No. 98-1170

In The

Supreme Court of the United States

LEONARD PORTUONDO, Superintendent,
Fishkill Correctional Facility,

Petitioner,

v.

RAY AGARD,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit

BRIEF *AMICUS CURIAE* FOR THE NEW YORK STATE DISTRICT ATTORNEYS ASSOCIATION IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. A corollary to the Fifth Amendment protection against compelled testimony (and aspects of the Sixth and Fourteenth Amendments) is the right to be present at trial. A defendant who is both present at trial and chooses to testify has been protected by the derivative right and has waived the Constitutional right. Should the holding of *Griffin v. California* be expanded to prohibit comment on a testifying defendant's credibility when the underlying Constitutional mandates have been fulfilled?

2. *Griffin v. California* held that the jury could not infer guilt from a defendant's invocation of his right to remain silent. Once respondent testified he waived *Griffin's* protection but the lower court transposed the reasoning of *Griffin* to a Sixth Amendment claim to preclude comment on respondent's credibility as exposed by his choice of when to testify. Should the lower court's alchemy be ratified when the concerns underlying *Griffin* no longer exist?

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INTEREST OF AMICUS CURIAE[1]

The New York State District Attorneys Association is a statewide organization consisting of the elected District Attorneys of all 62 New York State counties, as well as Assistant District Attorneys from most, if not all, of those counties. Its total membership is approximately 1,000. The Association has obtained the consent of the parties to appear as *amicus curiae* in this proceeding because of the presence of a question of law which is of great importance to prosecutors throughout this State. The issue is whether the State trial prosecutor's summation comment that defendant had an advantage at trial because he heard other witnesses before testifying constituted a prejudicial violation of defendant's Fifth and Sixth Amendment rights. Six State court judges and the district court judge who denied Agard's petition for a writ of habeas corpus found no prejudicial error; following rehearing, the United States Court of Appeals for the Second Circuit held that, in the absence of a factual showing that defendant tailored his testimony, reference to defendant's presence during trial and the resulting opportunity to tailor his testimony required vacatur of his State court conviction. *Agard v. Portuondo*, 159 F.3d 98 (2nd Cir. 1998).

The Association sought to appear as *amicus curiae* in this appeal because this Court's decision concerning the challenged practice will have significant impact on State prosecutors.

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[1] No entity other than members of *amicus*, New York State District Attorneys Association, contributed to the preparation or submission of this brief, which was authored by Suffolk County Assistant District Attorneys Steven A. Hovani and Michael J. Miller.

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment V – Grand Jury Indictment for Capital Crimes; Double Jeopardy; Self-incrimination; Due Process of Law; Just Compensation for Property

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI – Jury Trial for Crimes, and Procedural Rights

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

SUMMARY OF ARGUMENT

The New York State District Attorneys Association maintains that the decision of the Circuit Court is wrong because of its unwarranted reliance on the holding and reasoning of *Griffin v. California*, 380 U.S. 609 (1965). The Circuit Court both relied on the holding of *Griffin* to find a Fifth Amendment violation and the reasoning of *Griffin* to find a Sixth Amendment violation. Specifically, the lower court held that the prosecutor's reference to defendant's credibility unduly burdened his right to testify on his own behalf and his right to confront the witnesses against him.

Griffin, however, prohibited inferring guilt from silence. This concern is not present here because defendant testified and the prosecutor's comments did not ask the jury to find defendant guilty because of the timing of his testimony. Rather, the prosecutor only asked the jury to assess defendant's credibility in light of his trial tactics. Furthermore, the allegedly erroneous remarks were both fair comment on the evidence and a fair response to issues raised in defendant's summation.

ARGUMENT

THE DECISION OF THE SECOND CIRCUIT COURT OF APPEALS SHOULD BE REVERSED BECAUSE IT ERRONEOUSLY EXPANDS THE PROTECTION OF THE FIFTH AND SIXTH AMENDMENTS.

Notwithstanding the narrow scope of federal habeas review of state convictions, in *Agard v. Portuondo*, 117 F.3d 696 (2nd Cir. 1997), *reh.*, 159 F.3d 98 (2nd Cir. 1998), the Second Circuit vacated respondent's conviction based on

what is arguably a new rule; it became the first federal court[2] to conclude that a prosecutor's summation suggestion that the jury consider defendant's presence in the courtroom throughout the trial, and his resultant unique opportunity to tailor his testimony to that of other witnesses, impermissibly burdens the exercise of Fifth and Sixth Amendment rights and deprives the defendant of a fair trial. The court erred because the challenged comments, which proposed a reasonable, permissive inference to the triers of fact, were appropriate. In the alternative, the remarks constituted a permissible response to defense counsel's summation and did not violate Agard's constitutional rights. We ask this Court to reverse and to reinstate respondent's convictions.

I.

THE HOLDING AND REASONING OF *GRIFFIN V. CALIFORNIA* SHOULD NOT BE EXPANDED TO PROHIBIT COMMENT ON THE CREDIBILITY OF A DEFENDANT WHO HAS TESTIFIED.

The New York State District Attorneys Association is concerned that the decisions in *Agard v. Portuondo*, 117 F.3d 696 (2nd Cir. 1997) (*Agard I*) and *Agard v. Portuondo*, 159 F.3d 98 (2nd Cir. 1997) (*Agard II*) unwisely and wrongly expand the holding of *Griffin v. California*, 380

[2] As the Second Circuit noted, the highest courts in Connecticut, Maine, the District of Columbia, Vermont, and Massachusetts, along with the Court of Appeals of Washington State, have agreed that prosecutorial commentary on a defendant's presence during the testimony of other witnesses is improper. On the other hand, the Supreme Court of Michigan and the intermediate appellate courts of Minnesota, New Jersey, and Texas, which addressed similar remarks, did not find error.

U.S. 609 (1965). Too, the Second Circuit has taken another step down the slippery slope to the complete federalization of State criminal law. We maintain that both *Agard I* and *Agard II* incorrectly interpret the United States Constitution. In *Agard I* the court followed the reasoning in *Griffin* to hold that the defendant's Sixth Amendment right to confrontation was violated when the prosecutor questioned the defendant's credibility by noting the sequence of the trial testimony. *Agard I*, at 709-12. In *Agard II* the court refined *Agard I* but adhered to the formula that the reasoning from *Griffin* controlled the outcome of this case. The court also held that the reasoning of *Griffin* led to the conclusion that the prosecutor's comments about the defendant's credibility had a chilling effect on the defendant's implicit Fifth Amendment right to testify on his own behalf. *Agard I*, at 712.

By opting to testify, however, respondent waived the protection of Fifth Amendment, which in any event does not apply to credibility issues. More importantly there is no basis to import the *Griffin* reasoning to a claim that the defendant's right to testify on his own behalf was unduly burdened. Since the Fifth Amendment and *Griffin v. California* infect the *Agard I* and *Agard II* Sixth Amendment analysis, the sequence of discourse will be inverted from the one used in *Agard I*; that is, we will discuss the implied Fifth Amendment right to testify before assessing *Griffin's* impact on the Sixth Amendment claim.

The core protection of the Fifth Amendment was waived by defendant. In pertinent part the Fifth Amendment reads that, "nor shall (any person) be compelled in any criminal case to be a witness against, himself, nor be deprived of life, liberty, or property, without due process

of law." The Fifth Amendment prohibits compelled testimony, which, with regard to criminal defendants, simply means that they cannot be forced to become a witness at their own trial. *South Dakota v. Neville*, 459 U.S. 553 (1983). Furthermore, an utterance is coerced only to the extent that it is offered to establish criminal liability. *United States v. Appelbaum*, 445 U.S. 115 (1980); *United States v. Mandujano*, 425 U.S. 564 (1976).

Thus, the Fifth Amendment privilege relates to factual assertions and information disclosed through testimonial utterances or conduct. *Pennsylvania v. Muniz*, 496 U.S. 582 (1990). The Fifth Amendment privilege against self-incrimination is waived when the defendant decides to take the stand and testify. *Brooks v. Tennessee*, 406 U.S. 605 (1972). The essence of the Fifth Amendment is "the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own free will, and to suffer no penalty . . . for such silence." *Malloy v. Hogan*, 378 U.S. 1, 18 (1964). Here, defendant fully waived the core protection of the Fifth Amendment right to remain silent. He affirmatively decided to testify at his trial and there is no contention that his decision was burdened by any State action. Thus, any error found by the court in *Agard I* or *Agard II* must relate to ancillary, non-textual Fifth Amendment analysis.

Furthermore, the Fifth Amendment does not apply to a statement about credibility because there is no factual or informational assertion by the defendant. The prosecutor's summation remarks that are the focus of this case did not refer to any fact or information provided by defendant. The argument in question did not call defendant a liar or ask the jury to discount his factual recitation

because the State believed that defendant was disingenuous. Rather, the prosecutor's argument only asked the jury to assess defendant's credibility through his testimony. The Fifth Amendment does not apply to an assessment of credibility because this is not a factual or informational assertion by the defendant about the elements of the crime; credibility does not establish criminal liability.

The reasoning in *Griffin* should not be imported to a claim that defendant's right to testify on his own behalf was unduly burdened. The core protection of the Fifth Amendment testimonial privilege has been expanded to prevent a prosecutor's comments about a defendant's choice to remain silent. *Griffin v. California, supra.* In *Griffin*, the Court reasoned that a defendant has an absolute Constitutional right to remain silent and that a prosecutor's comments about silence put too heavy a burden on the right. In essence, it is impermissible to infer guilt from silence. The *Griffin* decision, moreover, relegated the compulsion aspect of the Fifth Amendment to secondary status.

In *Agard I* the court adopted the *Griffin* reasoning to hold that the prosecutor's remarks impermissibly burdened the defendant's Fifth Amendment right to testify on his own behalf. *Agard I*, at 712. This analysis should be rejected. First, this is a novel expansion of the Fifth Amendment protection and the holding in *Griffin*. The *Agard II* court rejected the belated argument that a new rule of constitutional law should not be made *via* a habeas corpus petition. *Teague v. Lane*, 489 U.S. 288 (1989). Although the court in *Agard II* could, and did, reject the *Teague* argument, this was an improvident exercise of discretion. *Agard I* and *Agard II* are not so within the

mainstream of conventional wisdom that petitioner should have anticipated a novel result. In *Agard II* the court realized that there was merit to petitioner's contention that this was a new rule of constitutional law. *Agard II*, at 100. The better practice would have been to analyze this issue. At a minimum the result in this case should be precluded because it is a new rule.

Second, the fabric of traditional Fifth Amendment analysis has been stretched thin. The rule that a prosecutor cannot comment on a defendant's right to remain silent is derivative of the amendment itself and has often been called into question. See, *Mitchell v. United States*, ___ U.S. ___, 119 S.Ct. 1307 (1999) (Scalia, J., dissenting). Here, of course, defendant was present at trial and waived his Fifth Amendment testimonial privilege. Despite waiver of the privilege itself and the derivative right expounded in *Griffin*, the *Agard I* court used *Griffin* to expand a second derivative right; the right to testify on one's own behalf. Again, the prosecutor's comments were not about the substance of the defendant's testimony; rather they were a request for the jury to assess credibility. Thus, *Agard I* prevents argument about testimony which itself is not the subject of the Fifth Amendment privilege. Even though the defendant has already waived the core protection afforded by the Fifth Amendment, *Agard I* collaterally extends the umbrella of the amendment.

Third, the right of a defendant to testify is already an ancillary Fifth Amendment right. *United States v. Dunnigan*, 507 U.S. 87, 93 (1993) ("The right to testify on one's own behalf in a criminal proceeding is made explicit by federal statute . . . and, we have said, it is also a right implicit in the Constitution . . . "). The court in *Agard I*

used a corollary to the Fifth Amendment to support an ancillary right to a right which, at most, is implicit in the Fifth Amendment. Two wholly derivative rights were used to collaterally vacate a conviction, even though the defendant was afforded the full protection of the rights actually guaranteed in the Constitution. Two secondary adaptations of the Fifth Amendment should not be used to cross-validate each other when the textual provisions of the Amendment have been followed.

Lastly, if *Agard I* is correct, together with the holding of *Brooks v. Tennessee*, 406 U.S. 605 (1972), it unreasonably restricts the prosecution's ability to sum-up to the jury. In *Brooks* a Tennessee procedural rule, which required a defendant to either testify before any other defense witness or forego the right to testify, was held to be unconstitutional because it was an impermissible restriction on the defendant's right to testify. The Tennessee rule undercut the privilege by making its assertion costly and the State's interest in preventing testimonial influence is insufficient to override the defendant's right to remain silent. Still, the defendant ran the risk of having the jury assess the defendant's credibility in light of the colored or perjured testimony. *Id.* at 611-12.

Brooks, together with *Griffin*, unmistakably established that a defendant can choose if and when to testify. Furthermore, defendant can suffer no penalty if he exercises his right to be free of compelled testimony. The prosecution can only sum up as to the demonstrable errors or lacunae in the defendant's testimony. None of these rules, however, was originally meant to address the manner, as opposed to the substance, of the defendant's testimony. If *Agard I* and *Agard II* are affirmed, this new

rule, combined with the old rule, will prevent all argument except for a dry recitation of fact.

In *Agard I*, however, a dry recitation of fact would not have been fair to the prosecution. The defense summed up first and attacked the credibility of the victim and presented the defendant's story as the truth about the events in question. If *Agard I*, *Brooks* and *Griffin* were combined, the prosecutor's summation would be restricted to arguing that the jury should see whether the defendant's story made sense, or hung together, or any other catch phrase suggesting it was incorrect. The defendant's story, however, was incorrect because it was smooth, consistent and obviously the result of having molded his testimony to the form provided by what had gone on before him. The only proper response was to provide the jury with a suggested road map for assaying the defendant's credibility. If *Agard I* is permitted to bar the type of summation used here, the question of credibility, which may be determinative in one-on-one cases such as sex crimes, will be a cipher to the jury.

The *Agard I* Fifth Amendment holding should be rejected. There is no basis to conclude that the defendant's right to testify was in any way burdened by the prosecutor's summation. The defendant told his story and had the benefit of defense counsel's summation, which questioned the veracity of the victim. Since the Fifth Amendment was never meant to protect observations about credibility – as opposed to the content of the communication – there is no reason to cobble a new rule to prevent comment about a condition not protected by the Fifth Amendment. If the summation were irrelevant or otherwise objectionable, State rules of evidence and procedure are the proper repository for a solution. In

other terms, there is no need to federalize this area of law in order to reach a just result.

II.

THE PROSECUTOR'S SUMMATION COMMENTS ON DEFENDANT'S PRESENCE IN THE COURTROOM AND HIS RESULTANT OPPORTUNITY TO CONFORM HIS TESTIMONY TO THAT OF OTHER WITNESSES WERE PERMISSIBLE AND DID NOT HAVE A SUBSTANTIAL OR INJURIOUS INFLUENCE ON THE JURY'S VERDICT.

A. The Second Circuit's holding rests on an unwarranted extension of the rationale of *Griffin v. California*.

Griffin v. California precludes inviting the jury to treat the defendant's decision not to testify as substantive evidence of guilt. Because the Second Circuit applied this Fifth Amendment based prohibition to an entirely different constitutional right, under circumstances which could not have been contemplated by this Court and in a manner not supported by the reasoning of *Griffin*, its decision should be reversed.

1. Introduction.

A criminal defendant's right to be present during criminal proceedings arises from both the Confrontation and Due Process Clauses. The Sixth Amendment Confrontation Clause guarantees a criminal defendant's right to directly encounter witnesses (see, *Maryland v. Craig*, 497 U.S. 836, 846 [1990] ["Face-to-face confrontation enhances the accuracy of fact finding by reducing the risk that a witness could wrongfully implicate an innocent person."]; *Coy v. Iowa*, 487 U.S. 1012, 1019-20 [1988] ["It is

always more difficult to tell a lie about a person 'to his face' than 'behind his back.' "]), the right to cross-examine those witnesses, and the right to be present at all material stages of the criminal proceeding. See, e.g., *Gerstein v. Pugh*, 420 U.S. 103, 119-20 (1975). The right to confrontation is intended to "ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing" in an adversarial setting. *Maryland v. Craig*, *supra* at 845; see also, *Kentucky v. Stincer*, 482 U.S. 730, 737 (1987).

While the Sixth Amendment guarantees a defendant's right to be present at all stages of a trial at which presence would contribute to the opportunity for effective cross-examination (*Stincer*, 482 U.S. at 740), the Fourteenth Amendment grants the further "right to be present at any stage of the proceeding that is critical to its outcome if [defendant's] presence would contribute to the fairness of the procedure." *Id.* at 745. The combined effect of these two provisions guarantees defendants the right to be present at all "important stages" of the proceeding. See, e.g., *Diaz v. United States*, 223 U.S. 442, 454-55 (1912).

Although the right to face-to-face confrontation is a core value protected by the Confrontation Clause (*Craig*, 497 U.S. at 847, citing *California v. Green*, 399 U.S. 149, 157 [1970]), the right is not absolute. Thus, in *Craig*, this Court recognized that the right to face-to-face confrontation may give way when "necessary to further an important public policy . . . " *Craig*, 497 U.S. at 850. Further, the admission of the reliable hearsay statements of an unavailable declarant does not violate a defendant's confrontation right. *Ohio v. Roberts*, 448 U.S. 56, 66 (1980) See also *California v. Green*, 399 U.S. 149 (1970) (out of court statement properly admitted if declarant available for

cross-examination). A defendant may also forfeit the right by his own obstreperous behavior. *Illinois v. Allen*, 397 U.S. 337 (1970). Plainly, therefore, a defendant's right to be physically present at trial and to cross-examine adverse witnesses may be compromised and, under limited circumstances, entirely eliminated.

A defendant has a constitutional right to decide if and when to testify. *Brooks v. Tennessee*, 406 U.S. 605, 611-12 (1972), but one who does waive the right to remain silent and takes the stand in his or her own defense is subject to cross-examination regarding the credibility of that testimony. See, e.g., *Perry v. Leeke*, 488 U.S. 272, 283 (1989).

2. The prosecutor's comments did not burden defendant's Sixth Amendment right of confrontation.

In her summation at Agard's trial the prosecutor referred to the defendant as "the one who had an answer for everything" and argued that "[a] lot of what he 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." Near the end of her summation, the prosecutor stated:

> 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 into the evidence?
>
> * * *
>
> He's a smart man. I never said he was stupid . . . He used everything to his advantage.

The court below agreed with Agard that these comments violated his rights to confront the witnesses against him and to a fair trial. The court distinguished summation remarks from those uttered during cross-examination and held:

> It is constitutional error for a prosecutor to insinuate to the jury for the first time during summation that the defendant's presence in the courtroom at trial provided him with a unique opportunity to tailor his testimony to match the evidence. *Agard v. Portuondo*, 117 F.3d 696, 703.

The court concluded that the prosecutor's comments violated Agard's "right to confrontation, his right to testify in his own behalf and his right to receive due process and a fair trial" because these remarks invited

> the jury to consider the defendant's exercise of his right to confrontation as evidence of guilt, and, therefore, penalize him for exercising that right. The comments, which implied that a truthful defendant would have stayed out of the courtroom before testifying or would have testified before other evidence was presented, forced defendants either to forego the right to be present at trial, forego their Fifth Amendment right to testify on their own behalf, or risk the jury's suspicion (footnote omitted). *Id.* at 709.

In so reasoning, the court below mischaracterized the facts and misplaced its reliance on this Court's holding in *Griffin v. California*.

In *Griffin* this Court recognized that judicial encouragement of the jury to infer *guilt* from the defendant's

decision not to testify – to view defendant's silence as substantive evidence of guilt – imposes an unwarranted penalty on a defendant's exercise of the constitutional right to refuse to testify. The holding of *Griffin* was expanded in *Carter v. Kentucky*, 450 U.S. 288, 300 (1981), mandating that, upon request, the court instruct the jury that it may draw no adverse inference from defendant's failure to testify, and in *Brooks v. Tennessee*, 406 U.S. 605, 610-11 (1972), declaring unconstitutional a state statute requiring defendants who opted to testify to do so before calling any other witness, because it made the assertion of the privilege to remain silent too "costly."

A defendant's right to remain silent is the counterpart of the right to testify on his or her own behalf.[3] Despite *Griffin's* prohibition on exacting a penalty as the price of exercising the right to remain silent, however, defendants are routinely "penalized" for their election to testify. But as this Court made clear in *Corbitt v. New Jersey*, 439 U.S. 212, 218 (1978), "not every burden on the exercise of a constitutional right, and not every pressure or encouragement to waive such a right is invalid." The rationale of the earlier holding in *McGautha v. California*, 402 U.S. 183, 214-15 (1971) was similar:[4]

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[3] Alan D. Hornstein, *Between Rock and a Hard Place: The Right to Testify and Impeachment By Prior Conviction*, 42 Vill.L.Rev. 1, 46-55 (1997). The author catalogues types of impeachment deemed to impose permissible costs on the defendant's right to testify.

[4] The aspect of *McGautha* which gave rise to this observation (that guilt and penalty phases of a capital trial may be joined in a single proceeding) has not been overruled, but subsequent cases leave little doubt that bifurcated capital trials are constitutionally required. See, e.g., *Furman v. Georgia*, 408

> 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.
>
> * * *
>
> It does no violence to the privilege that a person's choice may open the door to otherwise inadmissible evidence which is damaging to his case.

Thus, the right to testify is subject to legitimate limits, as are many other constitutional rights. If the cost imposed on defendant's assertion of the right serves a valid and significant governmental purpose, it should be constitutionally permissible. This Court has repeatedly found that the purpose of assisting the jury to ascertain the truth and, more specifically to limit the effectiveness of perjured testimony, is a valid and sufficiently significant governmental goal to justify the cost to defendants' right to testify. Thus, the admission of impeaching evidence directed toward the content of defendant's testimony does not unduly burden defendant's exercise of the right to testify.

For instance, the defendant in *United States v. Dunnigan*, 507 U.S. 87 (1993) was charged with conspiracy to distribute cocaine. After she testified that she had never possessed or dealt cocaine, the trial court permitted the government to offer rebuttal testimony from witnesses

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U.S. 238 (1972) (per curiam); *Proffitt v. Florida*, 428 U.S. 242 (1976).

who said they had purchased cocaine from defendant. The court also enhanced her sentence based on its finding that she had committed perjury. The Court of Appeals for the Fourth Circuit found the enhancement of defendant's sentence an unconstitutional inhibition of defendant's right to testify on her own behalf. Although this Court confirmed that the defendant had a right to testify, it reversed, declaring:

> Respondent cannot contend that increasing her sentence because of her perjury interferes with her right to testify, for we have held on a number of occasions that a defendant's right to testify does not include a right to commit perjury. 507 U.S. at 96.

Earlier, in *Nix v. Whiteside*, 475 U.S. 157 (1986), the Court had similarly concluded that a criminal defendant's right to testify did not include the right to commit perjury:

> Whatever the scope of a constitutional right to testify, it is elementary that such a right does not extend to testifying falsely . . . [because] there is no right whatever – constitutional or otherwise – for a defendant to use false evidence. 475 U.S. at 173.

To prevent perjurious testimony the Court has also permitted the impeachment of defendants by improperly obtained evidence. Thus, in *Harris v. New York*, 401 U.S. 222 (1971), ratifying the use of defendant's uncounseled statements for impeachment purposes, this Court again rejected the notion that the right of a defendant to testify or remain silent can "be construed to include the right to commit perjury." 401 U.S. at 225. See also *Oregon v. Hass*, 420 U.S. 714 (1975) (the "shield provided by *Miranda* cannot be perverted into a license to use perjury by way of a defense . . . " 420 U.S. at 721-22).

The focus of the Court's inquiry in these cases was the probity of portions of defendant's testimony and what inferences a jury should be permitted to draw from comparison of that testimony with prior inconsistent statements; in each case the impeachment evidence directed at the content of defendant's testimony was admissible *only* because the defendant opted to testify on his or her own behalf. The affirmative penalty on the defendant's assertion of the right to testify was deemed permissible because of the resultant advancement of the search for truth by enhancing the jury's ability to evaluate defendant's credibility on specific issues.

Indeed, a defendant's very status as defendant is routinely permitted to be brought to the jury's attention by the instruction that a testifying defendant may be impeached by his or her interest in the outcome of the case, presumably even in the absence of cross-examination on the subject. *United States v. Johnson*, 756 F.2d 453 (6th Cir. 1985); *United States v. Nunez-Carreon*, 47 F.3d 995 (9th Cir.), *cert. denied*, 515 U.S. 1126 (1995).

Similarly, when a defendant testifies at trial or otherwise presents a defense, the prosecutor in his summation is entitled to comment on defendant's failure "to support his own factual theories with witnesses." *United States v. Yuzary*, 55 F.3d 47 (2nd Cir. 1995). Even in a criminal case, a party's failure to produce witnesses or other non-cumulative evidence peculiarly within its control creates a presumption that the unproduced evidence would have been unfavorable. This neither shifts the burden of proof nor violates the defendant's right to testify.

The Second Circuit improperly transposed the Fifth Amendment analysis developed in *Griffin* to a Sixth Amendment claim. Here, the Sixth Amendment claim

only arose because defendant waived the protection of the Fifth Amendment and testified. If he had elected not to testify, there would have been no burden on his confrontation rights. In *Agard I* the court decided that the prosecutor's comments about defendant's credibility made defendant's exercise of his Sixth Amendment right too costly. But the Sixth Amendment right with regard to the timing of a defendant's testimony protects a procedural choice, not the substance of the testimony presented. Indeed, there can be little doubt that the defendant's decision whether or not to testify is based upon an assessment of the case presented against him: the weaker the case the less likely the testimony.

On the other hand, a defendant's decision about his Sixth Amendment rights is not devoid of content. Because it is based on trial factors rather than a theoretical assessment of constitutional protections, the choice in and of itself reflects on the defendant's credibility. The *Griffin* analysis developed not out of a concern for credibility; the only consideration was whether the jury would infer guilt from silence. Since there is little or no likelihood that a jury will infer guilt from the time or manner of exercising the Sixth Amendment right to confrontation, the rationale of *Griffin* is simply inapplicable in the context of the Sixth Amendment. Here defendant received the full textual protection of both the Fifth and Sixth Amendments; rights ancillary to the amendments should not be used to collaterally vacate the conviction. The textual rights will be drained of meaning if they become a subset of unpredictable ancillary rights.

3. Even assuming that defendant's right to confrontation was burdened by the prosecutor's summation remarks, that burden was not of the same type or degree as the one condemned by this Court in *Griffin*.

Here, to the extent a burden existed, it was not on the act of testifying but rather on the act of testifying falsely. The prosecutor's comment was only indirectly related to defendant's right to be present; its thrust was "not that defendant was present at trial but that his presence gave him an opportunity to conform his testimony." *People v. Buckey*, 424 Mich. 1, 378 N.W.2d 432, 439 (Mich. 1985); *State v. Robinson*, 157 N.J. Super. 118, 384 A.2d 569, 570 (N.J. 1978); *State v. Cassidy*, 236 Conn. 112, 672 A.2d 899, 918 (Conn. 1996) (Callahan, J., dissenting). Nor can it be logically concluded that the prosecutor's manifest intent was to comment on the defendant's exercise of his right to testify or that the character of the remark assured that the jury would so construe it.

In *Griffin*, the inference the jury was asked to draw was not only sanctioned by the trial court, but was also a natural consequence of defendant's failure to testify. As one commentator has credibly theorized, juries are far more likely to understand, and therefore follow, an instruction to either disregard certain evidence or apply it only to certain issues, than one asking them not to draw any inference from the fact that defendant did not testify.[5]

[5] "[T]he accused's failure to testify affirmatively raises the jurors' probability assessment of guilt from the baseline level. No matter how vigorously the court instructs the jurors not to take into account that failure to testify, they are almost certain to do so. * * * The only way to make sense of the instruction is to treat it as a charge to assume that, whether innocent or guilty, the defendant was equally likely to decline to testify. But, especially if the case against the defendant appears strong, so that an innocent defendant would be likely to testify, this assumption is contrary to the realities of the situation, and even more contrary to the jury's understanding of the situation. Thus, the jury can hardly help but ignore the instruction." Richard D. Friedman, *Character Impeachment Evidence: Psycho-Bayesian Analysis And A Proposed Overhaul*, 38 UCLA L. Rev. 637, 667-68 (1991); see also *Mitchell*, ___ U.S. ___, 119 S.Ct. at 1316 (Scalia, J., dissenting).

In *Griffin* this Court also noted the potential impact of judicial imprimatur on the jury's native propensity to draw an inference adverse to defendant: "What the jury may infer, given no help from the court, is one thing. What it may infer when the court solemnizes the silence of the accused into evidence against him is quite another." 380 U.S. at 614. Here the challenged comments were made by the prosecutor rather than the court; while they arguably fell in the middle of this continuum of influence, they were effectively neutralized by the trial court's cautionary instruction that the arguments of counsel were not evidence.

> The test for determining whether the prosecutor's remarks were constitutionally impermissible is: (1) whether the prosecutor's manifest intent was to comment on the defendant's silence or (2) whether the character of the remark was such that the jury would naturally and necessarily construe it as a comment on the defendant's silence. *United States v. Grosz*, 76 F.3d 1318, 1326 (5th Cir.), *cert. denied*, 519 U.S. 862 (1996) (internal quotations and citations omitted).

In sharp contrast to *Griffin*, here there was no direct comment on defendant's assertion of his right to confrontation or of his right to testify; the prosecutor limited her remarks to pointing out the unique advantage to a defendant of having the opportunity to hear all the testimony before testifying. More significantly, however, the Second Circuit's suggestion, that the jury could infer from the remarks that an innocent defendant would not have attended the trial and would have testified first, is illogical; it defies common sense that a defendant's decision *to* testify would be viewed by the jury as evidence of consciousness of guilt. Simply stated, the holding of *Griffin*, that comment on a defendant's refusal to testify is impermissible because the jury might draw an adverse inference, and the Second Circuit's rationale that an inference of guilt might be drawn from defendant's decision *to* testify, are mutually exclusive.

As previously noted, here, unlike in *Griffin*, the prosecutor's closing remarks cannot be construed as a suggestion that the jury treat Agard's mere presence in the courtroom during the entire trial as substantive evidence of his guilt. Equally significantly, however, a reasonable reading of the prosecutor's comments in this case refutes the Second Circuit majority's interpretation that they "invited the jury to consider the defendant's exercise of his right to confrontation as evidence of guilt . . . " or that they implied that a "truthful defendant" would have stayed out of the courtroom or would have testified before other evidence was presented. Rather, as the dissenter correctly observed, the prosecutor was merely pointing out what was obvious to the jurors who had likewise been present throughout the 10-day trial: "That the defendant also was there and could hear the State's

witnesses testify before he offered his own version of the events in question" *Agard*, 117 F.3d. at 718 (Van Graafeiland, J., dissenting). The prosecutor did not ask the jury to infer guilt from defendant's mere presence during the trial; she simply suggested that, when assessing his credibility during their deliberations, the jury could consider the fact that the defendant's testimony was largely harmonious with that of the victims.

Also unlike in *Griffin*, where defendant was completely denied the exercise of his Fifth Amendment right by virtue of the trial court's comments to the jury, the prosecutor's argument here did not abridge Agard's right of confrontation. He was present throughout the trial, cross-examined prosecution witnesses and, in general, was permitted to effectuate all components of the right. Since the reliability of prosecution witnesses was tested before the jury, defendant was afforded the full benefit of the right to confrontation. While the Second Circuit apparently sought to protect "the opportunity of a defendant to fabricate or conform testimony without comment, and the opportunity granted by the Fifth and Sixth Amendments . . . ", (*Agard*, 117 F.3d at 710) no such right exists. In a criminal trial, both sides are entitled to fairness; constitutional rights designed as shields against governmental abuses should not be permitted to provide a defendant with an undue advantage over the prosecution in the adversarial process.

4. Additional defects in the Second Circuit's analysis contributing to its erroneous decision.

The Second Circuit incorrectly asserted that Agard did not have an opportunity to respond to the prosecutor's comments. New York courts have broad discretion to permit a defendant to reopen his case after resting. *People v. Olsen*, 34 N.Y.2d 349, 357 N.Y.S.2d 487, 313 N.E.2d 782 (1974). Here, defense counsel sought to reopen neither his case (*People v. Ruine*, ___ A.D. ___, 685 N.Y.S.2d 47 [1st Dep't 1999]; see, *People v. Bartolomeo*, 126 A.D.2d 375, 513 N.Y.S.2d 981 [2nd Dep't 1987]), nor his summation (see, *People v. Gonzalez*, 68 N.Y.2d 424, 431, 590 N.Y.S.2d 795, 502 N.E.2d 583 [1986]) to counter the allegedly prejudicial prosecutorial assertion. In any case, respondent clearly anticipated the argument by raising the issue first.

Nor did the prosecutor's argument belatedly inject innuendo concerning bias or credibility into the case.

> The specter of fabrication pervaded the trial from its opening day. Winder testified that Agard committed anal sodomy on her; Agard said that he did not. One of them was not telling the truth. *Agard*, 117 F.3d at 720 (Van Graafeiland, J., dissenting).

The Second Circuit also erred in requiring an evidentiary showing for the prosecutor's remarks; there is simply no basis in this Court's jurisprudence for requiring such a predicate. It underestimates the common sense of the jury to presume that they failed to grasp the obvious fact that, unlike other witnesses, defendant was present throughout the trial and testified last, and that they were simply being asked to consider these factors in assessing witness credibility.

A defendant who testifies on his own behalf occupies the same position as any other witness at trial. *Brown v. United States*, 356 U.S. 148, 154-55 (1958). Permitting the prosecutor to ask the jury to consider defendant's presence in the courtroom in assessing his credibility may, like any other method of impeachment, impose a limited "cost" on the defendant's decision to testify. But, if the "primary object" of the Confrontation Clause is the search for the truth (*Douglas v. Alabama*, 380 U.S. 415, 418-19 [1965]), then permitting prosecutorial comment on what is, after all, patent to the jury, serves the significant countervailing State interest directly related to a crucial aspect of the truth-seeking process – the ability of the fact finder to fairly assess the credibility of the witnesses most obviously interested in the outcome of the case.

When a defendant subjects himself to cross-examination, one aspect of the credibility issue is whether his version of events has been fabricated. Asking a jury to consider whether that testimony was tailored to that of the other witnesses is a proper inquiry. The constitutional right of a defendant to be present at trial and to confront witnesses should not be extended to embrace a "right to be insulated from suspicion of manufacturing an exculpatory story consistent with the available facts." *State v. Smith*, 82 Wash. App. 327, 917 P.2d 1108, 1112 (Wash.App.Div. 1996).

B. Defense counsel's summation "invited" the prosecutor's remarks.

In his summation defense counsel characterized the complainant's allegations as fabrications, argued that Agard's testimony was consistent with that of his

accusers, and suggested that the jury compare the credibility of Agard and the prosecution witnesses. These comments clearly invited the prosecutor's comments, which did no more than "right the scales." *United States v. Young*, 470 U.S. 1, 11 (1985).

The circumstances of this case are analogous to those in *United States v. Robinson*, 485 U.S. 25 (1988). In *Robinson*, the prosecutor noted in rebuttal summation that the defendant, who had not testified, "could have taken the stand and explained [his version of events] to you." *Id.* at 26. This Court agreed with the government's contention that, although "direct," the prosecutor's comment was responsive to defense counsel's concluding arguments. The Court emphasized that both sides in a criminal trial are entitled to an "opportunity to meet fairly the evidence and arguments of one another." *Id.* at 869 (citing *United States v. Nobles*, 422 U.S. 225 [1975]). Based on its review of the challenged prosecutorial comment in context, this Court found that it did not warrant the application of the "broad dicta in *Griffin*" to the facts of *Robinson*:

> It is one thing to hold, as we did in *Griffin*, that the prosecutor may not treat a defendant's exercise of his right to remain silent at trial as *substantive evidence of guilt*; it is quite another to urge . . . that the same reasoning would prohibit the prosecutor from fairly responding to an argument of the defendant by adverting to that silence. There may be some 'cost' to the defendant in having remained silent in each situation, but we decline to expand *Griffin* to preclude a fair response by the prosecutor in situations such as the present one. *Id.*, at 33 (emphasis supplied).

C. Under the narrow standard of federal habeas review of a claim of prosecutorial misconduct the comments had no substantial and injurious effect.

Generally, a criminal conviction "is not to be lightly overturned on the basis of a prosecutor's comments standing alone" in an otherwise fair proceeding. *United States v. Young*, 470 U.S. 1, 11 (1985) (prosecutor's improper remarks expressing his personal belief that the defendant was guilty did not constitute reversible error).

The standard of habeas review is considerably narrower than it is on direct appeal. A federal habeas court's scope of review is "the narrow one of due process, and not the broad power that [it] would possess in regard to [its] own trial court." *Donnelly v. DeChristofaro*, 416 U.S. 637, 642 (1974). "Federal habeas challenges to state convictions entail greater finality problems and special comity concerns . . . [T]he burden of justifying federal habeas relief for state prisoners is 'greater than the showing required to establish plain error on direct appeal.' " *Engle v. Isaac*, 456 U.S. 107, 135 (1982).

The role of Federal habeas proceedings, although important, is a secondary and limited one in comparison to direct review. "Federal courts are not forums in which to re-litigate state trials." *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993), citing *Barefoot v. Estelle*, 463 U.S. 880 (1983). Thus, "error that may justify reversal on direct appeal will not necessarily support a collateral attack on a final judgment" *Id.*, at 1720, citing *United States v. Frady*, 456 U.S. 152, 165 (1982). These distinctions arise from the "State's interests in the finality of convictions . . . ;" principles of comity and federalism; and the view that

"[l]iberal allowance of the writ . . . degrades the prominence of the trial itself" and encourages habeas petitioners to re-litigate their claims on collateral review. *Id.* at 635.

Prosecutors must be given "reasonable latitude to fashion closing arguments" and to argue reasonable inferences based on the evidence. *United States v. Necoechea*, 986 F.2d 1273 (9th Cir. 1993). Thus, they are allowed to deal "hard blows," although not "foul" ones. *United States v. Gwaltney*, 790 F.2d 1378 (9th Cir. 1986), *cert. denied*, 479 U.S. 1104 (1987); *People v. Ashwal*, 39 N.Y.2d 105, 109, 383 N.Y.S.2d 204, 347 N.E.2d 564 (1976). Additionally, the prosecutor's comments must be viewed against the background of defense counsel's closing argument, can only be evaluated in their relationship to that summation and arguments advanced by the latter may be responded to by the former. *United States v. Matthews*, 20 F.3d 538 (2nd Cir. 1994); *United States v. Pelullo*, 964 F.2d 193 (3rd Cir. 1992).

A prosecutor's remarks during summation warrant the granting of a writ of habeas corpus only if the defendant establishes that the comments had a "substantial and injurious effect or influence on the jury's verdict." *Bentley v. Scully*, 41 F.3d 818, 824 (2nd Cir. 1994). In assessing whether a habeas petitioner has satisfied this showing, the court must also consider any curative measures the trial court may have taken to prevent prejudice, and whether the defendant's conviction was certain absent the prejudicial conduct. *Gonzalez v. Sullivan*, 934 F.2d 419, 424 (2nd Cir. 1991).

This trial was eminently fair and the evidence was strong enough to prompt the state appellate court to characterize it as overwhelming:

> The complainant testified that on May 6, 1990, the defendant held a gun to her head, threatened to kill her, and beat her in the course of forcing her to have anal intercourse by 'forcible compulsion.' Later at the emergency room of a hospital, the victim was found to have bruises on her arms and legs, a cut lip, and a black eye so seriously battered that she had hemorrhages in it four to five weeks later, as well as floating spots up to the day of trial. In addition, the defendant admitted to owning a gun, which was recovered by the police. *People v. Agard*, 119 A.D.2d 401, 402, 609 N.Y.S.2d 239 (2nd Dep't 1993).

Although this assessment is not binding on a federal habeas court, it is certainly entitled to a high degree of deference.

The prosecutor's remarks constituted a fair response to defense counsel's summation and suggested reasonable, logical and permissible inferences for the jury's consideration. Significantly, the trial court explicitly instructed the jury to consider only the evidence and emphasized that counsel's summations did not constitute evidence. Under the limited scope of collateral habeas review the challenged remarks did not cause substantial prejudice to respondent and did not undermine confidence in the certainty of conviction in their absence. In the real world of criminal jury trials, the effect of the challenged comments was *de minimis*. See *United States v. Cruz*, 797 F.2d 90 (2nd Cir. 1986). Because it can fairly be said that respondent's conviction resulted from the jury's assessment of the evidence and not from improper argument by the prosecutor, the order of the Second Circuit should be reversed.

CONCLUSION

AMICUS CURIAE – THE NEW YORK STATE DISTRICT ATTORNEYS ASSOCIATION – REQUEST THAT THE DECISION OF THE CIRCUIT COURT IN *AGARD I* AND *AGARD II* BE REVERSED FOR THE REASON STATED HEREIN.

DATED: Riverhead, New York
June 7, 1999

Respectfully submitted,

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