No. 98-1170

**IN THE SUPREME COURT OF THE UNITED STATES**

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LEONARD PORTUONDO, SUPERINTENDENT, FISHKILL CORRECTIONAL FACILITY,
*Petitioner*

v.

RAY AGARD
*Respondent*

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# BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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Filed August 9, 1999

This is a replacement cover page for the above referenced brief filed at the U.S. Supreme Court. Original cover could not be legibly photocopied

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## INTEREST OF *AMICUS CURIAE*[1]

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit corporation with membership of more than 10,000 attorneys and 28,000 affiliate members in all fifty states. The American Bar Association recognizes the NACDL as an affiliate organization and awards it full representation in its House of Delegates.

The NACDL was founded in 1958 to promote research in the field of criminal law, to disseminate and advance knowledge of the law in the area of criminal practice, and to encourage the integrity, independence, and expertise of defense lawyers in criminal cases. Among the NACDL's objectives are to ensure the proper administration of justice and to ensure that criminal statutes are construed and applied in accordance with the United States Constitution.

The issue before this Court is the constitutionality of a prosecutor's comments urging the jury to infer that the defendant tailored his testimony to that of the prosecution's witnesses, where such comments were made for the first time on summation, without any evidence to support the inference, and based solely on the fact that the defendant exercised his right to be present in the courtroom throughout his trial. The NACDL asks the Court to hold that such comments are unconstitutional as they needlessly penalize the assertion of the defendant's constitutional rights. The Court's resolution of this matter will impact virtually every criminal trial in which a defendant contemplates testifying in his own defense. The NACDL, therefore, has a significant interest in the outcome of this case.

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[1]The parties have consented to the submission of this brief. Their letters of consent have been filed with the Clerk of this Court. Pursuant to Supreme Court Rule 37.6, none of the parties authored this brief in whole or in part and no one other than *amicus*, its members, or counsel contributed money or services to the preparation or submission of this brief.

## SUMMARY OF ARGUMENT

It is a fundamental principle of constitutional law that the state may not penalize an individual's exercise of a constitutional right by making the assertion of that right costly. That principle controls this case and was properly applied by the Court of Appeals. The Second Circuit's holding in this case was a narrow one. The court held that the prosecutor penalized Ray Agard's exercise of his rights guaranteed by the United States Constitution when she urged the jury to infer that Agard had tailored his testimony to that of the prosecution's witnesses "1) for the first time on summation; 2) without facts in evidence to support the inference; [and] 3) in a manner which directly attack[ed] [Agard's] right to be present during his entire trial." Pet. App. 46a. These comments, which could be made of any defendant who exercises his right to confront the witnesses against him and then testifies in his own defense, do not promote, and indeed undermine, the truth-seeking function of the adversarial process. The prosecutor's comments thus needlessly forced Agard to pay a price for having exercised his Sixth Amendment right to attend his trial and to confront the witnesses against him and, therefore, were unconstitutional.

In *Griffin v. California*, 380 U.S. 609 (1965), this Court held it unconstitutional for a prosecutor to urge the jury to draw an inference adverse to the defendant based solely on the defendant's exercise of his Fifth Amendment right to remain silent. That adverse inference penalized the defendant by allowing the state to enlist his exercise of the right to remain silent to prove its case against him. It thus diminished the value of the right by making its assertion costly. *Id.* at 614. Since then, this Court has reaffirmed this "penalty" principle, applying it in many different contexts, both civil and criminal, and with respect to penalties imposed on many different constitutional rights.



The prosecutor's comments here constituted precisely the type of penalty proscribed by *Griffin* and its progeny. The trial below turned almost exclusively on the testimony of the complaining witnesses, Nessa Winder and Breda Keegan, and the defendant, Ray Agard. Their accounts of many of the underlying events were entirely consistent. Their accounts of other events, however, diverged. The credibility of these witnesses was thus at the heart of the case. In her summation, the prosecutor urged the jury to infer, without any evidence to support the inference, that Agard had abused his right to be present in the courtroom by tailoring his testimony to "fit" that of the prosecution's witnesses. The Court of Appeals properly saw these comments for what they were: "an outright bolstering of the prosecution witnesses' credibility vis-a-vis the defendant's based solely on the defendant's exercise of a constitutional right to be present during the trial." Pet. App. 72a. Put another way, the prosecution was able to enlist Agard's exercise of his right to be present at trial to aid in carrying its burden of proof and to increase the likelihood of conviction. Furthermore, the only way to avoid or even counter such an attack would have been for Agard either to have waived his confrontation rights altogether and absented himself from the courtroom while the state's witnesses testified against him, or to have refrained from testifying at all. This is precisely what this Court's penalty jurisprudence forbids.

Contrary to the position urged by the United States as *amicus curiae*, this Court's penalty jurisprudence is not somehow inapplicable here merely because Agard took the stand to testify in his own defense. The United States relies primarily on cases in which a defendant was not permitted to invoke his Fifth Amendment right to silence to avoid impeachment after having *waived* that right by taking the stand. That is not this case. Here, Agard in no way waived his right to confront the witnesses against him by taking the stand in his

own defense and, therefore, could not be penalized for having exercised that right. This Court's precedents make clear that when a defendant takes the stand as a witness in his own defense, he does not forfeit the rights that the Constitution guarantees him *as a defendant*. Although the prosecution may seek to ensure the reliability of any witness's testimony, when that witness is the defendant, it cannot do so at the expense of constitutional rights that he has not waived.

The prosecution's unfounded bolstering of its case at the expense of Agard's constitutional rights was not only unnecessary to further the truth-seeking function of the trial, but affirmatively undermined that goal. Comments casting suspicion on a defendant's mere presence in the courtroom are no more effective against the guilty than against the innocent: a defendant whose testimony "fits" the state's evidence because he is innocent is just as likely to suffer an adverse inference as a guilty defendant whose testimony "fits" because he has tailored it to the testimony he has heard. Indeed, such comments may be more effective against innocent defendants because the truthful testimony of an innocent defendant will more often "fit" the testimony of the State's witnesses. And because there are numerous valid and important reasons for a defendant to be present at trial, the inference of tailoring drawn from the exercise of that right is infused with unreliability.

As such, the state's argument that this type of impeachment by conjecture and innuendo is necessary to prevent defendants from using the Sixth Amendment as a vehicle to commit perjury is completely untenable. In support of this argument, the state and its *amici* point to cases in which a defendant was not permitted to invoke a constitutional right to avoid being cross-examined with evidence of prior inconsistent statements or conduct. Those cases have no relevance to this one. Here, the prosecutor's summation comments in no way furthered the



truth-seeking function of cross-examination and the adversary process, as they were based on nothing more than Agard's presence at trial, were not supported by any evidence, and shed no light whatsoever on his guilt or innocence. As the Court of Appeals correctly held, the state thus placed a penalty on Agard's constitutional right to confront his accusers without advancing any state interest. The decision of the Court of Appeals should be affirmed.

## ARGUMENT

### THE PROSECUTOR'S COMMENTS IN SUMMATION THAT AGARD USED HIS PRESENCE IN THE COURTROOM TO TAILOR HIS TESTIMONY TO THE PROSECUTION'S CASE VIOLATED AGARD'S CONSTITUTIONAL RIGHTS.

A defendant's right to be present at his trial is "[o]ne of the most basic of the rights guaranteed by the Confrontation Clause," *Illinois v. Allen*, 397 U.S. 337, 338 (1970), and is "scarcely less important to the accused than the right of trial itself." *Diaz v. United States*, 223 U.S. 442, 455 (1912). In this case, the prosecutor asked the jury in closing argument to draw an adverse inference from Agard's exercise of that right, stating that "unlike all the other witnesses in this case the defendant has a benefit and the benefit that he has, unlike all the other witnesses, is he gets to sit here and listen to the testimony of all the other witnesses before he testifies. . . . That gives you a big advantage, doesn't it. You get to sit here and think what am I going to say and how am I going to say it? How am I going to fit it into the evidence? . . . He used everything to his advantage." J.A. 49. Without reference to any evidence suggesting that Agard had tailored his testimony after hearing the prosecution's case, these comments encouraged the jury to discredit Agard's testimony based on nothing but the exercise of his constitutional right to attend his own trial. As such, they

penalized Agard's constitutional right to be present in the courtroom at every stage of his trial. Moreover, because this penalty was wholly unnecessary to further, and may even have distorted, the truth-seeking function that impeachment is intended to advance, the penalty imposed by the prosecutor's comments was unconstitutional.

### A. This Court's Penalty Jurisprudence Mandates the Result Reached By the Court of Appeals.

It is a firmly established principle of constitutional law that the state may not penalize an individual's exercise of a right guaranteed by the United States Constitution. This principle pervades every area of constitutional law and has been applied by this Court in many different contexts, both civil and criminal. As defined by this Court, any conduct of the state that diminishes a constitutional right by making its assertion costly is a penalty. Here, the prosecution's comments in summation penalized Agard's constitutional rights by urging the jury to discredit his testimony—thereby increasing the likelihood of conviction—based on nothing but the fact that he had exercised his right to be present at trial.

#### 1. The Prosecutor's Comments Imposed a Penalty on Agard's Exercise of His Constitutional Rights.

In *Griffin v. California*, this Court held it unconstitutional for a prosecutor to urge the jury to draw an inference adverse to the defendant based on the defendant's exercise of a constitutional right. 380 U.S. at 613-14. There, the defendant attended his trial and exercised his Fifth Amendment right to remain silent. In closing argument, the prosecutor attempted to capitalize on the defendant's silence by urging the jury to consider it against the defendant in determining whether the state had proved its case. According to the Court, these



remarks effectively "allow[ed] the State the privilege of tendering to the jury for its consideration the failure of the accused to testify." *Id.* at 613. As such, the prosecutor's comments constituted "a penalty imposed by courts for exercising a constitutional privilege. It cuts down on the privilege by making its assertion costly." *Id.* at 614.

Because there are numerous reasons why a defendant might decline to take the stand, the Court noted that it was sheer speculation for the jury to assume that the defendant's silence was evidence of his guilt. *Id.* at 613. For the same reason, the Court rejected the argument that the prosecution's comments did not exact a penalty because it was "natural and irresistible" for the jury to draw an adverse inference from the defendant's exercise of his constitutional right not to testify. *Id.* at 614. According to the Court, whatever the jury may have inferred on its own was irrelevant to the constitutional issue. Regardless of the jury's inclinations, the state was not at liberty to "solemnize" the jury's unguided speculation about the defendant's exercise of his constitutional rights into an adverse inference against him. *Id.*

Shortly after *Griffin* was decided, this Court relied on it in striking down a portion of the Federal Kidnaping Act as effecting an unconstitutional penalty on a defendant's Sixth Amendment right to a jury trial. *United States v. Jackson*, 390 U.S. 570, 583 (1968). Under that act, only a jury could impose the death penalty and, thus, only by pleading guilty and waiving one's right to a jury trial could a defendant ensure that the death penalty would not be imposed. According to the Court, the statute's selective death penalty provision "needlessly penalize[d] the assertion of a constitutional right." *Id.* (citing *Griffin*, 380 U.S. 609). In turn, the "inevitable effect" of the statute was to discourage a defendant's assertion of the Sixth Amendment right to a jury trial and the Due Process right not

to plead guilty. *Id.* at 581. Because that chilling effect was "unnecessary and therefore excessive," *id.* at 582, it was unconstitutional.

Similar reasoning underlay this Court's opinion in *Brooks v. Tennessee*, 406 U.S. 605 (1972). There, the Court invalidated a state statute that required a defendant desiring to testify to do so before any other defense witnesses. *Id.* at 609-12. The Court held that the statute unconstitutionally penalized a defendant's initial decision not to testify because that decision barred the defendant from testifying at the end of the case and thus "'cut[] down on the privilege (to remain silent) by making its assertion costly.'" *Id.* (quoting *Griffin*, 380 U.S. at 614).

This Court has applied the same reasoning in striking down penalties in numerous other contexts, both criminal and civil, including penalties on the right to vote, *see Harman v. Forssenius*, 380 U.S. 528, 540 (1965) ("It has long been established that a State may not impose a penalty upon those who exercise a right guaranteed by the Constitution"); the rights to free speech and association, *see, e.g., O'Hare Truck Service, Inc. v. City of Northlake*, 518 U.S. 712, 717 (1996) ("If the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. . . . Such interference with constitutional rights is impermissible") (internal quotation marks and citation omitted); *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 256 (1974) (striking down right-of reply statute that "exact[ed] a penalty" on speech); the right to travel, *see Shapiro v. Thompson*, 394 U.S. 618, 631 (1969) (holding that denial of welfare benefits constituted unconstitutional penalty on right to travel, (quoting *Jackson*, 390 U.S. at 570), *overruled in part on other grounds by Edelman v. Jordan*, 415 U.S. 651 (1974); and the right against compulsory self-incrimination, *see Spevak v. Klein*, 385



U.S. 511, 515 (1967) (citing *Griffin* for proposition that threat of disbarment constitutes a "penalty" on an attorney's right to remain silent in disciplinary proceedings) (opinion of Douglas, J.); *see also Lefkowitz v. Turley*, 414 U.S. 70, 83 (1973) ("plaintiffs' disqualification from public contracting for five years as a penalty for asserting a constitutional privilege is violative of their Fifth Amendment rights") (internal quotation marks and citation omitted).

Finally, only last Term, in *Mitchell v. United States*, 119 S. Ct. 1307 (1999), this Court applied *Griffin* in the sentencing context and held that, even though the defendant already had pled guilty, the district court could not draw an adverse inference from the defendant's refusal to testify at her sentencing hearing. The fact that the defendant's substantive guilt was no longer at issue was irrelevant. What was important was that the defendant still possessed a Fifth Amendment privilege. *Id.* at 1315-16 (citing *Estelle v. Smith*, 451 U.S. 454, 462-63 (1981)). As long as she retained the right to remain silent, she could not be penalized for her invocation of that right by means of an adverse inference that would lead to the imposition of a higher sentence. *Id.*

These cases make clear that the Court of Appeals properly applied the penalty analysis of *Griffin* and its progeny here. The proscription against penalizing constitutional rights is a fundamental principle that applies in both civil and criminal contexts, wherever an individual is forced to pay a price for the exercise of a constitutional right. Yet, based solely on Agard's exercise of his Sixth Amendment right to be present in the courtroom throughout his trial, *Allen*, 397 U.S. at 338, the prosecutor urged the jury to draw the adverse inference that Agard's testimony should be discounted because he had tailored his testimony to that of the prosecution's witnesses. J.A. 49. The prosecution was thus allowed to enlist Agard's exercise of

his right to be present at trial to aid in carrying its burden of proof and to increase the likelihood that Agard would be convicted. *See Griffin*, 308 U.S. at 613; *cf. Mitchell*, 119 S. Ct. at 1316. As the Court of Appeals correctly held, the prosecutor's comments penalized Agard's right to be present at trial by making his assertion of that right costly. Pet. App. 41a-43a. That is precisely the type of penalty prohibited by *Griffin* and its progeny.[2]

Moreover, to avoid that penalty, Agard either would have had to waive his confrontation rights and absent himself from the courtroom while the state's witnesses testified against him, or refrain from testifying altogether. This Court has held that it is "intolerable that one constitutional right should have to be surrendered in order to assert another." *See Simmons v. United States*, 390 U.S. 377, 394 (1968). Where, as here, credibility is the central issue at trial, *see* Pet. App. 34a; Br. of United States at 11, there is a very real possibility that a testifying defendant in Agard's position would be forced to waive his right to confront the witnesses against him in order to preserve his credibility with the jury. Pet. App. 41a ("The comments, which imply that a truthful defendant would have stayed out of the courtroom before testifying or would have testified before other evidence was presented, force defendants either to forgo

[2]The state's contention that Agard's Sixth Amendment right to be present at his trial was not violated because Agard fully exercised that right, Pet. Br. at 31-33, has been soundly rejected by this Court. *See, e.g., Brooks*, 406 U.S. at 611 n.6 ("The dissenting opinions suggest that there can be no violation of the right against self-incrimination in this case because Brooks never took the stand. But the Tennessee rule [requiring a defendant desiring to testify to do so first among defense witnesses] imposed a penalty for petitioner's initial silence, and *that penalty* constitutes the infringement of the right.") (emphasis added). *See also Griffin*, 380 U.S. at 613-14 (penalty of adverse inference violated defendant's constitutional right to remain silent notwithstanding fact that defendant fully exercised that right by not taking the stand).



the right to be present at trial, forgo their Fifth Amendment right to testify on their own behalf, or risk the jury's suspicion.") (footnote omitted). Thus, as in *Jackson*, the "inevitable effect" of comments such as those at issue here is to chill the defendant's exercise of his constitutional right to be present throughout his trial. *See Jackson*, 390 U.S. at 581.

The state and its *amici* argue that the Court's penalty analysis does not apply here because the penalty imposed on Agard was an adverse inference concerning his credibility, as opposed to his substantive guilt. Pet. Br. at 15; Br. of the United States at 18-26; Br. of the New York State Dist. Attorneys Ass'n at 22. That is a distinction without a difference. As the cases discussed above make clear, *supra*, pp. 6-9, the prohibition against penalizing an individual's exercise of a constitutional right has been applied in numerous contexts and has never been limited to adverse inferences of a criminal defendant's guilt. Moreover, this Court has recognized that where a criminal trial turns almost entirely on the credibility of the witnesses, "'impeaching the defendant's credibility is to imply, if not [to] prove, guilt.'" *Loper v. Beto*, 405 U.S. 473, 483 (1972) (plurality opinion) (invalidating impeachment by use of prior conviction resulting from trial in which defendant had been denied right to counsel) (quoting and adopting *Gilday v. Scafati*, 428 F.2d 1027, 1029 (1st Cir. 1970)). *Cf. Rock v. Arkansas*, 483 U.S. 44, 52 (1987) ("the most important witness for the defense in many criminal cases is the defendant himself"). Here, the parties do not dispute that the prosecution's case turned entirely on whether the jury believed Agard's testimony or that of the complaining witnesses. The adverse inference that the prosecution urged the jury to draw with respect to Agard's credibility thus *was* an adverse inference going to his substantive guilt, and was prohibited even under the state's artificially restrictive interpretation of this Court's penalty jurisprudence.

### 2. Agard Did Not Forfeit His Right to Be Free from Unconstitutional Penalties Merely Because He Testified on His Own Behalf.

The United States, as *amicus curiae*, contends that the Court's penalty jurisprudence is inapplicable here because once a defendant decides to testify, he may be treated the same as any other witness for the purpose of ensuring the reliability of his testimony. Br. of the United States at 13-18, 22. That is not the law. To the contrary, this Court has made clear that when a defendant takes the witness stand, he retains the rights guaranteed by the Constitution to all defendants and that those rights do not automatically yield to the prosecution's need to ensure the reliability of the defendant's testimony.

This Court twice has held that the interest in preventing improper influences on a defendant's testimony does not justify burdening the defendant's exercise of rights guaranteed by the Constitution. In *Brooks*, 406 U.S. at 612, the Court struck down a Tennessee statute that required criminal defendants wishing to testify to do so before all other defense witnesses. *See supra*, p. 8. That statute was an attempt to reconcile the "ancient practice of sequestering prospective witnesses in order to prevent their being influenced by other testimony" with the defendant's right to be present at trial. *Brooks,* 406 U.S. at 607. Despite recognizing the importance of preventing the defendant from "coloring his testimony to conform to what has gone before," the Court concluded that exacting a price for a defendant's exercise of his right to remain silent by foreclosing later testimony unless he chooses to testify first was "not a constitutionally permissible means of ensuring [the] honesty" of his testimony. *Id.* at 611. The *Brooks* Court thus flatly rejected the notion that the interest in preventing tailored testimony could justify treating a criminal defendant, whose rights are



protected by the Constitution, the same as other witnesses, who are not entitled to the same protections. *Id.* at 611 n.5.

In *Geders v. United States*, 425 U.S. 80 (1976), the Court struck down an order of the trial court prohibiting the testifying defendant from consulting with his attorney during an overnight recess, finding that it infringed the defendant's Sixth Amendment right to assistance of counsel. *Id.* at 91. Although the order was intended to prevent improper influence on testimony, the Court held that because that interest could be advanced by other means that would not infringe the defendant's Sixth Amendment rights, the conflict between the defendant's right to consult with his attorney during an overnight recess and the prosecutor's desire to prevent improper testimonial influence had to be resolved in favor of the defendant's Sixth Amendment right. *Id.*

*Brooks* and *Geders* make clear that the state's interest in preventing improper testimonial influence does not justify treating a defendant the same as any other witness when doing so would burden a constitutional right unique to the defendant.[3] Nor is it relevant that the state's witnesses would be vulnerable to impeaching comments by defense counsel had they been present in the courtroom during the testimony of other witnesses. Br. of United States at 11; *see also* Pet. App. 76a; Pet. Br. at 7, 41-42; Br. of United States at 24 n.11. Indeed, the *Brooks* Court rejected precisely such an argument when it noted that the burden imposed by a requirement that the defendant testify first among defense witnesses "is not lightened

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[3]*Perry v. Leeke*, 488 U.S. 272 (1989), is not to the contrary. *See* Pet. Br. at 30. There, the Court did not ask whether the defendant's Sixth Amendment rights were burdened, because it explicitly held that "in a short recess in which it is appropriate to presume that nothing but the testimony will be discussed, the testifying defendant does not have a constitutional right to advice." 488 U.S. at 284; *see also id.* at 281 (distinguishing *Geders*).

by the fact that Tennessee courts also require the chief prosecuting witness to testify first for the State if he chooses to remain in the courtroom after other witnesses are sequestered" because "of course . . . the State, through its prosecuting witness[es], does not share the defendant's constitutional right not to take the stand." *Brooks*, 406 U.S. at 611 n.5. It is clear, therefore, that when a defendant testifies, he does not forfeit the rights that the Constitution guarantees him *as a defendant*. Although the prosecution may seek to ensure the reliability of a witness's testimony, when that witness is the defendant, it cannot do so at the expense of his constitutional rights.

The United States attempts to obscure this unremarkable though fundamental rule of law by reference to cases holding that once a defendant takes the stand, he cannot avoid impeachment by relying on his Fifth Amendment right to remain silent. Br. of United States at 14-17. Those cases have no application here. In *Jenkins v. Anderson*, 447 U.S. 231, 238 (1980) and *Raffel v. United States*, 271 U.S. 494, 497 (1926), the Court held that once a defendant casts aside the "cloak" of the Fifth Amendment right to remain silent, his pre-trial silence can be used to impeach his credibility as a prior act inconsistent with his decision to testify at trial. Similarly, in *Brown v. United States*, 356 U.S. 148, 155-56 (1958), the Court held that once a defendant takes the stand, she has waived her Fifth Amendment right to silence and cannot invoke that right to evade cross-examination on matters to which she has testified on direct. Collectively, these cases stand for the proposition that once a defendant takes the stand, he waives his Fifth Amendment right to silence and cannot, therefore, continue to invoke its protections. They do not stand for the proposition that once a defendant takes the stand, he waives *all* of his constitutional rights and cannot invoke the protections afforded by *any* of them. Here, Agard exercised his Sixth Amendment right to attend his trial and certainly did not waive it by taking



the stand. The Fifth Amendment cases relied on by the state and its *amici* are thus entirely inapposite.[4]

The prosecutor's invitation to the jury to discredit Agard's testimony constituted a penalty of the most basic sort. Regardless of the fact that Agard testified in his own defense, the prosecutor's comments rendered Agard's assertion of his right to confront the witnesses against him more costly by casting doubt on his testimony—and, therefore, his defense—based on nothing but the fact that Agard exercised the rights to which he was entitled *as a defendant*. And, as explained below, because that penalty was entirely unnecessary, the prosecutor's comments violated Agard's constitutional rights under the Sixth Amendment, made applicable to the states through the Fourteenth Amendment.

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[4]Nor did Agard's counsel "open the door" to the prosecutor's comments as did defense counsel in *United States v. Robinson*, 485 U.S. 25 (1988). *See* Pet. App. 76a; *see also* Br. of United States at 24 n.11; Pet. Br. at 7, 37 n.15, 41-42. In *Robinson*, after the defendant had exercised his Fifth Amendment right not to testify, defense counsel misleadingly argued to the jury on summation that the government had denied defendant an opportunity to explain his version of the relevant events. 485 U.S. at 27-28. This Court held that, as a "fair response," the prosecutor was entitled on summation to inform the jury that defendant could have testified if he wished. *Id.* at 31-34. Significantly, the Court emphasized the fact that the prosecutor's comments did not constitute a penalty because they did not invite the jury to draw an adverse inference. *Id.* at 32. Here, in contrast, the prosecutor pointedly urged the jury to draw an adverse inference from Agard's exercise of his right to be present in the courtroom. J.A. 49. Moreover, by arguing that the prosecution witnesses had fabricated their testimony, Agard's counsel did not in any way "open the door" to the issue of whether Agard himself had used his presence at trial to tailor his testimony to the prosecution's case.

**B. The Prosecutor's Comments in Summation Were Not Only Unnecessary To, but Affirmatively Subverted, the Ascertainment of Truth Through the Adversary Process.**

To sustain the imposition of this penalty upon Agard's constitutional right to be present at his trial, the state must meet a heavy burden. This Court measures the legitimacy of the challenged governmental practice against the extent to which that practice impairs the policies underlying the right affected. *See, e.g., Jenkins*, 447 U.S. at 236-38. Where, as here, the right at issue is one guaranteed to the accused under the Confrontation Clause, the burden imposed must, as the state recognizes, be "*necessary* to further an important public policy." *See Maryland v. Craig*, 497 U.S. 836, 850 (1990) (emphasis added); *Coy v. Iowa*, 487 U.S. 1012, 1021 (1988); *see* Pet. Br. at 21.[5] The only public policy put forth by the state to defend its prosecutor's comments is the ascertainment of truth through the adversarial process. *See, e.g.*, Pet. Br. at 14, 27, 30. But penalizing a defendant's exercise of his right to be present in the courtroom—particularly where there is no

[5]That the state can cite only one federal case—*Illinois v. Allen*, 397 U.S. 337 (1970)—in which infringement of a defendant's right to be present at trial was deemed constitutional makes clear that infringement of that right is not countenanced except where necessary to avoid extraordinary harm. *See id.* at 338 (holding that defendant may be removed from courtroom where "he engages in speech and conduct which is so noisy, disorderly, and disruptive that it is exceedingly difficult or wholly impossible to carry on the trial"). The other two cases cited by the state, *Schmerber v. California*, 384 U.S. 757, 765 (1966) (holding that admission against defendant of nontestimonial evidence obtained from forced blood test did not violate the defendant's Fifth Amendment right against self-incrimination), and *Estelle v. Williams*, 425 U.S. 501, 505-06, 512 (1976) (holding that compelling a defendant to stand trial in his prison uniform violates the Fourteenth Amendment), did not involve the right to be present at trial.



evidence suggesting that the defendant has abused or waived that right—does not further that policy.

The prosecutor's comments here were in no way necessary to promote the ascertainment of the truth. In particular, the prosecutor's comments were made for the first time on summation and were simply a bald-faced attack on Agard's right to be present in the courtroom. *See* Pet. App. 46a. As the Second Circuit emphasized, the prosecutor did not point to any evidence supporting an inference that Agard tailored his testimony upon hearing the testimony of other witnesses; rather, the only support for that inference was Agard's presence at trial. Pet. App. 46a, 68a, 72a.[6] As Judge Winter recognized below, allowing such comment would ensure that in every case in which a testifying defendant exercises his right to be present in the courtroom, the government will have the opportunity to

[6]The state's contention that the prosecutor did provide a factual basis for her accusation of tailoring and that the Second Circuit simply misinterpreted the record is without merit. *See* Pet. Br. at 44-47. The comments that Agard was "slick," J.A. 45, that his testimony sounded "rehearsed," J.A. 48, and that he testified for the first time on cross-examination that Ms. Winder had slapped him during their first encounter, J.A. 48, were attacks on Agard's credibility. *See* Br. of United States at 23-24. Not one of those references, however, suggests that Agard tailored his testimony after hearing the other witnesses testify. Nor is the fact that Agard's testimony corroborated much of the complaining witnesses' testimony but for the denials of the crimes, J.A. 46-47, evidence of tailoring. Finally, the state's characterization of the prosecutor's reference to *defense counsel's* argument about the existence of Ms. Winder's boyfriend "fit[ting] the whole scenario here," J.A. 37, as a reference to evidence of tailoring by *Agard* is a flat misrepresentation of the record. *Compare* J.A. 37 (prosecutor noting that defense counsel "[came] up with the story that he says fits the whole scenario here, that there was a boyfriend involved") *with* Pet. Br. at 46 (arguing that prosecutor referred to "how *defendant's* explanation that Ms. Winder attacked him due to concern about her boyfriend was proffered because it 'fits the whole scenario here'") (emphasis added).

effect "an outright bolstering of the prosecution witnesses' credibility vis-a-vis the defendant's based solely on the defendant's exercise of a constitutional right to be present during the trial." Pet. App. 72a.[7] The prosecution would be allowed such unfounded bolstering even though prosecutors already have ample alternative means on cross-examination and in summation to challenge a defendant's testimony and credibility. Pet. App. 46a; *see, e.g.*, *Connecticut v. Cassidy*, 672 A.2d 899, 908 (Conn. 1996).[8]

This unsupported bolstering is not only unnecessary to further the truth-seeking function of the trial, but is affirmatively harmful to that goal. In the absence of any facts suggesting tailoring, comments casting suspicion on a defendant's exercise of his constitutional rights "are prejudicial and not at all probative." Pet. App. 46a; *see also Griffin*, 380 U.S. at 613. Such comments are no more probative as to guilty defendants than they are as to innocent defendants: a defendant whose testimony "fits" that of other witnesses because he is innocent is just as likely to suffer an adverse inference as a guilty

[7]Thus, it is the prosecution, and not the defense, that will enjoy a "tactical advantage[]" as a result of, and at the expense of, the defendant's exercise of his rights. *See* Pet. Br. at 23. Because this tactical advantage is gained at the expense of the defendant's constitutional right to be present at trial, it is different in kind from the advantage a prosecutor may gain by referring to the defendant's interest in the outcome of the case. *See* Pet. Br. at 45; Br. of United States at 24. Comment on the defendant's interest in the outcome of the case, sanctioned in *Reagan v. United States*, 157 U.S. 301 (1895), does not trigger the *Griffin* penalty analysis because it does not encourage the jury to draw an adverse inference from the defendant's exercise of a constitutional right.

[8]In her summation, the prosecutor did just that, arguing that Agard's prior statements, his demeanor, his interest in the outcome of the case, and the inconsistency between his recollection and that of certain of the state's witnesses, all cast doubt on his testimony. J.A. 44-46.



defendant whose testimony "fits" because he is in fact tailoring his story based on the testimony he has heard. Put another way, the prosecutor's use of such comments will be equally effective in convicting guilty *and* innocent defendants—directly contrary to the "ultimate objective" of our criminal justice system "that the guilty be convicted and the innocent go free." *Herring v. New York*, 422 U.S. 853, 862 (1975). *See also United States v. Nobles*, 422 U.S. 225, 230 (1975) ("The dual aim of our criminal justice system is 'that guilt shall not escape or innocence suffer.'") (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935)). Indeed, such a practice may be even *more* effective against innocent defendants, because a closer "fit," which in many cases would signify innocence rather than guilt, will invariably render a defendant more vulnerable to the prosecutor's attack. Thus, the effect of the practice is "to impede [the search for truth] and to infect a criminal proceeding with the clear danger of convicting the innocent." *Tehan v. United States ex rel. Shott*, 382 U.S. 406, 416 (1966).

As such, the practice defended by the state here violates the policies underlying the Confrontation Clause. This Court consistently has recognized that the fundamental policy underlying the Confrontation Clause is to promote the reliability of the evidence and to protect the adversary process by permitting the defendant to hear and challenge the evidence offered against him. *See, e.g.*, *Lilly v. Virginia*, 119 S. Ct. 1887, 1894 (1999) ("[t]he 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") (quoting *Craig*, 497 U.S. at 845); *White v. Illinois*, 502 U.S. 346, 356 (1992) (basic purpose of Confrontation Clause is to promote integrity of factfinding process); *Craig*, 497 U.S. at 846 ("mission of the Confrontation Clause is to advance a practical concern for the accuracy of the truth-determining

process in criminal trials") (internal quotation marks and citation omitted); *Coy*, 487 U.S. at 1019-20 (confrontation rights promote fairness and ensure integrity of the factfinding process); *Lee v. Illinois*, 476 U.S. 530, 540 (1986) (noting that confrontation right "promotes reliability in criminal trials" and serves as a safeguard "to promote to the greatest possible degree society's interest in having the accused and [the] accuser engage in an open and even contest in a public trial"); *Ohio v. Roberts*, 448 U.S. 56, 65 (1980) (underlying purpose of Confrontation Clause is "to augment accuracy in the factfinding process by ensuring the defendant an effective means to test adverse evidence").

Prosecutorial comment casting doubt on the defendant's testimony based solely on his presence at trial impairs, rather than promotes, the reliability of the criminal process and its adversary nature. Because the effectiveness of adverse comment on a defendant's presence at trial has no relation (at best) or an inverse relation (at worst) to the defendant's culpability, the inference of tailoring drawn from that comment is, precisely like the comment in *Griffin*, "infused with unreliability." Pet. Br. at 26. Moreover, unlike impeachment of a defendant's testimony upon cross-examination, which "may enhance the reliability of the criminal process" because it "allows prosecutors to test the credibility of witnesses by asking them to explain prior inconsistent statements and acts," *Jenkins*, 447 U.S. at 238, generic comments made at the summation stage allow the prosecution to sidestep the adversarial give-and-take, because the defendant has no realistic chance to respond. *See* Pet. App. 40a n.6. *Cf. Polk County v. Dodson*, 454 U.S. 312, 318 (1981) ("The system assumes that adversarial testing will ultimately advance the public interest in truth and



fairness"). [9]

Finally, asking the jury to draw an adverse inference from the defendant's presence at trial profoundly disturbs the balance of rights and obligations in the adversarial criminal process. In reaffirming *Griffin*, this Court recently emphasized the importance of that balance:

> The rule against adverse inferences is a vital instrument for teaching that the question in a criminal case is not whether the defendant committed the acts of which he is accused. The question is whether the Government has carried its burden to prove its allegations *while respecting the defendant's individual rights*.

*Mitchell*, 119 S. Ct. at 1316 (emphasis added). *See also Oregon v. Hass*, 420 U.S. 714, 722 (1975) (recognizing that "[w]e are, after all, always engaged in a search for truth in a criminal case *so long as the search is surrounded with the safeguards provided by our Constitution*") (emphasis added). To allow the state to "enlist the defendant in [carrying its burden]," *Mitchell*, 119 S. Ct. at 1316, would be to subvert the adversarial balance by transforming a defendant's exercise of constitutionally protected rights into an unfair advantage for the state.

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[9] That the defendant could try to counter the prosecutor's blanket accusation by moving to reopen the case, Pet. App. 65a, Pet. Br. at 36-37, hardly cures the constitutional violation. As the state concedes, Pet. Br. at 36, reopening of the case is within the trial court's discretion; therefore, it is by no means certain that the defendant would be able to take the stand again. Even if he could, there is little or nothing he could say to rebut such a generic claim. In effect, the state would have this Court hold that it is permissible to create a presumption that a testifying defendant who exercises his right to be present at trial has tailored his testimony as long as the defendant may be given a chance to attempt to "rebut" the presumption.

The state's argument that the Second Circuit's holding "skews the level playing field" in favor of the *defendant* is therefore completely untenable. Pet. Br. at 24. Preventing prosecutors from attacking a defendant's credibility on the basis that he exercised his right to be present at trial would not, as the state asserts, permit use of the Sixth Amendment as a "license to commit perjury free from the risk of impeachment designed to detect . . . falsehoods" in his testimony. *Id.* In support of this argument, the state and the United States rely on an array of cases in which a criminal defendant was forbidden to invoke a constitutional right to avoid being cross-examined with *evidence* inconsistent with his trial testimony. Br. of United States at 15-18; Pet. Br. at 20 n.5, 24. *See, e.g., Harris v. New York*, 401 U.S. 222, 224-26 (1971) (defendant impeached on cross-examination with prior inconsistent statements taken in violation of *Miranda* rights); *Walder v. United States*, 347 U.S. 62, 65-66 (1954) (defendant impeached with evidence seized in violation of Fourth Amendment where existence of such evidence disproved defendant's testimony); *see also Jenkins*, 447 U.S. at 238 (defendant impeached on cross-examination with prior inconsistent conduct); *Raffel*, 271 U.S. at 497-98 (same).

These cases turn on the notion that cross-examination helps further the truth-seeking function of the trial because it "allows prosecutors to test the credibility of witnesses *by asking them to explain prior inconsistent statements and acts*." *Jenkins*, 447 U.S. at 238 (emphasis added).[10] But that is not this case. Rather, the narrow issue presented here is whether a prosecutor

[10]*See also Perry*, 488 U.S. at 282-83 (importance of cross-examination outweighed defendant's right to confer with counsel during cross-examination); *Brown*, 356 U.S. at 154-57 (defendant not permitted to invoke Fifth Amendment to evade cross-examination with respect to issues testified to on direct).



may urge the jury to draw an inference adverse to the defendant's credibility "1) for the first time on summation; 2) without facts in evidence to support the inference; [and] 3) in a manner which directly attacks the defendant's right to be present during his entire trial." Pet. App. 46a. Accordingly, cases holding that a defendant may not use a constitutional right as a shield to avoid being cross-examined with *facts* that would reveal the falsity of his testimony are entirely inapposite. As the Court of Appeals explained:

> Lawyers may not raise innuendo relating to bias or credibility from the shadows of unlitigated facts for the first time in their closing arguments. Such tactics prevent rebuttal and cross-examination, which are the engines of the truth-finding process in an adversarial criminal trial. Without facts in evidence to support an inference of fabrication, such remarks are prejudicial and not at all probative. They certainly do not provide an important reason for us to cut back on a defendant's exercise of his Sixth Amendment rights.

Pet. App. 46a. None of the cross-examination cases cited by the state and its *amici* is remotely relevant to this issue and none, therefore, compels or even supports reversal of the decision below.

Nor does *United States v. Dunnigan*, 507 U.S. 87, 96-98 (1993) (right to testify not violated by sentence enhancement for perjury), or *Nix v. Whiteside*, 475 U.S. 157, 171-75 (1986) (right to testify and right to counsel not violated where defendant's counsel dissuaded him from offering perjured testimony), support the state's argument. Pet. Br. at 24. In those cases, the trial court made a *factual finding* that the defendant committed perjury, *Dunnigan*, 507 U.S. at 89, 95-96, or intended to commit perjury. *Whiteside*, 475 U.S. at 182 (Blackmun, J., concurring). Similarly unavailing is *United*

*States v. Nobles*, 422 U.S. 225 (1975). Pet. Br. at 24. In that case, defense counsel sought to impeach the credibility of prosecution witnesses through the testimony of an investigator, but refused to produce the investigator's contemporaneous report concerning the conversations at issue. 422 U.S. at 227-32. The Court held that the trial judge's order precluding the investigator from testifying without disclosing the report did not violate the defendant's rights to compulsory process and cross-examination because the Sixth Amendment does not allow the defendant to escape the "legitimate demands of the adversarial system" by deliberately presenting only half of a witness's knowledge. *Id.* at 241.

While the truth-seeking function of the adversary system legitimately demands that a defendant not commit perjury, not present "half-truths," and not testify "free from the embarrassment of impeachment evidence from the defendant's own mouth," *Hass*, 420 U.S. at 723, that function is not furthered where, as here, the prosecutor reaches beyond "evidence from the defendant's own mouth" to attack the defendant's credibility, for the first time on summation, solely on the basis of his exercise of a constitutional right. The prosecutor's comments here—which were based on nothing more than Agard's presence at his own trial—in no way furthered the truth-seeking function of the adversary process, as the comments were completely divorced from any testing of this particular defendant's guilt or innocence. The state therefore placed a penalty on Agard's constitutional right to confront his accusers without advancing any state interest. This the Constitution forbids.



## CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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