v. Georgia, 408 U. S. 238, 33 L. Ed. 2d 346, 92 S. Ct. 2726 (1972) 14

Geders v. United States, 425 U. S. 80, 47 L. Ed. 2d 592, 96 S. Ct. 1330 (1976) 21

Griffin v. California, 380 U. S. 609, 14 L. Ed. 2d 106, 85 S. Ct. 1229 (1965) 8, 9, 10, 13, 15, 19, 23

Grunewald v. United States, 353 U. S. 391, 1 L. Ed. 2d 931, 77 S. Ct. 963 (1957) 25

Harris v. New York, 401 U. S. 222, 28 L. Ed. 2d 1, 91 S. Ct. 643 (1971) 25

Jenkins v. Anderson, 447 U. S. 231, 65 L. Ed. 2d 86, 100 S. Ct. 2124 (1980) 25

Kastigar v. United States, 406 U. S. 441, 32 L. Ed. 2d 212, 92 S. Ct. 1653 (1972) 18

Lakeside v. Oregon, 435 U. S. 333, 55 L. Ed. 2d 319, 98 S. Ct. 1091 (1978) 13

Malloy v. Hogan, 378 U. S. 1, 12 L. Ed. 2d 653, 84 S. Ct. 1489 (1964) 9

Mancusi v. Stubbs, 408 U. S. 204, 33 L. Ed. 2d 293, 92 S. Ct. 2308 (1972) 17

Maryland v. Craig, 497 U. S. 836, 111 L. Ed. 2d 666, 110 S. Ct. 3157 (1990) 16, 17, 18, 19

McGautha v. California, 402 U. S. 183, 28 L. Ed. 2d 711, 91 S. Ct. 1454 (1971) 14

Mincey v. Arizona, 437 U. S. 385, 57 L. Ed. 2d 290, 98 S. Ct. 2408 (1978) 18

Miranda v. Arizona, 384 U. S. 436, 16 L. Ed. 2d 694, 86 S. Ct. 1602 (1966) 25

Murphy v. Waterfront Comm'n, 378 U. S. 52, 12 L. Ed. 2d 678, 84 S. Ct. 1594 (1964) 12

Ohio v. Roberts, 448 U. S. 56, 65 L. Ed. 2d 597, 100 S. Ct. 2531 (1980) 16, 17

People v. Agard, 606 N. Y. S. 2d 239 (N.Y. App. Div. 1993) 5

People v. Buckey, 378 N. W. 2d 432 (Mich. 1985) 22, 23

Raffel v. United States, 271 U. S. 494, 70 L. Ed. 1054, 46 S. Ct. 566 (1926) 11, 25

Reed v. State, 633 S. W. 2d 664 (Tex. App. 1982) 23

Rock v. Arkansas, 483 U. S. 44, 97 L. Ed. 2d 37, 107 S. Ct. 2704 (1987) 23, 24, 26

State v. Grilli, 369 N. W. 2d 35 (Minn. App. 1985) 23

State v. Howard, 323 N. W. 2d 872 (S.D. 1982) 23

State v. Hoxsie, 677 P. 2d 620 (N.M. 1984) 23

State v. Robinson, 384 A. 2d 569 (N.J. App. 1978) 23

United States v. Balsys, 141 L. Ed. 2d 575, 118 S. Ct. 2218 (1998) 12

United States v. Dunnigan, 507 U. S. 87, 122 L. Ed. 2d 445, 113 S. Ct. 1111 (1993) 23, 26

United States v. Hale, 422 U. S. 171, 45 L. Ed. 2d 99, 95 S. Ct. 2133 (1975) 11

United States v. Nobles, 422 U. S. 225, 45 L. Ed. 2d 141, 95 S. Ct. 2160 (1975) 19

United States v. Robinson, 485 U. S. 25, 99 L. Ed. 2d 23, 108 S. Ct. 864 (1988) 14, 15

Walder v. United States, 347 U. S. 62, 98 L. Ed. 503, 74 S. Ct. 354 (1954) 25

White v. Illinois, 502 U. S. 346, 116 L. Ed. 2d 848, 112 S. Ct. 736 (1992) 18

Wilson v. United States, 149 U. S. 60, 37 L. Ed. 650, 13 S. Ct. 765 (1893) 9, 10

United States Statute

18 U. S. C. § 3481 9

Rule of Court

Fed. Rule Evid. 615 20

Treatises

3 W. Blackstone, Commentaries (1st ed. 1768) 16

6 J. Wigmore, Evidence (Chadbourn rev. 1976) 20, 21

8 J. Wigmore, Evidence (McNaughton rev. 1961) 12

IN THE

Supreme Court of the United States

LEONARD PORTUONDO, Superintendent,
Fishkill Correctional Facility,

Petitioner,

vs.

RAY AGARD,

Respondent.

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the due process protection of the accused into balance with the rights of the victim and of society.

Although the Constitution grants many protections to criminal defendants, it does not insulate them from the consequences of their choices. When defendant chose to testify, he opened himself to attacks on his credibility, including the

1. Rule 37.6 Statement: This brief was written entirely by counsel for *amicus*, as listed on the cover, and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief.

Both parties have given written consent to the filing of this brief.

district attorney's commentary that he had the advantage of seeing every other witness's testimony. The Second Circuit's holding that the state cannot impose any "cost" on the exercise of constitutional rights improperly insulates defendant from the consequences of his actions by meddling with legitimate state practices. This is contrary to the interests CJLF was formed to protect.

SUMMARY OF FACTS AND CASE

Defendant, Ray Agard, met Nessa Winder and Brenda Keegan at a Manhattan club on Friday, April 27, 1990. *Agard* v. *Portuondo*, 117 F. 3d 696, 698 (CA2 1997). Winder testified that after accompanying defendant to his residence that night, she and defendant engaged in oral and vaginal sex on the night of the 27th and the morning of the 28th, but she refused his request for anal intercourse. See *id.*, at 699. She also testified that although she slept at his place Saturday night, after an afternoon at the beach, she turned down his attempt to initiate sex as her boyfriend from London would soon be visiting. *Ibid.*

Defendant, his friend Freddy, Keegan, and Winder met again on Saturday, May 5, at the same club where they first met. See *ibid.* The group drank and talked for several hours. Some, including Winder, used cocaine. *Ibid.* Winder testified that she got drunk and passed out, last remembering the arrival of defendant's friend Kiah and the group's decision to go to another club. Keegan testified that Winder, although drunk, was "walking and talking" at the time of her memory failure. *Ibid.* The group left in Kiah's car, where they eventually moved to another bar and continued drinking. During the trip Winder was in defendant's lap, but was not affectionate, as she was sleeping. *Ibid.*

Between 4:00 and 4:30 a.m., they left the bar. Although Keegan wanted to return to her place with her roommate Winder, the group went to Agard's place at his suggestion. *Ibid.* Kiah and Freddy left for beer, while defendant let the two

women in, where they then went to defendant's bedroom. Winder immediately fell asleep on defendant's bed. After Keegan indicated that she wanted to call a cab, defendant responded that she should stay and have a beer, since he had his friends go to the trouble of getting some. He then became verbally abusive and threatening. *Ibid.* Eventually, he pulled a gun out of a drawer and placed it "against Keegan's head, saying, 'I'm going to give you three seconds to shut up.' " *Id.*, at 700. Defendant then put the gun away and continued to verbally abuse Keegan until his friends returned. Although reluctant to leave her roommate, Keegan decided to leave with Kiah. While leaving, she brushed by defendant, who grabbed her around the neck. Keegan screamed and defendant let go, "cursing her for getting him in trouble with his landlady." *Ibid.*

Winder testified that she woke up at 9:30 a.m., wearing nothing but her vest. She could not remember how she got where she was, but she knew she needed to get home to meet her boyfriend coming from England. *Ibid.* She recalled "that at some point [defendant] had asked her for 'a fuck' and she said 'no.' " *Ibid.* When she tried to call a cab, defendant put the phone down cursing both her and Keegan. *Ibid.* When she started to get dressed defendant hit her and eventually threatened her with a gun to force her to commit oral sodomy. *Ibid.*

Winder asked to be allowed to go to the bathroom, and defendant assented. *Ibid.* After first locking herself in the bathroom, she attempted to flee to Freddy's room, where she begged Freddy to help. She then brought Freddy with her into defendant's room. Defendant ordered Freddy out, and he complied. *Ibid.* Winder screamed in the hopes of getting the landlord's attention. Defendant then punched her three times in the face. *Id.*, at 700. Defendant next proceeded to commit several acts of rape, oral, and anal sodomy on Winder. See *id.*, at 700-701.

After defendant was through with her, he called a taxi to take her home. He escorted her downstairs, threatening her if she called the police. *Id.*, at 701. Because she had no money,

the cab dropped her off a short distance from defendant's place, where she managed to call Keegan. She hid until Keegan found her, and the two immediately went to the police station. *Ibid.* The medical exam showed no signs of abnormality in Winder's vagina or anus and only her vaginal sample was positive for spermatozoa. *Ibid.*

On the day after the rape, May 7, 1990, Winder and Keegan found the following message on their answering machine:

> "You will know who this message is for. After careful consideration of this entire situation, it was my fault. I was a golden asshole. The only thing I can do is say I'm sorry and that's it. I'll never bother you again. Live safely and peacefully. Goodbye." *Ibid.*

At trial, both Keegan and Winder identified the voice as defendant's.

Defendant claimed that he and Winder engaged in consensual anal intercourse with lubricants their first night together. *Id.*, at 701. He asserted that on the second weekend Winder was awake and amorous towards him during the drive to the second nightclub. He declared that while Keegan wanted to go home, Winder had no reservations about going to his place. *Ibid.* Defendant and Winder fell asleep next to each other on his bed at 6:00 a.m. When they awoke three hours later they engaged in consensual vaginal sex. He claimed they reawakened between noon and 1:00 p.m., with Winder " 'upset,' and 'kind of hyper,' and concerned that her boyfriend was going to kill her." *Ibid.* When he tried to calm her she struck him and scratched the inside of his mouth. See *id.*, at 701-702. He reflexively "used the palm of his open hand to push her away, 'mush[ing]' her in the eye." *Id.*, at 702. He called a cab and gave her $25 for fare. His call the next day was to apologize for mushing her in the face. *Ibid.*

Kiah testified for the defense that Winder hugged and kissed defendant during the drive to the second club and that she was conscious at the last bar, contrary to Keegan's testimony. He

also said that Keegan never informed him that defendant had threatened her with a gun. *Ibid.*

At the closing argument, the district attorney argued that defendant was " 'the one who had an answer for everything' " and that his story fit perfectly with the complaining witnesses except for "the denials of the crime." *Id.*, at 707. She then noted that "unlike all the other witnesses . . . he [defendant] gets to sit here and listen to the testimony of all the other witnesses before he testifies." *Ibid.* Defendant was convicted on one count of anal sodomy, of felony assault with rape as the underlying felony, and three weapons counts. *Id.*, at 702. The felony assault conviction was dismissed by the trial court as inconsistent with the rape acquittal. *Ibid.*

The state intermediate appellate court vacated one weapon count, while affirming the other convictions. *People* v. *Agard*, 606 N. Y. S. 2d 239, 240 (N.Y. App. Div. 1993). On March 21, 1996, the federal district court denied his habeas petition. *Agard* v. *Portuondo*, *supra*, 117 F. 3d, at 698. The Second Circuit reversed, *id.*, at 715, finding that the district attorney's reference to defendant's observation of all other testimony violated his right to confrontation, *id.*, at 709, to testify on his own behalf, *id.*, at 712, and the due process right to a fair trial. *Id.*, at 714.

SUMMARY OF ARGUMENT

The Due Process Clause is an inappropriate vehicle for analyzing the closing argument in the present case. Only egregiously improper closing arguments violate due process. Thus, the rule of *Griffin* v. *California* does not extend to due process. Since the present case turns on extending *Griffin*, the district attorney's remarks did not violate due process.

Before determining whether *Griffin* may be extended to other constitutional rights, it is first necessary to understand its basis in the Fifth Amendment's self-incrimination privilege. *Griffin*, relying on past practice, notes that testifying poses a

risk to the innocent defendant who has prior convictions, or who would be a poor witness. In situations where the Fifth Amendment is inapplicable, this Court accepts the relevance of inferring guilt from a failure to respond to an accusation. Because it is logical to infer guilt from a failure to testify, *Griffin* must be based on more than protecting innocents.

Griffin's Fifth Amendment rationale is found in the proscription against subjecting defendants to the "cruel trilemma" of contempt, perjury, or self-incrimination. The pressure from the inference of guilt is sufficiently close to contempt to make *Griffin* error a form of compelled self-incrimination. *Griffin*'s rationale thus primarily protects the guilty, as innocent defendants are not confronted with any "trilemma," as they can honestly testify to their innocence.

Defendant's Sixth Amendment right to physical confrontation, like all other confrontation rights, is intended to assure an accurate verdict. Each component of the Confrontation Clause is meant to help defendant test the accuracy and credibility of the state's witnesses. This right to confrontation is interpreted with an eye towards the needs of the trial it governs, thus discouraging impractical literalism and retaining flexibility so long as there is substantial compliance with its truth-finding function.

Defendant received as much confrontation as the Constitution requires. The People's witnesses testified under oath, in the presence of defendant and the jury, and were subject to unencumbered cross-examination. The district attorney's comments that defendant's presence at trial allowed him to tailor his testimony to what he heard did not diminish these rights, because the closing argument advanced the interests protected by the Confrontation Clause.

Sequestering witnesses is an ancient and universal practice that is essential to an accurate verdict. Keeping witnesses from hearing each other's testimony helps expose inconsistencies and prevents falsehoods. It is considered, after cross-examination, to be one of the best methods for detecting untrue testimony.

Because the Confrontation Clause prevents defendant from being sequestered, the closing argument in the present case represents a reasonable compromise between sequestration and confrontation. The district attorney's remarks to the jury were accurate: witnesses do tailor their testimony to what they have heard, and criminal defendants have greater means and motive to tailor than any other witnesses. The extensive testimony that differed on a few key details reinforced this risk in the present case. Giving this information to the jury allowed it to judge defendant's credibility in its proper context while preserving his basic right to confrontation. Because *Griffin* is based on considerations other than accuracy of the verdict, it does not apply to this truth-finding closing argument that is consistent with the goals of the Confrontation Clause.

Defendant's right to testify was not violated by the closing argument. This right is limited to preventing rules that arbitrarily limit defendant's testimony in a manner disproportionate to their goals. Defendant was not kept from testifying. The fact that his choice to testify exposed him to attacks on his credibility does not violate this right. A defendant who testifies is treated like any other witness and is subject to vigorous attacks on his credibility. Because the Constitution is not a license to commit perjury, attacks on defendant's credibility are given more leeway. Thus illegally seized evidence and custodial statements taken without *Miranda* warnings can be used to attack a testifying defendant's credibility. The Constitution does not insulate defendant from the adverse consequences of his decision to exercise a constitutional right. The district attorney's accurate assessment of defendant's credibility therefore neither prevented nor burdened his right to testify.

ARGUMENT

I. The People's closing argument did not violate due process.

Although the present case turns on whether the rule of *Griffin* v. *California*, 380 U. S. 609 (1965) applies to the Confrontation Clause or defendant's right to testify, it is first necessary to clear out some constitutional underbrush left by the Second Circuit's opinion. The Second Circuit's lead opinion held that, in addition to violating the Sixth Amendment, the district attorney's commentary on defendant's presence at trial also violated his due process right to a fair trial. See *Agard* v. *Portuondo*, 117 F. 3d 696, 712-714 (CA2 1997) (Oakes, J.). Because this opinion invoked the right to a fair trial, the limits on applying substantive due process to criminal procedure were not applicable. See *Albright* v. *Oliver*, 510 U. S. 266, 273, n. 6 (1994). The right to a fair trial does not, however, transform a reviewing court into a roving censor, parsing closing arguments for the smallest impropriety. The fundamental fairness standard of due process is an inappropriate vehicle for analyzing the argument in the present case.

Before it can violate due process, a closing argument's impropriety must be "egregious." *Donnelly* v. *De Christoforo*, 416 U. S. 637, 647-648 (1974). The most relevant example of the height of the due process hurdle that defendant must leap is *Griffin*'s predecessor, *Adamson* v. *California*, 332 U. S. 46 (1947). *Adamson* examined a California law allowing the trial court to instruct the jury that it could consider defendant's failure to testify against him. See *id.*, at 48. Because the Fifth Amendment did not then apply to the states, see *id.*, at 52-53, defendant had to make his attack under the due process right to a fair trial. *Id.*, at 53. Due process is not coextensive with the Fifth Amendment's self-incrimination right, see *id.*, at 54, but instead protected against a narrow set of particularly serious constitutional wrongs. Although due process prevented the "compulsion to testify by fear of hurt, torture or exhaustion" or "any other type of coercion," *ibid.*, due process did not prohibit

commentary upon defendant's decision not to testify. The state could require defendant "to choose between leaving the adverse evidence unexplained and subjecting himself to impeachment through disclosure of former crimes" because "[t]he purpose of due process is not to protect an accused against a proper conviction but against an unfair conviction." *Id.*, at 57.

Had this Court not applied the Fifth Amendment to the states in *Malloy* v. *Hogan*, 378 U. S. 1 (1964), California's instruction would still be valid. The fairness of the California instruction was not questioned in *Griffin*. What mattered was the excessive burden it placed on the exercise of the Fifth Amendment privilege. See *Griffin*, *supra*, 380 U. S., at 614. Therefore, the inference from silence struck down in *Griffin* is still valid under due process. See *Baxter* v. *Palmigiano*, 425 U. S. 308, 319 (1976). If *Griffin* error does not violate due process, then fundamental fairness does not support *extending* *Griffin* beyond the self-incrimination privilege.

II. *Griffin* is a limited decision closely tied to the policies supporting the self-incrimination privilege.

Before determining whether *Griffin* v. *California*, 380 U. S. 609 (1965) should be expanded from the self-incrimination privilege to either the Confrontation Clause or the right to testify, it is important to understand the decision's rationale and its Fifth Amendment roots. An understanding of *Griffin*'s roots will reveal how far it may extend.

Griffin relies more on generalities than specifics for its initial justification. The decision first placed heavy reliance upon past practice. It noted the strong majority rule against commenting on defendant's decision not to testify. *Id.*, at 611, n. 3. It also found much support for its Fifth Amendment interpretation from *Wilson* v. *United States*, 149 U. S. 60 (1893). *Griffin*, 380 U. S., at 612. *Wilson* interpreted the statute granting criminal defendants competency to testify, the predecessor to 18 U. S. C. § 3481, as prohibiting commentary

on defendant's exercise of the right to silence at trial. See *Wilson*, 149 U. S., at 65. The *Griffin* Court quotes extensively from a well-known passage in *Wilson* which pointed out the dangers testifying posed to the innocent defendant.

> ". . . the act was framed with a due regard also to those who might prefer to rely upon the presumption of innocence which the law gives to every one, and not wish to be witnesses. It is not every one who can safely venture on the witness stand though entirely innocent of the charge against him. Excessive timidity, nervousness when facing others and attempting to explain transactions of a suspicious character, and offences charged against him, will often confuse and embarrass him to such a degree as to increase rather than remove prejudices against him. It is not every one, however honest, who would, therefore, willingly be placed on the witness stand. The statute, in tenderness to the weakness of those who from the causes mentioned might refuse to ask to be a witness, particularly when they may have been in some degree compromised by their association with others, declares that the failure of the defendant in a criminal action to request to be a witness shall not create any presumption against him." *Griffin*, *supra*, 380 U. S., at 613 (quoting *Wilson*, *supra*, 149 U. S., at 66).

By simply substituting "Fifth Amendment" for "act" and "statute," *Griffin* established its self-incrimination foundation. See *id.*, at 613-614. Comment on the exercise of the privilege was thus " 'inquisitorial,' " see *id.*, at 614 (quoting *Murphy* v. *Waterfront Comm'n*, 378 U. S. 52, 55 (1964)), as it imposed too high a cost on the exercise of the privilege. See *ibid.* These passages only begin the inquiry. A careful examination of the Fifth Amendment and cases applying *Griffin* reveal the decision's meaning.

As this Court subsequently demonstrated, *Griffin* does not forbid any "cost" from being imposed upon the Fifth Amendment privilege. *Baxter* v. *Palmigiano*, 425 U. S. 308, 312

(1976) involved a prison disciplinary hearing in which the prisoner's silence would be held against him. Even though this practice placed at least some cost on the prisoner's exercise of his Fifth Amendment privilege, this Court refused to extend *Griffin*. *Id.*, at 319.

The fundamental differences between a prison disciplinary hearing and a criminal prosecution were key to the decision not to extend *Griffin*. *Ibid.* As the Court noted, *Griffin*'s Fifth Amendment protection did not extend to civil cases, where adverse inferences may be drawn against parties that do not testify. *Id.*, at 318. Because prison discipline involved interests other than the prosecution of criminals, this Court "decline[d] to extend the *Griffin* rule to this context," *id.*, at 319, demonstrating that *Griffin* is inextricably tied to the policies of the self-incrimination privilege.

> "It is important to note here that the position adopted by the Court of Appeals is rooted in the Fifth Amendment and the policies which it serves. *It has little to do with a fair trial and derogates rather than improves the chances for accurate decisions.* Thus, aside from the privilege against compelled self-incrimination, the Court has consistently recognized that in proper circumstances silence in the face of accusation is a relevant fact not barred from evidence by the Due Process Clause." *Ibid.* (emphasis added).

Baxter provides the first key to a proper understanding of *Griffin*; the decision only extends to where its Fifth Amendment policies are served. Unfortunately, the *Griffin* decision did not go into great detail when explaining the Fifth Amendment policies behind the decision. Although it demonstrated how a hypothetical innocent defendant may have good reasons not to testify, see *supra*, at 10, this could not form a strong basis for that decision, as it flies in the face of this Court's consistent recognition of the relevance of silence in the face of accusation. See *Baxter*, *supra*, 425 U. S., at 319; see also *United States* v. *Hale*, 422 U. S. 171, 176 (1975); *Adamson* v. *California*, 332 U. S. 46, 56 (1947); *Raffel* v. *United States*, 271 U. S. 494, 499

(1926). Therefore, some other Fifth Amendment policy must form the basis of the *Griffin* rule.

Because the self-incrimination privilege applies to so many different situations, and because its history is uncertain, the privilege has no single policy. See 8 J. Wigmore, Evidence § 2251, pp. 295-297 (McNaughton rev. 1961). Instead, up to a dozen policies have been asserted to justify it. See *id.*, at 297-310, n. 2. This Court's most extensive examination of self-incrimination policy is found in *Murphy* v. *Waterfront Comm'n*, 378 U. S. 52, 55 (1964) (citations and internal quotation marks omitted), overruled on other grounds in *United States* v. *Balsys*, 141 L. Ed. 2d 575, 599, 118 S. Ct. 2218, 2230 (1998).

> "It reflects many of our fundamental values and most noble aspirations: our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; our preference for an accusatorial rather than an inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair play which dictates a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load; our respect for the inviolability of the human personality and of the right of each individual to a private enclave where he may lead a private life; our distrust of self-deprecatory statements; and our realization that the privilege, while sometimes a shelter to the guilty, is often a protection to the innocent."

Griffin attacks the California instruction as "inquisitorial." This term, however, is no more than a label. Cf. 8 Wigmore, *supra*, § 2251, at 312, n. 5 (dismissing argument that the privilege prevents procedures such as those associated with the Star Chamber or Inquisition as "platitudes"). What matters is why that label sticks.

The policy most closely supporting *Griffin* is *Murphy*'s "cruel trilemma." Allowing the trial court or prosecutor to tell the jury to infer guilt from silence is a form of "unconstitutional compulsion." *Lakeside* v. *Oregon*, 435 U. S. 333, 339 (1978). Thus, in *Griffin*, *Murphy*'s third prong of contempt was replaced with the state's "free[dom] to ask the jury to draw adverse inferences from a defendant's failure to take the witness stand." See *ibid.* While *Griffin* does no doubt protect the innocent defendant by removing the risk that he is a poor witness or could be impeached with prior convictions, see *Griffin*, *supra*, 380 U. S., at 614-615, it primarily shields guilty defendants from this special variant of *Murphy*'s "cruel trilemma." This is, of course, a protection that only benefits the guilty. The innocent defendant has no "trilemma," as he may testify without incriminating or perjuring himself. Therefore, "[t]his 'trilemma' is wholly of the guilty suspect's own making of course. An innocent person will not find himself in a similar quandary (as one commentator has put it, the innocent person lacks even a 'lemma')." *Brogan* v. *United States*, 522 U. S. 398, 404 (1998) (citation omitted).

Griffin's basis in compulsion is also found in one of the rare cases extending *Griffin*, *Brooks* v. *Tennessee*, 406 U. S. 605 (1972). *Brooks* invoked *Griffin* to overturn a Tennessee rule requiring defendant to testify first if at all. See *id.*, at 610-612. What made the Fifth Amendment privilege " 'costly' " in this case, *id.*, at 611 (quoting *Griffin*, 380 U. S., at 614), was the compulsion inherent in requiring him to testify so early in the trial. "*Pressuring* the defendant to take the stand, by foreclosing later testimony if he refuses, is not a constitutionally permissible means of ensuring his honesty." *Id.*, at 611 (emphasis added).

The statement in *Carter* v. *Kentucky*, 450 U. S. 288, 301 (1981) that "[t]he *Griffin* case stands for the proposition that a defendant must pay no court-imposed price for the exercise of his constitutional privilege not to testify" must be read in this context. The "price" condemned in *Carter* is only extracted through *Griffin*'s unique trilemma. In other circumstances,

defendants must bear the costs associated with being required to make difficult choices concerning the exercise of their rights. "The cases in this Court since [*United States* v. *Jackson*, 390 U. S. 570 (1968)] have clearly established that not every burden on the exercise of a constitutional right, and not every pressure or encouragement to waive such a right, is invalid." *Corbitt* v. *New Jersey*, 439 U. S. 212, 218 (1978).

In *Crampton* v. *Ohio*, 402 U. S. 183, 210-211 (1971),[2] defendant challenged Ohio's unitary trial, where the jury determined both guilt and punishment in a single verdict. Defendant attacked this under *Griffin* because he could remain silent on the issue of guilt only at the price of losing any chance to plead his case on the issue of punishment. *Ibid.* The Court upheld this burden on the self-incrimination privilege. *Id.*, at 217.

> "The criminal process, like the rest of the legal system, is replete with situations requiring the making of difficult judgments as to which course to follow. Although a defendant may have a right, even of constitutional dimensions, to follow whichever course he chooses, the Constitution does not by that token always forbid requiring him to choose." *Id.*, at 213 (internal quotation marks and citation omitted).

Griffin is a narrow ruling based on the close similarity between the pressure to testify from inferring guilt from silence and the pressure exerted by the threat of contempt. It is even narrower within the confines of a prosecutor's commentary on defendant's silence. In *United States* v. *Robinson*, 485 U. S. 25, 26 (1988), defense counsel's closing argument asserted that the state had not allowed defendant to tell his side of the story. The prosecutor responded by arguing that defendant could have taken the stand. *Ibid.* This Court declined to extend *Griffin*,

2. *Crampton* was decided with *McGautha* v. *California*, 402 U. S. 183 (1971). after *Furman* v. *Georgia*, 408 U. S. 238 (1972), this Court granted rehearing and vacated on other grounds. See *Crampton* v. *Ohio*, 408 U. S. 941 (1970).

noting that its statement that the self-incrimination privilege "forbids . . . comment by the prosecution on the accused's silence," *Griffin*, *supra*, 380 U. S., at 615, was merely "broad dicta . . . that must be taken in light of the facts of that case." *Robinson*, *supra*, 485 U. S., at 33-34. Even though, as in *Griffin*, "[t]here may be some 'cost' to the defendant in having remained silent" this was not enough to extend *Griffin*'s narrow rule. *Id.*, at 34.

When the Second Circuit chose to extend *Griffin* to the Confrontation Clause and the right to testify, it was building upon a very narrow base. As shall be seen, *Griffin* cannot support this edifice.

III. The Confrontation Clause's basis in the accuracy of the fact-finding process does not support an extension of *Griffin*.

The primary constitutional issue raised by the district attorney's closing argument is its effect on defendant's Sixth Amendment right to confrontation. Although most Confrontation Clause decisions are concerned with hearsay testimony or limits on cross-examination, the clause also preserves defendant's physical confrontation with the state's witnesses. *Coy* v. *Iowa*, 487 U. S. 1012, 1016 (1988). Like the cross-examination and hearsay components of the clause, the right to physical confrontation is primarily concerned with aiding the accuracy of the fact-finding process. Because the risk that defendant tailored his testimony after hearing the other witnesses' testimony was substantial, the district attorney's argument in the present case enhanced the accuracy of the verdict, and thus satisfied the Confrontation Clause.

A. Confrontation and the Truth.

Unlike the hydra-headed rationales for the Fifth Amendment's self-incrimination privilege, the Confrontation Clause's purpose is singular. Whether it regulates hearsay, cross-

examination, or physical confrontation, the clause has but one goal:

> "The central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact. The word 'confront,' after all, also means a clashing of forces or ideas, thus carrying with it the notion of adversariness." *Maryland* v. *Craig*, 497 U. S. 836, 845 (1990).

Physical confrontation between defendant and the witness advances this goal because it is more difficult to falsely accuse someone to that person's face. "A witness 'may feel quite differently when he has to repeat his story looking at the man whom he will harm greatly by distorting or mistaking the facts. He can now understand what sort of human being that man is.' " *Coy*, *supra*, 487 U. S., at 1019 (internal quotation marks omitted). Thus, "[i]t is always more difficult to tell a lie about a person 'to his face' than 'behind his back.' " *Ibid.*; see also *Ohio* v. *Roberts*, 448 U. S. 56, 63, n. 6 (1980); 3 W. Blackstone, Commentaries 373 (1st ed. 1768). Public perception of the need for physical confrontation comports with reality, which explains physical confrontation's importance in maintaining both the perception and the reality of a fair criminal trial. See *Coy*, 487 U. S., at 1018-1019.

While physical confrontation is at " 'the core of the values furthered by the Confrontation Clause,' " *Craig*, *supra*, 497 U. S., at 847 (quoting *California* v. *Green*, 399 U. S. 149, 157 (1970)), this Court has "nevertheless recognized that it is not the *sine qua non* of the confrontation right." *Ibid.* Instead, cross-examination, the oath, and demeanor give "all that the Sixth Amendment demands: 'substantial compliance with the purposes behind the confrontation requirement.' " *Roberts*, *supra*, 448 U. S., at 69 (quoting *Green*, 399 U. S., at 166); accord *Craig*, 497 U. S., at 847. Therefore confrontation "is generally satisfied when the defense is given a full and fair opportunity to probe and expose [testimonial] infirmities

through cross-examination, thereby calling to the attention of the factfinder the reasons for giving scant weight to the witness' testimony." *Delaware* v. *Fensterer*, 474 U. S. 15, 22 (1985) (*per curiam*).

The Sixth Amendment is a trial right which "must also be interpreted in the context of the necessities of trial and the adversary process." *Craig*, *supra*, 497 U. S., at 850. Literal compliance with the words of the Confrontation Clause is thus avoided as impractical. The clearest example is hearsay testimony; a literalist view of the right to confrontation would forbid any hearsay from being admitted against the accused, an unacceptable outcome. See *Roberts*, *supra*, 448 U. S., at 63. Instead, this Court steers "a middle course among proposed alternatives" for interpreting the Confrontation Clause. *Id.*, at 68, n. 9. Absolutism is similarly absent from face-to-face confrontation. "We have never held, however, that the Confrontation Clause guarantees criminal defendants the *absolute* right to a face-to-face meeting with witnesses against them at trial." *Craig*, 497 U. S., at 844 (emphasis in original).

Therefore, this Court has "never insisted on an actual face-to-face encounter at trial in *every* instance in which testimony is admitted against a defendant." *Id.*, at 847 (emphasis in original). Hearsay statements can be admitted against defendant if they have "sufficient 'indicia of reliability' . . . ." *Mancusi* v. *Stubbs*, 408 U. S. 204, 216 (1972) (quoting *Dutton* v. *Evans*, 400 U. S. 74, 89 (1970)). The less important physical confrontation with the testifying witness is subject to the same limitations. This right can be dispensed with when it "is necessary to further an important public policy and only where the reliability

of the testimony is otherwise assured." *Craig*, 497 U. S., at 850.[3]

Although the *Craig* Court notes that the confrontation right is not "easily . . . dispensed with," *id.*, at 850, the district attorney's argument in the present case is far from the total denial of physical confrontation at issue in *Craig*. As the next section demonstrates, the People's argument did not burden this least important confrontation right, and it actually advanced the Confrontation Clause's goal of aiding the accuracy of the verdict.

B. The Right Choice.

1. Choice and accuracy.

Before analyzing the effect of the district attorney's closing argument on defendant's right to confrontation, it is important to note how much confrontation defendant received. A typical Confrontation Clause case involves the total denial of at least some part of confrontation. See, *e.g.*, *Craig*, *supra*, 497 U. S., at 840 (child witness in child abuse case testifying outside defendant's physical presence over one-way, closed circuit television); *White* v. *Illinois*, 502 U. S. 346, 348-349 (1992) (spontaneous declaration and medical examination exceptions to hearsay rule). By contrast, the present case involved no deprivation of any of defendant's opportunities to confront the witnesses against him. The adverse witnesses testified under oath, in the presence of defendant and the jury, and were subject to cross-examination. The district attorney's comment that

3. This stands in sharp contrast to the immutable Fifth Amendment self-incrimination privilege. No policy justifies compelled self-incrimination. The government thus cannot use the threat of contempt to force out self-incriminating testimony without first granting immunity to the witness. See *Kastigar* v. *United States*, 406 U. S. 441, 453 (1972). Such evidence is inadmissible even when the integrity of the fact-finding process is threatened; compelled statements are inadmissible at trial to impeach defendant's contrary testimony. *Mincey* v. *Arizona*, 437 U. S. 385, 398 (1978). Under the Fifth Amendment, the only issue is whether the privilege applies, once there is compelled self-incrimination no policy overrides its exclusionary rule.

defendant's presence at trial allowed him to tailor his testimony is no burden on his fully exercised confrontation rights.

While the complete elimination of some aspect of confrontation may only be justified when "necessary to further an important public policy," *Craig*, *supra*, 497 U. S., at 850, the mere indirect burden in the present case warrants less demanding justification. Defendant only bears this cost if he chooses to testify.[4] Just as *Griffin* v. *California*, 380 U. S. 609 (1965) does not insulate a defendant from making choices, see *supra*, at 13-14, neither does the Sixth Amendment insulate defendant from the consequences of his decisions.

In *United States* v. *Nobles*, 422 U. S. 225, 228-229 (1975), the District Court conditioned the admissibility of impeachment testimony by a defense witness on the production of an investigative report prepared by the witness, a defense investigator. When counsel declined to produce the report, the District Court ruled that the investigator could not testify about the items contained in the report, namely interviews with prosecution witnesses. Defendant attacked this under Sixth Amendment's confrontation and compulsory process rights, which this Court concluded, "misconceives the issue." *Id.* at 241. Defendant was not prevented from presenting his witness or impeaching prosecution witnesses. The District Court "merely prevented respondent from presenting to the jury a partial view of the credibility issue . . . ." *Ibid.* As this Court concluded: "The Sixth Amendment does not confer the right to present testimony free from the legitimate demands of the adversarial system; one cannot invoke the Sixth Amendment as a justification for presenting what might have been a half-truth." *Ibid.*

As the Confrontation Clause is intended to help find the truth, any burden on defendant's confrontation that gives accurate information to the jury is a "legitimate demand[] of the adversarial system . . . ." *Ibid.* *Nobles* demonstrates that if the

4. The burden on defendant's right to testify is addressed in Part IV, *infra*.

district attorney's remarks were correct, then defendant's confrontation right was not violated.

2. Finding the truth.

The district attorney's closing argument reflects a truth with roots far older than the common law. The idea that witnesses should be separated to prevent their testimony from being tailored to each other's has ancient roots. See 6 J. Wigmore, Evidence § 1837, p. 455 (Chadbourn rev. 1976). By keeping the witnesses from hearing each other's testimony, inconsistencies in their stories can be detected, thus exposing falsehoods. *Ibid.* The common law courts were quick to understand this, and witness sequestration started even before the development of the jury trial in the fifteenth century. See *id.*, at 456-457. This practice crossed the Atlantic with our common law heritage, and is now the universal rule, whether by statute, or through the inherent power of the trial court. See *id.*, at 457-458, and 1998 Supp., p. 727; see, *e.g.*, Fed. Rule Evid. 615. "[S]equestration consists merely in preventing one prospective witness from being taught by another's testimony." 6 Wigmore, *supra*, § 1838, at 461.

The cost of failing to sequester the witness varies with the type of testimony he or she heard. A prospective witness who heard testimony of the opposing side "could thus ascertain the precise points of difference between their testimonies, and could shape his own testimony to better advantage for his cause." *Ibid.* Preventing this will thus inhibit false testimony. See *ibid.* The separation of witnesses from the same side achieves even more: the detection of false testimony. If witnesses of the same side cannot keep the details of their stories consistent, then at least one witness on that side must be either lying or mistaken; by contrast, if witnesses from opposing sides contradict each other then the jury must go through "the troublesome uncertainty" of having to weigh the credibility of the opposing witnesses. See *id.*, at 462.

Sequestration is not perfect; allowances must be made for honest mistakes, and it may not catch sufficiently well-planned perjury. Nonetheless, sequestration is a powerful tool to help the jury find the truth.

> "But when all allowances are made, it remains true that the expedient of sequestration is (next to cross-examination) one of the greatest engines that the skill of man has ever invented for the detection of liars in a court of justice. Its supreme excellence consists in its simplicity and (so to speak) its automatism; for while cross-examination, to be successful, often needs the rarest skill, and is always full of risk to its very employers, sequestration does its service with but little aid from the examiner, and can never, even when unsuccessful, do serious harm to those who have invoked it." *Id.*, at 463.

Unfortunately, the witness with the greatest incentive to tailor testimony, the criminal defendant, is the one witness who cannot be sequestered. See *Geders* v. *United States*, 425 U. S. 80, 88 (1976). In *Geders*, defendant was prevented from talking with counsel during an overnight recess which had been called just as he was to be cross-examined. *Id.*, at 82. This Court appreciated the substantial interests served by sequestration, see *id.*, at 87, but this mini-sequestration did not serve that interest well because defendant's right to attend the trial gave him ample opportunity to tailor his testimony. See *id.*, at 88. Given the substantial hardship to defendant from the trial court's order, this Court held that some lesser means should be used to deal with coaching. Among the possibilities were skillful cross-examination, which might develop a record for counsel to exploit during closing argument. *Id.*, at 89-90.

The closing argument in the present case represents this type of reasonable accommodation. The threat of tailoring is a fact: witnesses can and do tailor testimony, if given the opportunity. Since defendant has so much at stake, and is entitled to be the last witness to testify, see *Brooks* v. *Tennessee*, 406 U. S. 605, 611-612 (1972), the criminal defendant is by far the most likely

witness to tailor testimony. When the district attorney informed the jury of defendant's opportunity to tailor his testimony, she simply provided the jury with the wisdom of the law's centuries of experience.

The Second Circuit's contention that the district attorney first should have developed some factual basis for the remark, see *Agard* v. *Portuondo*, 117 F. 3d 696, 711 (CA2 1997) (Oakes, J.), is without merit. Just as the district attorney may be free to make the common-sense argument that defendant has a motive to lie in order to escape incarceration, see *ibid.*, she may also explain how defendant's story fits so neatly with so much of the victim's story, except for their accounts of the crimes. Common sense and experience show that the defendant had both the means and motive to fit his story to the victim's where it suited his interest.[5]

The closing argument must be analyzed in its context. See *Donnelly* v. *De Christoforo*, 416 U. S. 637, 645 (1974). This is a case involving extensive and detailed testimony by two sets of witnesses that differ only on a few critical facts. See *Agard*, *supra*, 117 F.3d, at 698. The remarks were not an attempt to imply guilt from defendant's mere presence at trial, see *id.*, at 709, but an attempt to educate the jury about the credibility of defendant's agreement with the complaining witnesses on so many details. See *People* v. *Buckey*, 378 N. W. 2d 432, 438 (Mich. 1985) ("[a]ny resulting inference was not directly of guilt, but rather that defendants had the opportunity to conform their testimony because they heard other witnesses testify"). This Court does not lightly infer that the prosecutor meant the most unfair or damaging inference from a remark, or that the jury will even draw such a conclusion. See *Donnelly*, 416 U. S., at 647. The district attorney's remarks are most reasonably seen as an appropriate, common-sense comment on defendant's credibility as a witness, a position held by several states. See,

5. Thus, the district attorney also could have noted the even more important point that defendant could tailor his testimony to that of his *supporting* witness, his friend Kiah.

e.g., *Buckey*, 378 N. W. 2d, at 438; *State* v. *Grilli*, 369 N. W. 2d 35, 37 (Minn. App. 1985); *State* v. *Hoxsie*, 677 P. 2d 620, 622 (N.M. 1984); *Reed* v. *State*, 633 S. W. 2d 664, 666 (Tex. App. 1982); *State* v. *Howard*, 323 N. W. 2d 872, 874 (S.D. 1982); *State* v. *Robinson*, 384 A. 2d 569, 570 (N.J. App. 1978) (*per curiam*).

Since the right to confrontation aims to ensure an accurate verdict, any burden arising from the remarks is incidental, as the remarks *helped* the jury assess defendant's credibility. *Griffin*, based in Fifth Amendment principles unconnected with the truthfulness of testimony, see *supra*, at 13, cannot make the journey to the truth-based Confrontation Clause.

IV. Attacking defendant's credibility as a witness does not violate the right to testify.

The Second Circuit is correct in pointing out that defendant does have a constitutional right to testify on his own behalf. See *Agard* v. *Portuondo*, 117 F. 3d 696, 712 (CA2 1997). This Court has held that defendant has the implicit right to testify in the Sixth Amendment's compulsory process clause, due process, and the Fifth Amendment's self-incrimination privilege. *Rock* v. *Arkansas*, 483 U. S. 44, 51-53 (1987); *United States* v. *Dunnigan*, 507 U. S. 87, 96 (1993). The Second Circuit's holding that the closing argument violated this right by burdening it in a manner analogous to *Griffin* v. *California*, 380 U. S. 609 (1965), see *Agard*, 117 F. 3d, at 712, exceeds the boundary of a very narrow right. Defendant does not possess an unconditional right to testify free of either constraints or consequences. Accurate commentary about his credibility as a witness is the price defendant must expect to pay if he chooses to exercise his right to testify.

Rock, the genesis of this right, involved a total ban on hypnotically refreshed testimony. 483 U. S., at 45. Because defendant could not remember the details of the day she shot her husband, her counsel had her hypnotized in order to refresh

her testimony. *Id.*, at 46. The trial court's order limited her testimony "to 'matters remembered and stated to the examiner prior to being placed under hypnosis.' " *Id.*, at 47.

Rock did not ban all limits on hypnotically refreshed testimony. It turned on the arbitrariness of the state rule. "Just as a State may not apply an arbitrary rule of competence to exclude a material defense witness from taking the stand, it also may not apply a rule of evidence that permits a witness to take the stand, but *arbitrarily* excludes material portions of his testimony." *Id.*, at 55 (emphasis added).

Rock, by limiting its reach to arbitrary restrictions on defendant's testimony, recognized that "the right to present relevant testimony is not without limitation." *Ibid.* It noted that "[n]umerous state procedural and evidentiary rules control the presentation of evidence and do not offend the defendant's right to testify." *Id.*, at 55, n. 11. Restrictions on defendant's testimony were permissible so long as they were not only "arbitrary or disproportionate to the purposes they are designed to serve." *Id.*, at 56.

The Arkansas rule virtually prevented defendant from testifying to the key events surrounding the shooting, despite the fact that her story was corroborated by other witnesses. *Id.*, at 57. The Court also felt that in some individual cases, hypnotically refreshed testimony might be reliable if proper procedural safeguards were in place. See *id.*, at 60-61. Arkansas' *per se* exclusion was thus arbitrary and disproportionate. See *id.*, at 61.

The closing argument in the present case is far removed from the arbitrary, near-total exclusion struck down in *Rock*. The greatest difference is, of course, that the district attorney's attack on defendant's credibility did not prevent him from testifying. Although he could not predict the content of his opponent's closing argument before choosing to testify, defendant was on notice that his credibility could and probably would be attacked. "[I]mpeachment follows the defendant's own decision to cast aside his cloak of silence and advances the

truth-finding function of the criminal trial." *Jenkins* v. *Anderson*, 447 U. S. 231, 238 (1980). Once defendant takes the stand, he must be treated like any other witness. *Raffel* v. *United States*, 271 U. S. 494, 497 (1926); see also *Grunewald* v. *United States*, 353 U. S. 391, 420 (1957). Defendant can even expect to be impeached with evidence that the Constitution forbids the state from using in its case in chief. Statements taken contrary to the rule of *Miranda* v. *Arizona*, 384 U. S. 436 (1966) can be used to impeach defendant, *Harris* v. *New York*, 401 U. S. 222, 226 (1971), as can evidence taken in violation of the Fourth Amendment. *Walder* v. *United States*, 347 U. S. 62, 65 (1954). Although such evidence is inadmissible in the state's case in chief, this Court understands that the Constitution does not grant defendant a license to commit perjury. See *Harris*, 401 U. S., at 226. Even if testifying carries the serious risk of cross-examination and impeachment, an enlightened criminal justice system can require defendant to make this choice. See *Brooks* v. *Tennessee*, 406 U. S. 605, 609 (1972).

When assessing whether a constitutional right has been unduly burdened "it also is appropriate to consider the legitimacy of the challenged governmental practice." *Jenkins*, *supra*, 447 U. S., at 238. The People's closing argument pointed out to the jury the problems associated with the constitutionally compelled decision to not sequester defendant. See Part III B, *supra*. It did not infer guilt from his presence, but simply gave the jury an accurate assessment of defendant's credibility, which serves the very important interest of helping the jury reach an accurate verdict. See *ibid.*

In *Jenkins*, this Court upheld impeaching defendant with his pre-arrest silence. 447 U. S., at 238-239. *Griffin* did not apply because, unlike *Griffin*, defendant chose to testify. *Griffin* is even further removed from the present case. In *Jenkins*, defendant's silence was used against him. Here, the Second Circuit extended *Griffin* to an entirely different right, the right to testify, in a case where defendant was allowed to give a full, detailed rendition of his side of the case. A handful of accurate comments concerning defendant's credibility did not make this

testimony vanish. It only placed the testimony in its proper context. The right to testify is not infringed when defendant " 'must comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence.' " *Rock*, *supra*, 483 U. S., at 56, n. 11 (quoting *Chambers* v. *Mississippi*, 410 U. S. 284, 302 (1973)). Fair commentary on the evidence satisfies *Rock*'s standard.

Ultimately, the district attorney's legitimate commentary on the risks associated with defendant's testimony did not burden the right to testify because it was his decision to testify. In *United States* v. *Dunnigan*, *supra*, 507 U. S., at 96, this Court held that a sentence enhancement for defendant's perjury as a witness at her own trial did not impermissibly burden her right to testify. Making her testimony potentially riskier was of no constitutional significance. "Our authorities do not impose a categorical ban on every governmental action affecting the strategic decisions of an accused, including decisions whether or not to exercise constitutional rights." *Ibid.* Defendant has made his choice, he must now be left to live with it.

CONCLUSION

The decision of the Court of Appeals for the Second Circuit should be reversed.

June, 1999

Respectfully submitted,

CHARLES L. HOBSON

Attorney for Amicus Curiae
Criminal Justice Legal Foundation