No. 98-1170

IN THE SUPREME COURT OF THE UNITED STATES

LEONARD PORTUONDO, SUPERINTENDENT, FISHKILL CORRECTIONAL FACILITY,
Petitioner

v.

RAY AGARD
Respondent

BRIEF OF RESPONDENT

Filed August 9, 1999

QUESTION PRESENTED

Whether the court of appeals correctly held that it is constitutional error to draw an adverse inference against a testifying defendant without any proof of tailoring, based solely on the exercise of his rights to be present and to confront his accusers.

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STATEMENT OF THE CASE

The Complainants' Allegations

Nessa Winder and *Breda Keegan*, old friends and roommates, first met respondent at a club on April 27, 1990. Winder agreed to go back to his apartment, and based on a talk they had on the subway ride home, after someone had "hassle[d]" them because Winder "was a white girl with a black man," respondent showed her a gun that he kept in his closet (W:34-40, 45-50, 167-70; K:232-37, 266-68, 275-76).[1] They engaged in consensual sex that night and again the next morning, and spent the day and another night together. They did not have further sex, because Winder's English boyfriend was coming to visit sometime the following week and she decided they "shouldn't go on like this" (W:41-44, 51-58, 170-77, 180). Respondent was "very understanding," and she testified that she had had a "great time" with him (58).

The following Saturday, Winder and Keegan met respondent at the same club. They later went to another bar with two of respondent's friends, and the five left for respondent's house between 4:00 and 4:30 a.m. (W:58-66, 180-82; K:238-45, 268-72). When they arrived, respondent's friends left to buy beer and the other three went upstairs. Winder fell asleep on respondent's bed, and Keegan claimed that respondent became verbally abusive and threatened her with violence, including pointing a gun at her (245-50). Keegan decided to leave, and accepted a ride home from one of respondent's friends

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[1] Numbers refer to the trial transcript; "S" to the sentencing minutes; "Pet.App." to the appendix to petitioner's certiorari petition; and "JA" to the parties' joint appendix in this Court.

when they returned. She testified that respondent again threatened her (250-52, 274-75), but this was denied by *Adolph Kiah*, who was called as a defense witness (524-25, 535). Keegan got home at around 6:00 a.m. and immediately went to bed without calling the police (252).

Winder awoke at 9:30 a.m. Respondent woke up also, and she told him she was in a rush to get home because she was expecting her English friend. He allegedly cursed her after she declined to have sex, and "busted" her lip (66, 73-77). During the next 3 1/2 hours, she said she was punched in the eye, threatened with a gun and sexually assaulted eight times (three acts of rape, three of oral sodomy and two of anal sodomy) (77-98). Twice she went to the bathroom by herself, and she admitted that she did not stay there behind the locked door or call out the window for help; nor did she ever attempt to run out the front door of the apartment, even when respondent left her to go to the bathroom and kitchen (81-83, 92-93, 95). Eventually, respondent called a cab for her (98-99), and he left a general apology on her answering machine the next day (108-09, 158-60).

Respondent's Testimony

Respondent, *Ray Agard*, essentially corroborated the complainants' accounts of the first weekend that he met them (*see* 649-59). The second weekend, Keegan was very loud when they got back to his house, and he went to sleep as soon as she left, about 6:00 a.m.(667-68, 698-704). He and Winder awoke about three hours later and had vaginal intercourse; they fell asleep again, reawaking between noon and 1:00 p.m. Winder was "kind of lazy" at

first, but when she noticed the clock she became "upset" and got up. She said "I got to get home. He's going to kill me," referring to her boyfriend, and she acted "hyper" (668-70, 710-11). Attempting to calm her down, respondent approached from behind and took hold of Winder's shoulders. She turned around and "smacked" him and then grabbed his lower lip, scratching him on the inside [Winder acknowledged scratching his lip: 88-89]. Reflexively, in response to the pain this caused, he used the palm of his hand to push her away, "hit[ting]" or "mush[ing]" her in the eye (670-72, 711, 716-19, 721-22, 725-26).

The next day, respondent called to apologize "because I felt that I should not have mushed her in the face" (673-74, 727). "I'm a guy. You feel kind of bad when you have an argument with a girl that you thought you liked, and it gets to the point where you have done something physical" (728). He was arrested the following day at the credit counseling company where he worked, and an unloaded gun, plus bullets stored with it, were recovered from his bedroom closet (Det. Giardina: 329-31, 333-41).

The Medical Evidence

Dr. *Ardeshir Karimi* saw Winder late on May 6, 1990. Her eye was black and blue, but there was no sign of injury to her lip (411-12, 429-30, 434). Winder testified that the two acts of anal intercourse she had allegedly been forced to engage in had hurt very much, at the time and later (94-96, 164-65, 222-24). However, Karimi's internal examination revealed no abnormalities of any kind –

e.g. redness, black and blue marks or other color change, or the presence of foreign particles – in either the anal (or vaginal) area (417, 428-29, 431-33). Also, Dr. *Robert Lewis*, a serology expert (444), determined that sperm was present only on the vaginal slides; all of the slides and swabs containing mouth and rectal material tested negative (453-56, 474-78).

Prosecutor's Remarks on Summation

The prosecutor noted that respondent was "the one who had an answer for everything" (JA 45), and "[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" (JA 46-47). She returned to this theme near the end of her summation (JA 49):

> You know, ladies and gentlemen, 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.
>
> [objection overruled]
> 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?
>
> [objection overruled]
> He's a smart man. I never said he was stupid. . . . He used everything to his advantage.

The Charge, Deliberations and Verdict

Nineteen counts were submitted (*see* 847-97), two relating to Keegan – menacing and second degree possession of a weapon [possession with intent to use unlawfully, P.L. 265.03] – and fourteen associated with Winder: second degree possession of a weapon, nine sexual offenses [multiple counts of forcible rape, oral and anal sodomy and one count of sexual abuse, P.L. 130.35, 130.50, 130.65], unlawful imprisonment in the first and second degrees, intimidating a witness and felony assault [causing physical injury, no intent required, P.L. 120.05(6)]; respondent was also charged with two counts of "simple" possession of a weapon in the third degree [P.L. 265.02(1), misdemeanor level possession of an unloaded firearm coupled with prior conviction of crime; no 'intent to use unlawfully' element], and one lesser possession count in the alternative.

Deliberations lasted for four days, during which the jurors were sequestered (914-1054). They asked to hear the testimony of several witnesses, including respondent and Winder, and also requested re-instruction on the anal sodomy counts and the definition of "beyond a reasonable doubt" (915-22, 963, 1031). Respondent was ultimately acquitted of all charges relating to the complainants but two: one anal sodomy count and felony assault (1061-65); the assault conviction was later dismissed as repugnant to the rape acquittals (1073; *see* 1049, 1066). He was also convicted of both counts of third degree weapons possession.[2]

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[2] On respondent's state court appeal, the Appellate Division modified the judgment by dismissing one of the

SUMMARY OF ARGUMENT

The State seeks to impugn the credibility of *every* testifying defendant based solely on the defendant's exercise of his Sixth Amendment right to attend his trial, regardless of whether the State has adduced *any* evidence that he tailored his testimony. In numerous cases, this Court has condemned the needless burdening of constitutional rights, particularly where, as here, no overriding state interest is served: on the contrary, there is no legitimate basis to treat the Sixth Amendment as an unfair litigation advantage. The State is perfectly free to adduce evidence that the defendant tailored his account, and to engage in appropriate cross-examination. To go further, and comment on the defendant's right to be present as a means to cast wholesale suspicion on his account of the facts, is to provide an unfair litigation advantage to the prosecution. For the defendant's testimony may "fit" that of other witnesses for reasons other than hearing them in court – most notably, because he has not "tailored" at all, but rather is telling the truth; an inference of fabrication based on presence is accordingly speculative at best and may often be completely unfounded. Moreover, the risk of tailoring based on courtroom presence is minimal for defendants due to, *e.g.*, generous pre-trial discovery policies in modern times; defendants know a great deal about the case before they ever enter the courtroom, and are

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weapons' possession counts (Pet. App. 7). Respondent has fully served his sentence on the remaining weapons count and did not raise any issues with respect to this conviction in his habeas petition.

thus far less prone to being influenced by the testimony of others.

The conversion of a constitutional prerogative into an impeachment device also undermines the presumption of innocence. All defendants have confrontation rights, and the credibility of the innocent and guilty alike is undermined by spotlighting the "benefit" this provides. Indeed, the more coherent and consistent and fleshed out a defendant's testimony is – factors typically pointing to veracity – the more "tailored" *i.e.* unworthy of belief it will appear. The defense would also be saddled with a burden to rebut a charge of tailoring, which, despite petitioner's facile reference to the defendant's purported ability to reopen the case, would be virtually impossible to meet. If the defendant tried to do so, moreover, his Fifth Amendment privilege would be compromised: in anticipation of a recent fabrication charge based on hearing other witnesses in court, he would need to find a prospective rebuttal witness to whom to make a detailed statement of the facts before the trial started.

Even if comments on the defendant's unique *opportunity* to tailor are constitutionally permissible, the prosecutor in this case went further: she lodged an affirmative accusation of tailoring without any evidentiary support whatsoever. Thus, simply by virtue of his exercise of his right to be present, respondent was tagged a liar and, concomitantly, the credibility of the State's witnesses was bolstered. This was unquestionably a penalty imposed on the exercise of his Sixth Amendment rights. The court below found that the prosecutor's comments violated respondent's right to due process as well; it was fundamentally unfair to raise a tailoring claim for the first time

on summation, with no record support and no meaningful opportunity for the defendant to respond. Although petitioner argues that respondent's Fourteenth Amendment rights to due process and a fair trial were not violated, this issue was neither presented in its Question Presented nor is it fairly included therein. Accordingly, the claim should not be considered by this Court.

The finding of a due process violation was, in any event, amply justified. Because the State has not contested the additional finding that the constitutional error (whether based on the Fifth, Sixth or Fourteenth Amendments) was sufficiently harmful to warrant granting the writ, the judgment below should be affirmed.

ARGUMENT

THE COURT OF APPEALS CORRECTLY HELD THAT IT IS CONSTITUTIONAL ERROR TO DRAW AN ADVERSE INFERENCE AGAINST A TESTIFYING DEFENDANT WITHOUT ANY PROOF OF TAILORING, BASED SOLELY ON THE EXERCISE OF HIS RIGHTS TO BE PRESENT AND TO CONFRONT HIS ACCUSERS.

I. Comments which invite the jury to draw an adverse inference against the defendant solely due to his exercise of his Sixth Amendment rights should be prohibited.

The State seeks permission to impugn the veracity of *every* defendant who takes the stand with the fact that he exercised his Sixth Amendment right to attend his trial. Petitioner maintains that a testifying defendant should not be treated any differently than ordinary witnesses,

yet propounds a rule which makes just such a distinction: defendants, unlike other witnesses, have confrontation rights, and defendants alone would be subject to a sweeping charge of tailoring grounded on that circumstance. Moreover, the charge need not be supported by any proof, according to petitioner – under the guise of leveling the playing field, the State contends that it should be entitled to impugn the credibility of all defendants, innocent and guilty alike, based on nothing more than rank speculation that they *might* have tailored their testimony after hearing other witnesses. As the court below correctly held, the rule petitioner advocates violates the defendant's Fifth and Sixth Amendment rights.

A. The court of appeals properly determined that respondent's Sixth Amendment rights were violated by the prosecutor's comments on summation, which significantly burdened his right to be present without advancing any legitimate state interest.

A practice by which the State needlessly penalizes the defendant for exercising his constitutional rights is itself unconstitutional. This broad principle was clearly stated in *Griffin v. California*, 380 U.S. 609 (1965), a case relied on by the court of appeals to support its finding of constitutional error in this case. *See also Grunewald v. United States*, 353 U.S. 391, 425-26 (1957) (concurring opinion of four Justices) (hard to conceive of circumstances "that would justify use of a constitutional privilege to discredit or convict a person who asserts it. The value of constitutional privileges is largely destroyed if persons can be penalized for relying on them").

Griffin's penalty analysis has been applied in subsequent cases as well, and has not been limited to practices which implicate only Fifth Amendment rights. For example, the same reasoning was used in *United States v. Jackson*, 390 U.S. 570 (1968), to strike down a death penalty provision. Under the statute, only a defendant who asserted his Sixth Amendment right to a jury trial risked a sentence of death; "the defendant who abandons the right to contest his guilt before a jury is assured that he cannot be executed," because only a jury could impose that ultimate penalty (*id.* at 581). This Court noted that "[i]f the provision had no other purpose or effect than to chill the assertion of constitutional rights by penalizing those who choose to exercise them, then it would be patently unconstitutional" (*id.*). *See also, e.g., Mitchell v. United States*, 119 S.Ct. 1307, 1316 (1999) (trial court "imposed an impermissible burden on the exercise of the constitutional right against compelled self-incrimination" by holding defendant's silence against her at sentencing); *Brooks v. Tennessee*, 406 U.S. 605, 610-11 (1972) (law which "exacts a price for [defendant's] silence by keeping him off the stand entirely unless he chooses to testify first" ruled unconstitutional; it "casts a heavy burden on a defendant's otherwise unconditional right not to take the stand," thereby improperly "cut[ting] down on the privilege . . . by making its assertion costly"); *Shapiro v. Thompson*, 394 U.S. 618, 629-31 (1969) (citing *Jackson*, striking down law which "unreasonably burden[ed]" constitutional right to travel); *Harman v. Forsseni*, 380 U.S. 528, 540 (1965) (ruling unconstitutional a provision which abridged right to vote; "It has long been established that a State may not impose a penalty upon those who exercise a right guaranteed by the Constitution"); *cf. Zant v. Stephens*, 462 U.S. 862, 885 (1982) (invalid to "authorize[ ] a jury to draw adverse inferences from conduct that is constitutionally protected").

Even if the particular governmental practice at issue has a perfectly legitimate objective, it would still be unconstitutional if it "needlessly chill[s] the exercise of basic constitutional rights" (*Jackson, supra*, 390 U.S. at 582). Therefore, in determining whether constitutional error has occurred, it is necessary to consider not only whether the State's objective is reasonable in itself, but also whether that objective can be achieved by means which do not exact a price for the defendant's assertion of his rights (*id.* at 582-83). As petitioner has acknowledged, the burdening of constitutional rights is "permissible" only "when the benefit to be achieved is of sufficient magnitude and the impairment of the right is not appreciable" (Pet.Br., p.17; *see id.*, pp.19, 24-27).

In this case, two fundamental constitutional rights were targeted by the prosecutor: respondent's twin exercise of his Sixth Amendment rights to be present at trial and confront his accusers and his Fifth and Sixth Amendment right to testify on his own behalf, all rights secured in state proceedings by the Fourteenth Amendment. *See, e.g., Rock v. Arkansas*, 483 U.S. 44, 51-53 (1987); *Illinois v. Allen*, 397 U.S. 337, 338 (1970); *Pointer v. Texas*, 380 U.S. 400, 403 (1965). With credibility the only issue for the jury to decide, the prosecutor used these rights to convert the plausibility of respondent's account – he was "the one who had an answer for everything," "[a] lot of what he told you corroborates what the complaining witness told

you. The only thing that doesn't is the denials of the crimes. Everything else fits perfectly" – into a liability; endorsed by the trial court, which overruled defense counsel's objections, the prosecutor urged the jury to dismiss respondent's testimony as a fabrication based solely on the "benefit" and "advantage" he alone had: "he gets to sit here and listen" 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?"

Unquestionably, respondent's confrontation rights were asserted at great cost to the defense. The only way to avoid this generic form of "impeachment," moreover, is to chose between the important right to be present or the equally important right to testify. Clearly, to sustain such a forced election of rights, or, alternatively, to justify the automatic impugning of a defendant's credibility if such an election is not made, the State must proffer a substantial overriding interest. It purports to do so, arguing that the prosecutor's comments were a legitimate form of "impeachment" which fosters the search for truth. This is so, petitioner claims, because in *every* case where an unsequestered defendant takes the stand – whether or not there is evidence that he has actually used the "benefit" he has to his "advantage" – the inference of tailoring is so logical, and the prospect of tailoring so likely, that the defendant's exercise of his Fifth and Sixth Amendment rights must be flagged to the jury as a license to commit perjury. Petitioner's premise is flawed, however, and its interest in promoting reliable verdicts cannot justify the kind of burdening of defendant's rights at issue here.

First, there are a number of explanations for why the defendant is able to "answer" all pertinent questions put to him, or why his account "fits" the State's evidence "perfectly" except for his "denials of the crimes": most notably, the defendant is telling the truth. *See Doyle v. Ohio*, 426 U.S. 610, 617-18 (1976) (impeachment of defendant's credibility with proof of his post-arrest silence prohibited in part because such silence is "ambiguous," and a negative inference is therefore not necessarily warranted). If the jury can be asked to consider the defendant's opportunity to adjust his account based on the assertion of his confrontation rights, without any proof that he actually used the opportunity to his advantage, the presumption of innocence is effectively undermined – resting on no firmer ground than rank speculation, the defendant's testimony is singled out for special scrutiny and his credibility blanketly assailed. The defendant's status, in turn, is used against him, and the innocent defendant who has not tailored his testimony is tarred to the same degree as the guilty defendant who has. This is hardly a "litigation boon" to the defense (Pet.Br., p.34). *See James v. Illinois*, 493 U.S. 307, 314 (1990) (approving impeachment rules which "discourage[ ] perjured testimony *without discouraging truthful testimony*" [emphasis added]).[3]

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[3] This was not the case in *Perry v. Leeke*, 488 U.S. 272 (1989), where this Court found no error in precluding the defendant from conferring with his lawyer during a brief, 15-minute recess between direct and cross-examination: the Court expressly noted that cross-examination of an uncounselled witness "is more likely to lead to the discovery of truth" (488 U.S. at 282). In addition, although there is no constitutional right to consult

Second, the State has legitimate, time-honored methods for establishing a tailoring claim, if such a claim is valid, without punishing the defendant for exercising his constitutional prerogatives: the introduction of impeachment evidence such as prior inconsistent statements, appropriate cross-examination and fair comment on the evidence during summation. Thus, if proof that the defendant tailored his testimony is available or can properly be developed, the prosecutor is certainly free to adduce such evidence and to use it, in support of an argument that the defendant fabricated his version of events and should not be believed or for any other relevant purpose. Significantly, virtually all of the cases petitioner cites address standard forms of impeachment *evidence*. *See* cases cited in Pet.Br., p.20 incl. n.5, such as *Jenkins v. Anderson*, 447 U.S. 231, 235-38 (1980) (approving impeachment of defendant's credibility with proof of pre-arrest silence); *Harris v. New York*, 401 U.S. 222, 224-25 (1971) (same re: prior inconsistent statements made to police in violation of *Miranda* rights); *Brown v. United States*, 356 U.S. 148, 154-56 (1957) ("If [the defendant] takes the stand and testifies in his own defense, his credibility may be impeached and his testimony assailed like that of any other witness, and the breadth of his waiver is determined by the scope of relevant cross-examination").

Third, whether or not evidence of tailoring is adduced, there is no justification for deriding the defendant's Sixth Amendment rights as an unfair litigation

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with counsel while testifying (*id.* at 281), a defendant *does* have a constitutional right to be present at trial.

advantage: at most, the defendant's opportunity to hear other witnesses *might* serve to explain how he happened to modify or shape his testimony; it is not evidence of tailoring in its own right. *Cf. Grunewald v. United States*, *supra*, 353 U.S. at 420 ("[the defendant] was subject to cross-examination impeaching his credibility just like any other witness," but "[t]his does not . . . resolve the question whether in the particular circumstances of this case the cross-examination should have been excluded because its probative value on the issue of [defendant's] credibility was so negligible as to be far outweighed by its possible impermissible impact on the jury"). And, where the prosecutor has an evidentiary basis to argue that the defendant altered his story (an entirely appropriate attack on his credibility), it does not legitimately advance the State's cause to note that the defendant had received "a big benefit and advantage that other witnesses did not have, he got to sit here and listen to all the proof before he took the stand." *Cf. Wainwright v. Greenfield*, 474 U.S. 284, 295 (1986) ("the State's legitimate interest in proving [defendant's sanity] could have been served by carefully framed questions that avoided any mention of the defendant's exercise of his constitutional rights to remain silent and to consult counsel"). The latter comments have no probative content whatsoever, and are instead an impermissible burdening of the defendant's constitutional rights to be present at trial and to confront his accusers face-to-face. *See, e.g., United States v. Jackson*, *supra*, 390 U.S. 570.

Absent evidence of tailoring, the endorsement of petitioner's position would permit impeachment by speculation and innuendo – hardly conducive to the search

for truth. On the contrary, armed with nothing more than defendant's presence at trial, the prosecutor could highlight factors which typically point to the speaker's honesty – no inconsistencies, no gaps, few deviations from the accounts of opposing witnesses except on material points – and convert them instead into reasons to doubt the defendant's veracity. Such an argument also permits the State to undermine the defendant's credibility wholesale, as to all the particulars of his account, and concomitantly bolster the credibility of the State's witnesses. As a result, the defendant is severely punished for exercising his Sixth Amendment rights, and thus "do[ing] what the law plainly allows him to do." *United States v. Goodwin*, 457 U.S. 368, 372 (1982).

Finally, the risk of tailoring based on presence while others testify is generally far lower for defendant witnesses than other witnesses, and is virtually non-existent with respect to material facts. In modern times, a criminal defendant is afforded broad discovery rights and corresponding access to a wealth of pre-trial discovery (police reports with witness statements, medical reports, grand jury minutes, etc.). In addition, and also in contrast to other witnesses, the defendant has a right to counsel. From the moment he is charged, throughout the typically considerable period before the trial is held, the defendant has an advocate whose job it is to investigate the facts, to uncover weaknesses in the State's case, and to consider as well the points on which the defendant is most vulnerable. Therefore (although unbeknownst to the jury), he has a very good idea of what the prosecution witnesses will say before they appear at trial, and has ample time to fashion the best "story" possible if he is determined to lie

on the stand. Significantly, *all* witnesses have the *opportunity* to fabricate, in myriad ways, and cross-examination, the " 'greatest legal engine ever invented for the discovery of truth' " (*California v. Green*, 399 U.S. 149, 158 [1970]), provides very effective tools for exposing perjury.

An ordinary witness, in contrast, will be far less prepared and knowledgeable about the case overall, and concomitantly far more susceptible to influence by other witnesses. Even with respect to non-defendant witnesses, moreover, the importance of the sequestration rule is hardly as "profound" as petitioner maintains (Pet.Br., p.28). Professor Wigmore himself acknowledged that the rule was inspired not by the routine practice of tailoring, but rather by the "*occasional* readiness of the interested person to adapt his testimony" (*Brooks v. Tennessee, supra*, 406 U.S. at 607, quoting Wigmore [emphasis added]). In New York, the exclusion of witnesses is not even a matter of right, but one addressed to the trial court's discretion (*see People v. Medure*, 178 Misc. 2d 878, 880 [Sup.Ct., Bronx Co., 1998] and cases cited therein), and the federal rule authorizes an exemption for one "whose presence is shown by a party to be essential to the presentation of his cause" (Fed.R.Evid. 615).

Respondent does not contend that sequestration has no validity in curbing the tailoring of testimony. However, it is clearly far more effective when applied to non-party witnesses than to the defendant. Further, there is no countervailing policy at stake with the ordinary witness, whereas the defendant has a concomitant constitutional right to both face his accusers and to testify on his own behalf. To eliminate even the barest possibility of tailoring, sequestration is accordingly a reasonable precaution

for all witnesses save the defendant. In his case, of course, forced sequestration is forbidden by the Sixth Amendment; and, in keeping with the dictates of *Griffin*, *Jackson* and other decisions previously discussed, it is clearly unwarranted to permit adverse comment on a defendant's rights simply to reduce not the *fact* of tailoring – such proof, if any, can be developed independently – but the mere *possibility* of it.

Significantly, this Court has twice been asked to weigh the policy considerations favoring sequestration of witnesses generally against specific constitutional rights of the accused, and it has twice resolved the question in the defendant's favor. In *Brooks v. Tennessee*, 406 U.S. 605 (1972), the Court struck down a state law which required the defendant to testify as the first witness for the defense if he testified at all. The statute was

> related to the ancient practice of sequestering prospective witnesses in order to prevent their being influenced by other testimony in the case. . . . Because the criminal defendant is entitled to be present during trial, and thus cannot be sequestered, the requirement that he precede other defense witnesses was developed by court decision and statute as an alternative means of minimizing this influence on him.

Id. at 607. The Tennessee law reflected "an apparent attempt at symmetry," for the State's chief prosecuting witness was also required to testify first if he wanted to remain in the courtroom for the balance of the trial (*id.* at 611, n.5). There was "a fundamental distinction" between the two sides, however: "the State, through its prosecuting witness, does not share the defendant's constitutional

right not to take the stand. Thus, the choice to present the prosecuting witness first or not at all does not raise a constitutional claim secured to the State, as it does in the situation of the defendant" (*id.*). That the statute reflected a legitimate "interest in preventing testimonial influence" was acknowledged, but "[p]ressuring the defendant to take the stand, by foreclosing later testimony if he refuses, is not a constitutionally permissible means of ensuring his honesty" (*id.* at 611). Here, too, pressuring a defendant to waive his right to be present during the government's presentation of proof, in order to preclude the prosecutor from impugning his credibility on tailoring grounds if he elects to testify, should be forbidden.

Similarly, in *Geders v. United States*, 425 U.S. 80 (1975), the rationale of sequestration was deemed insufficient to interfere with the defendant's Sixth Amendment right to counsel. An overnight recess had been declared during the defendant's testimony, and the trial court's order that he not consult with counsel during that period was held unconstitutional. Once again, the benefits of sequestration generally were acknowledged, as were the trial judge's efforts at evenhandedness: before each recess, *all* witnesses whose testimony had not been completed were admonished not to discuss their testimony with anyone (*id.* at 87-88). Nevertheless, there "are other ways to deal with the problem of possible improper influence or 'coaching' of a witness" besides interfering with the right to counsel. For example,

> [a] prosecutor may *cross-examine* a defendant as to the extent of any "coaching" during a recess, subject, of course, to the control of the court. *Skillful cross-examination could develop a record*

> *which the prosecutor in closing argument might well exploit* by raising questions as to the defendant's credibility, if it developed that defense counsel had in fact coached the witness as to how to respond on the remaining direct examination and on cross-examination.

id. at 89-90 (emphasis added). But "[t]o the extent that conflict remains between the defendant's right to consult with his attorney" and the State's desire to minimize "the risk of improper 'coaching,' the conflict, must, under the Sixth Amendment, be resolved in favor of the right to the assistance and guidance of counsel" (*id.* at 91).

Here, as well, the State has powerful tools with which to expose tailoring: prior inconsistent statements and cross-examination. *All* witnesses, including the defendant, are subject to impeachment with actual proof of tailoring. But the defendant should never be subjected to unsupported accusations of fabrication – much less those linked directly to the exercise of his constitutional prerogatives. Such accusations compromise basic, fundamental rights that ordinary witnesses do not have, as well as the important policies underlying those rights, *e.g.*, the presumption of innocence, the right to a fair trial and to present a defense and, of course, the right of confrontation.[4]

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[4] That the defendant is not an ordinary witness and may not always be treated as such is hardly a novel proposition. For example, he is the only witness who cannot be impeached without limitation concerning his pre-trial silence. *Compare Fletcher v. Weir*, 455 U.S. 603 (1982), and *Jenkins v. Anderson*, 447 U.S. 231 (1980), *with Doyle v. Ohio*, 426 U.S. 610 (1976); under New York law, the distinction drawn between criminal defendants and other witnesses in this area is even starker. *See People v. Conyers*, 52 N.Y.2d 454, 458-59 incl. n.2 (1981); *People v. Dawson*, 50 N.Y.2d 311, 321 (1980). In New York, the defendant is also entitled to circumscribe the admissibility of prior crimes evidence should he elect to take the stand; the entire criminal history of a non-party witness, in contrast, may be spread before the jury. *People v. Ocasio*, 47 N.Y.2d 55 (1979); *People v. Sandoval*, 34 N.Y.2d 371 (1974); *see People v. Allen*, 69 A.D.2d 558, 560 (2nd Dept. 1979), *aff'd* 50 N.Y.2d 898 (1980) (discussing policy reasons for treating the two categories of witnesses differently). Similar distinctions are drawn in federal court as well. *See* Fed.R.Evid. 609. Most pertinent to this case, the defendant is the only witness who has a constitutional right to be present and confront the other witnesses who appear, a distinction with recognized constitutional implications. *See Brooks v. Tennessee*, 406 U.S. at 611 incl. n.5; *see also Geders v. United States*, 425 U.S. at 91.

In sum, comments which seek to penalize a defendant for exercising his constitutional rights are forbidden, at the least where, as in the context under review here, the State has no legitimate overriding interest to counterbalance the chilling effect that the threat of such comments will have. Direct references to the defendant's singular right to be present should accordingly be prohibited as violative of the Sixth Amendment.

B. The violation of respondent's Sixth Amendment rights was particularly egregious because the prosecutor did not merely note respondent's opportunity to tailor but affirmatively accused him of doing so, with no supporting evidence and based solely upon the assertion of his right to be present.

Assuming, *arguendo*, that there could ever be circumstances in which it would be legitimate to link the defendant's exercise of his right to be present with a tailored testimony charge, this Court should still affirm the judgment of the court of appeals. For the prosecutor in this case did not simply note on summation that respondent had the chance to adjust his testimony to fit the State's case; instead, she argued that he had actually taken advantage of the opportunity and lied. Petitioner concedes that this accusation was made. Pet.Br. at, *e.g.*, p.17 ("the prosecutor's comments here [were] that defendant had *and used to his benefit* his unique opportunity to hear the other witnesses"); p.39 ("The prosecutor merely argued that the defendant *wrongfully conformed his testimony* around that of the prosecution witnesses"); p.46 ("the prosecutor . . . argu[ed] that *his testimony was tailored*"). Moreover, although the charge of tailoring certainly suggested to the jury that supporting evidence existed, none had been proffered, and the argument was entirely speculative.[5]

[5] In its brief (p.46), petitioner cites a few items of "evidence" that purportedly supported the trial prosecutor's tailoring argument, but none is even remotely legitimate: (1) the prosecutor's own characterization of respondent as a "smooth slick character" – an entirely subjective description, again with no supporting evidence, and hardly "proof" in its own right; (2) her rhetorical query as to whether a short section of respondent's testimony "sounded rehearsed" – *not* because he had heard other witnesses, but because "[h]e said it twice. He said it on direct examination and he said it on cross" (*see* JA 48); (3) her contention "that defendant's testimony essentially corroborated that of the prosecution witnesses but for his denials of the crimes, and that '[e]verything else fits perfectly' " – if true (this charge covered the entire testimony of multiple witnesses in a single sentence), the same could be said if respondent had been telling the truth; (4) her claim that "*defendant's* explanation" concerning a certain point "fits the whole scenario here" – this is actually a reference to an argument made by *defense counsel* on summation, not to respondent's testimony (*see* JA 37); and, finally, (5) "[the trial prosecutor] directed the jury's attention to the fact that it was only on cross-examination that defendant remembered that Ms. Winder had slapped him during their first encounter" – it is hard to see how changing one's own account between direct and cross examination (here, merely adding a detail) supports a charge of "tailored to fit the State's case"; more significantly, *Winder never mentioned this slapping incident herself* (nor did anyone else), so a "tailoring" accusation is completely unjustified (for the record, the trial prosecutor mischaracterized respondent's testimony when she claimed he said he had been slapped three times before Winder scratched him [JA 48; defense counsel's objection overruled] – he consistently said she slapped him only once before scratching his lip [*see* 670-72, 711, 719, 726]).

If a line between permissible and impermissible comment on presence is to be drawn, then, it was clearly crossed in this case. The requirement that a verdict be grounded solely on lawful, probative evidence is hardly a remarkable proposition (*see, e.g., Taylor v. Kentucky*, 436 U.S. 478, 485 [1978]), and neither is the corollary: in closing argument, the prosecutor may not refer to matters not in evidence, intimate the existence of additional proof

of which he is personally aware, or ask the jurors to draw conclusions which are not fairly inferable from the proof (*see, e.g., Berger v. United States*, 295 U.S. 78, 84, 88 [1935]). And, as the court below noted (Pet.App. 51a), citing *Darden v. Wainwright*, 477 U.S. 168, 181-82 (1986), this Court has advocated particular vigilance in safeguarding the exercise of specific constitutional rights against prosecutorial abuse. *See also Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974). The prosecutor's argument also effectively turned the presumption of innocence on its head: the jury was asked to presume instead that all defendants who exercise their rights to confrontation and to testify have tailored their accounts, and are therefore less worthy of belief than the State's witnesses. As a witness, however, a defendant is neither believable nor unbelievable *per se*. *Allison v. United States*, 160 U.S. 203, 210 (1895); *Reagan v. United States*, 157 U.S. 301, 310 (1895). In this case, moreover, the prosecutor did not merely invoke a presumption of fabrication, she made an actual charge of tailoring linked directly and solely to respondent's right to be present.

Clearly, respondent's Sixth Amendment rights were affirmatively used against him, both to undermine his credibility and, in juxtaposition, to bolster the complainants' accounts; indeed, the very plausibility of his account became a reason to doubt his veracity. That this was a penalty under the *Griffin-Jackson-Brooks* line of cases discussed *ante* cannot be seriously questioned, nor can the State possibly legitimize the practice. Significantly, apart from claiming that the tailoring accusation *did* have evidentiary support (*but see* n.5, *ante*), the State makes no effort to do so. The result, in turn, was to

undermine the search for truth, not foster it, because the credibility issue was improperly weighted in the State's favor.

C. This Court's decision in *Griffin v. California* mandates affirmance of the judgment below.

Although the court of appeals only analogized this case to *Griffin v. California, supra*, 380 U.S. 609 (Pet.App. 42a), finding the constitutional issue here "somewhat similar" (Pet.App. 73a), *Griffin* provides an independent basis for this Court's affirmance of the judgment. In *Griffin*, comments on the defendant's silence at trial, inviting the jury to use the defendant's invocation of his Fifth Amendment privilege against him, were held to be constitutional error. Although the defendant's right to remain silent had been literally respected – he was not compelled to testify – a penalty was nevertheless exacted. The comments thus "cut[ ] down on the privilege by making its assertion costly" (380 U.S. at 614). In this case, likewise, the prosecutor commented on the defendant's presence at trial, and invited the jury to use the invocation of his confrontation rights against him. He exercised his right to be present, just as the defendant in *Griffin* exercised his right to remain silent, but a penalty was just as clearly imposed.

Just months ago, in *Mitchell v. United States, supra*, 119 S.Ct. 1307, the tenets of *Griffin* were upheld by this Court. Because the penalty analysis in this case is logically indistinguishable from that in *Griffin* and *Mitchell*, a finding of constitutional error must follow. That the jurors might notice defendant's unique opportunity to

listen to the other witnesses before he takes the stand, and draw an adverse inference of tailoring on their own, cannot excuse or soften the error of having the inference expressly drawn for them by the State's representative. *See Griffin v. California*, 380 U.S. at 614. And, to the extent that the fact-finders would be more likely to hold the accused's exercise of his right to remain silent against him than his exercise of his right to be present, a negative reference to the latter is even more prejudicial than the comments ruled unconstitutional in *Griffin*: what might otherwise be an unremarkable fact – the defendant is there, listening to the evidence – is affirmatively flagged to the jury and converted into a liability for the defense.

Moreover, that the defendant's silence was used as substantive evidence of guilt in *Griffin* and his presence as impeachment evidence in this case is a distinction without a difference. Indeed, in *Doyle v. Ohio, supra*, 426 U.S. 610, this Court found the prosecutor's use of defendant's post-arrest silence – not as substantive evidence of guilt but solely to impeach his credibility – to be constitutional error. In both *Griffin* and here, the prosecutor sought to raise an unfavorable inference from the exercise of the defendant's constitutional rights, and in each case thereby imposed a penalty for his assertion of those rights. Rather than turning a silent defendant into a source of evidence against himself, as in *Griffin*, comments on the defendant's exercise of his right to be present effectively convert a *testifying* defendant into a source of incriminating proof: only a guilty defendant fabricates his account of events, and only a guilty defendant would need the crutch of hearing all of the witnesses against him before taking the stand himself.

D. This Court's decision in *Reagan v. United States* does not support petitioner's contention that it can impugn the credibility of all defendants based solely on the exercise of their Sixth Amendment rights.

Petitioner has pointed to the propriety of the interested witness charge in support of its argument; citing this Court's decision in *Reagan v. United States*, 157 U.S. 301 (1895), it notes that the defendant's status necessarily gives him an interest in the outcome of the case which can properly be flagged to the jury as relevant to his credibility (*see* Pet.Br., p.21). The analogy, however, does not hold up. The remarks at issue here highlight the unique "benefit" the defendant has which purportedly reflects negatively on his credibility; he alone has the privilege of listening to others testify, and that privilege renders his own testimony suspect. The 'impeachment' argument applies only to defendants, and it directly implicates rights afforded by the Fifth and Sixth Amendments. In contrast, comments on a defendant's interest, and attendant motive to lie, do not concomitantly convert the defendant's exercise of a constitutional right into an unfair litigation advantage: no adverse inference is drawn from the fact that the defendant chose to take the stand. On the contrary, *all* trial witnesses, by definition, testify, and the interest of *any* witness is an appropriate subject for comment.

Moreover, the modern trend is to avoid instructions in which the defendant's testimony is singled out for special scrutiny. *See, e.g., United States v. Rollins*, 784 F.2d 35, 37-39 (1st Cir. 1986); authorities cited in brief of United States as amicus curiae, p.15, n.5. This is certainly

true in New York, where the jury is routinely instructed that they may consider the interest of any witness, including the defendant, but that there is no presumption that an interested witness lies or that a disinterested witness tells the truth. *People v. Agosto*, 73 N.Y.2d 963, 967 (1989); *People v. Whitmore*, 123 A.D.2d 336 (2nd Dept. 1986); *see People v. Gadsen*, 80 A.D.2d 508 (1st Dept. 1981).[6]

Significantly, the *Reagan* decision also noted "[t]he fact that [the witness] is a defendant does not condemn him as unworthy of belief" (157 U.S. at 305); the jury may not be told "directly or indirectly that the defendant is to be disbelieved because he is a defendant, for that would practically take away the benefit which the law grants when it gives him the privilege of being a witness" (*id.* at 310); *accord Allison v. United States*, 160 U.S. 203, 210 (1895) ("As a witness, a defendant is no more to be visited with condemnation than he is to be clothed with sanctity, simply because he is under accusation, and there is no presumption of law in favor of or against his truthfulness"); *Hicks v. United States*, 150 U.S. 442, 452 (1893)

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[6] At the time the *Reagan* decision was published, it had been less than fifteen years since the *per se* disqualification of defendants as witnesses was abolished by federal statute (157 U.S. at 304-05). At common law, anyone with the least interest in the proceeding, necessarily including all criminal defendants, was deemed incompetent to testify, and this antipathy lasted in this country through the end of the nineteenth century; as late as 1961, in fact, Georgia still forbade a defendant from being a witness in his own behalf. *Ferguson v. Georgia*, 365 U.S. 570, 573-77 (1961). For what it is worth, it seems unlikely that an interested witness charge such as that delivered in *Reagan* (reproduced in the syllabus) would be wholeheartedly endorsed today.

("men may testify truthfully, although their lives hang in the balance"). The comments at issue in this case, in contrast, *do* condemn defendants as a group as unworthy of belief.

Thus, when a defendant's unique "opportunity to tailor" is spotlighted, and his veracity thereby automatically impugned, error similar to that foreclosed by *Reagan*, *Allison* and *Hicks* is committed. The jury is, in effect, invited to presume fabrication on the defendant's part in every case – there is no other reason to discuss the point. Although every defendant who testifies is an interested witness, not every interested witness tailors his testimony, and the jury certainly should not be urged to assume that he did.

II. The court of appeals correctly held that respondent's Fifth Amendment rights were also violated by the prosecutor's comments.

The contention that defendants can uniformly be accused of tailoring their testimony, simply by virtue of their presence at trial, implicates Fifth Amendment rights in several respects. First, a defendant will be pressured to abandon his right to testify, "a necessary corollary to the Fifth Amendment's guarantee against compelled testimony" (*Rock v. Arkansas, supra*, 483 U.S. at 52), in order to foreclose the prosecutor from assailing his veracity. This pressure will be particularly acute if an affirmative accusation of tailoring is lodged as it was in this case. If the defendant can be tagged a liar simply because he was present during presentation of the evidence, testimony which he would otherwise expect to exonerate him would

instead become evidence of guilt – only a guilty person would fabricate facts, and only guilty defendants lie about what transpired.

Second, an unsupported tailoring argument shifts the burden of proof to the defense to rebut the accusation. Petitioner disingenuously contends that this is easily accomplished, for a truthful defendant is allegedly free to counter the adverse inference of fabrication by moving to reopen the proof (Pet.Br., p.36). If the State is permitted to make a blanket charge of tailoring, however, as it did here, the defendant is at a serious disadvantage in attempting to dispel the aura of suspicion which has been cast upon him: he does not know what to rebut, specifically, because the tailoring charge is devoid of any detail. If he decided to be a rebuttal witness himself, then, the defendant could do no more than seek to get back on the stand (which would be at the court's discretion under New York law, *People v. Washington*, 71 N.Y.2d 916, 918 [1988]) and baldly state that he had not tailored his testimony as a result of hearing the other witnesses. Proving a negative ("I never beat my wife") is virtually impossible, and such "rebuttal evidence" would hardly be convincing to the jury.

Thus, the only way for a defendant to successfully combat a baseless tailoring argument would be to waive his right to remain silent before trial commences; he would then have a rebuttal witness in reserve who would be able to recount his pre-trial statements and demonstrate that his trial testimony was *not* "adjusted" to fit other witnesses' accounts. In *Brooks v. Tennessee, supra*, 406 U.S. 605, this Court held it unconstitutional to require the defendant to testify immediately after the prosecution

rested, prior to calling any other defense witnesses. Necessarily, then, it is unconstitutional to require him to make a statement before the trial starts, solely to able to counter an unsupported claim of tailoring based on the exercise of his Sixth Amendment rights.

As a practical matter, moreover, the possibility that other witnesses could salvage the defendant's credibility would necessarily be low. The most likely person with whom the defendant would have discussed the facts of the case before trial, who might thereby be in a position to recount defendant's prior consistent statements to the jury, would be defense counsel. A defendant should not be compelled to discuss the facts of the case with his attorney any more than with anyone else, of course, and certainly not in anticipation of a gratuitous attack on his credibility at trial. Further, in order to use counsel to meet the charge of fabrication, the defendant would be forced to waive his attorney-client privilege. There would also be a serious risk that counsel would then be disqualified from further participation in the case under the Code of Professional Responsibility and New York's advocate-witness rule (*see People v. Paperno*, 54 N.Y.2d 294, 299-300 [1981]). Since any competent defense attorney would advise his client not to discuss the charges with anyone, it is doubtful that other rebuttal witnesses would exist. But if they did, the defense would have to request a continuance in order to seek them out, which would disrupt the progress of the trial indefinitely after the evidence had already been closed.

Finally, even if such witnesses could be found and timely produced, it is not at all clear that they would be permitted to rehabilitate the defendant's credibility. For

prior consistent statements are hearsay, and are only admissible to rebut a charge of recent fabrication. The proponent of such evidence must therefore demonstrate that the prior statements were made at a time when the speaker had no motive to lie, and in the context under discussion here, a guilty defendant would have the same motive to fabricate upon commission of the crime as he would at trial. *People v. McClean*, 69 N.Y.2d 426, 427-28 (1987); *People v. Davis*, 44 N.Y.2d 269, 277-78 (1978); *see also Tome v. United States*, 513 U.S. 150 (1995) and Fed.R.Evid. 801(d)(1). Thus, the only person who could counter a sweeping, wholly unsupported claim of tailoring would be one to whom the defendant had made as full and detailed an account of events as he later gave at trial – a very tall order to fill.

Petitioner's claim that the defendant could put on a rebuttal case is thus glibly stated but unconvincing. In many cases the defendant would have nothing with which to counter a "he was able to tailor because he heard our witnesses" argument; if he did, his Fifth Amendment privilege would necessarily be abrogated. To put his back to the wall in this way is constitutionally untenable, for no legitimate purpose can be served by the sort of "impeachment" argument that was made at respondent's trial.

On the contrary, there is a far higher risk of impeding the search for truth than promoting it if such an argument is condoned. The honest defendant, testifying truthfully from recollection, will be unfairly impugned – the more coherent and complete his account, the stronger the accusation of fabrication will appear – and he will have equally unacceptable options for foreclosing such an

attack: (1) he can refrain from testifying altogether, thereby denying the fact-finder valuable evidence; (2) he can waive his confrontation rights with all their associated fair trial benefits (*see, e.g., Coy v. Iowa*, 487 U.S. 1012 [1988]; *Snyder v. Massachusetts*, 291 U.S. 97 [1934]), and undermine as well his rights to counsel and to present a defense; or (3) he can, as a preemptive move, waive his right to remain silent and make a detailed post-arrest statement to the police or other witnesses, which can later be compared to his trial testimony if a tailoring claim is made; alternatively, he can give up his Fifth Amendment right to preclude the admission of his post-arrest silence into evidence (*Doyle v. Ohio*, 426 U.S. 610 [1976]) – if the defendant does not have such a pre-trial statement with which to counter a tailoring charge, his silence will be implicitly used against him.

The defendant should not have to make such choices merely to afford the State the opportunity to make unfounded attacks on his credibility. *See Simmons v. United States*, 390 U.S. 377, 394 (1968) ("we find it intolerable that one constitutional right should have to be surrendered in order to assert another"); *Lefkowitz v. Cunningham*, 431 U.S. 801, 807-08 (1977) (statute impermissibly "requires appellee to forfeit one constitutionally protected right as the price for exercising another"). At the very least, a tailoring charge made for the first time on summation, as it was in this case, must be deemed unconstitutional, for it is virtually impossible for the defendant to rebut such a charge.

III. The court of appeals' conclusion that the prosecutor's tailoring argument also violated respondent's Fourteenth Amendment rights to due process and a fair trial is not properly before this Court and is, in any event, correct.

A. Because petitioner did not seek review of the court of appeals' holding that the prosecutor's summation comments violated due process, that holding is an independent basis for the judgment below, which should be affirmed.

Petitioner contends that the court of appeals erred by finding a due process violation in this case (*see* Pet.Br., pp.39-44). This issue, however, was not set forth in petitioner's Question Presented:

> Whether the Second Circuit Court of Appeals erred in extending this Court's decision in *Griffin v. California*, 380 U.S. 609 (1965) – which prohibited a prosecutor's comment on a defendant's right to remain silent – to a prosecutor's comments on a testifying defendant's presence in the courtroom during the testimony of other witnesses?

Nor is the due process issue fairly included within the question. Indeed, the Solicitor General has candidly admitted that the *only* issue presented in the certiorari petition is whether *Griffin* was erroneously extended (amicus brief, p.25, n.14), and the Fourteenth Amendment is not even cited in petitioner's brief as "involved" in the issue presented to this Court (*see* Pet.Br., p.2).

Therefore, petitioner's due process argument should not be considered by this Court. U.S.Sup.Ct. Rule 14.1(a); *Jones v. United States*, 67 U.S.L.W. 4508, 1999 U.S.Lexis 4201, p.35 (1999); *Taylor v. Freeland*, 503 U.S. 638, 645 (1992); *Yee v. Escondido*, 503 U.S. 519, 535-38 (1992). Clearly, whether the particular comments made at respondent's trial warrant granting of the writ on due process grounds is an entirely different question than that presented by petitioner. *See, e.g., Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 510 U.S. 27, 31-32 (1993), quoting *Yee v. Escondido, supra*, 503 U.S. at 537 ("a question which is merely 'complementary' or 'related' to the question presented in the petition for certiorari is not 'fairly included therein' ").

Moreover, contrary to petitioner's claim that the court of appeals rested its finding of a due process violation solely on the court's "assum[ption of] the existence of a *Griffin*-like error," with no other analysis (Pet.Br., pp.39-40), this is simply not the case: fairness was the underlying theme of the court's decision. The court held that "the prosecutor's comments 'so infected the trial with unfairness as to make the resulting conviction a denial of due process' " (Pet.App. 49a, quoting *Darden v. Wainwright, supra*, 477 U.S. 168, 181; *Donnelly v. DeChristoforo, supra*, 416 U.S. 637, 643). The tailoring argument was found to be fundamentally unfair, for when the prosecutor

> raises the specter of fabrication 1) for the first time on summation; 2) without facts in evidence to support the inference; *or* 3) in a manner which directly attacks the defendant's right to be present during his entire trial, our alarm bells begin to ring. When all three circumstances are present, the bells become shrill sirens. Such commentary is not proper comment on credibility. Lawyers may not raise innuendo relating

> to bias or credibility from the shadows of unlitigated facts for the first time in their closing arguments. . . . Without facts in evidence to support an inference of fabrication, such remarks are prejudicial and not at all probative.

Pet.App. 46a (emphasis added). The prosecutor is free to argue that the defendant lacks credibility, but only if "that argument has a basis in fact and not only in innuendo" (47a; *see also* concurring opinion at 68a-69a). The argument was also deemed unfair because respondent had no meaningful opportunity to respond to the charge (conc.opin., 68a-69a).

Thus, it was the particular argument made in this case, not *any* comment on the exercise of Sixth Amendment rights, that drove the court of appeals' due process analysis. In fact, the court explicitly stopped short of ruling that *all* references to the defendant's exercise of his right to be present would constitute *per se* constitutional error – it "express[ed] no opinion as to the propriety or constitutionality of similar remarks made during cross-examination" (Pet.App. 40a). Moreover, its decision on petitioner's rehearing petition had no quarrel with the making of "a factual argument that a defendant used his familiarity with the testimony of the prosecution witnesses to tailor his own exculpatory testimony" (*id.* at 72a). The court of appeals instead ruled that it was improper to raise a tailoring claim for the first time on summation with no supporting evidence, based solely on the defendant's exercise of his Sixth Amendment rights (*id.* at, *e.g.*, 46a, 72a-73a).

The court's Fourteenth Amendment analysis is thus independent from its Sixth Amendment finding of constitutional error, and it is only the latter issue that petitioner sought review of in this Court.

B. The court of appeals' finding of a due process violation was, in any event, completely justified.[7]

As previously discussed (*see* Part I[B], *ante*), the prosecutor did not simply ask the jury to consider respondent's opportunity to tailor his testimony, based solely on the exercise of his confrontation rights without a shred of evidence to support the charge – she actually accused him of tailoring. This was not only a Sixth Amendment violation, but a due process violation as well: the argument was fundamentally unfair and sufficiently egregious to warrant granting of the writ under the Fourteenth Amendment (*see* Part III [A], *ante*).

Petitioner's additional attacks on the court of appeals' due process analysis are equally specious. First,

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[7] Unlike petitioner, respondent's due process arguments are properly before the Court. Respondent is entitled to rely on any argument in defense of the judgment which is supported by the law and the record. *E.g.*, *Schenck v. Pro-Choice Network*, 519 U.S. 357, 384 at n.12 (1997); *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 325 at n.3 (1987); *see Northwest Airlines, Inc. v. County of Kent*, 510 U.S. 355, 364-65 incl. n.8 (1994). The claims require no further factual development (*cf. Roberts v. Galen*, 119 S.Ct. 685, 687 incl. n.2 (1999), nor is the issue a "far-reaching" one (*South Central Bell Telephone Co. v. Alabama*, 119 S.Ct. 1180, 1186 [1999]), divorced from the grounds relied on by the court below to support its judgment.

its "fair response" argument (Pet.Br., pp.41-42) is, respectfully, as ludicrous as its contention that the charge of tailoring was grounded in the evidence (Pet.Br., p.46; *see* n.5, *ante*). *Of course* defense counsel urged that the complainants were lying, that they were telling a "story" – their accounts completely contradicted respondent's in several material respects, and it was clear that someone was lying. Indeed, it was precisely because credibility was the *only* issue for the jury to resolve that the prosecutor's sweeping tailoring accusation – urging rejection of respondent's account because he had had the unfair "advantage" of listening to the State's witnesses and constructing a tale that neatly "fit . . . into the evidence" – was so prejudicial. However, defense counsel based *his* claims of fabrication firmly on the evidence: *e.g.*, the extensive medical records, the police reports, the photographs of Ms. Winder after she reported the alleged crimes, and the relative reasonableness or unreasonableness of the competing accounts (*see* JA 6-28). Thus, when he characterized Winder's story as "scripted" – an instance specifically cited by petitioner as justifying the prosecutor's "responsive" tailoring accusation (Pet.Br., pp.7, 41) – it was based on her acknowledgment that she had made notes of her encounter with respondent and had consulted them prior to testifying before the grand jury and at trial (JA 17). Similarly, his contention that the two complainants (who had been friends and roommates for years) had "talk[ed] it over" before going to the police to report a rape (JA 15) – also cited by petitioner in support of its "invited response" claim (pp.7, 41) –

reflected testimony given by both women during their direct examinations.[8]

Petitioner also cites certain routine instructions given by the trial court which purportedly "minimized the impact" of the prosecutor's erroneous summation comments (Pet.Br., pp.42-43). On the contrary, when the prosecutor twice makes a specific tailoring accusation that is immediately objected to and the defense is twice overruled, the resulting prejudice cannot possibly be cured by telling the jury later, as part of a series of boilerplate instructions, that what lawyers say is not evidence. *Compare Caldwell v. Mississippi*, 472 U.S. 320, 339 (1985) (death sentence invalidated, where trial judge "not only failed to correct the prosecutor's remarks, but in fact openly agreed with them") *with Donnelly v. DeChristoforo, supra*, 416 U.S. 637, 644 (impropriety of prosecutor's comments explicitly flagged to jury by trial court and direct curative instructions also given). Rather than ameliorating the

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[8] *United States v. Robinson*, 485 U.S. 25 (1988), cited by petitioner in support of its 'fair response' claim (Pet.Br., p.42), does not advance its cause. In *Robinson*, defense counsel made a specific argument that the government had precluded the defendant from explaining his side of the story, and the prosecutor responded that as a matter of fact, he had had the opportunity to take the stand and provide whatever explanation he chose (*id.*, at 26). The prosecutor's argument, in short, did not seek to use defendant's silence against him, but simply contested a factual claim that had been raised by the defense. In this case, counsel did not contend, *e.g.*, that respondent had not had the chance to tailor his testimony – which might have invited the response that he had – and instead based his attacks on the complainants' credibility on actual evidence before the jury; as previously noted, the prosecutor's tailoring argument was, in contrast, generic, and had nothing to do with the proof.

prejudice, the trial judge exacerbated it by giving his contemporaneous stamp of approval to the prosecutor's remarks.

Finally, petitioner contends that "the proof of guilt was strong," which "minimized the likelihood that the prosecutor's remarks infected the entire trial" (Pet.Br., p.42). The court of appeals, which reviewed the entire record (Pet.App. 33a), disagreed (*id.*, 33a-35a, 51a), and for good reason: the jurors deliberated an exhausting four days – hardly an open and shut case for the prosecution – and ultimately acquitted respondent of fourteen of the sixteen complainant-based charges they considered (JA 57-60) (one of the counts of which respondent was convicted, felony assault [no intent to cause physical injury required], was subsequently dismissed by the trial court).[9] Clearly, the credibility contest was not easily resolved in the State's favor, and in fact it was almost resolved entirely in respondent's favor. The State's case can be considered "strong," therefore, only if it is assumed that respondent was lying – precisely the issue that was unfairly slanted by the prosecutor's tailoring argument. That respondent was not convicted of all counts hardly evidences that the jury was not swayed by the error; indeed, he may well have been acquitted of the balance of the complainants' charges had his veracity not been unfairly called into question.

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[9] The numerous acquittals included all counts associated with the claim that respondent had threatened both complainants with a gun; in its brief, petitioner treats these alleged threats as established fact. (Pet.Br., p.42).

C. Since respondent was compelled by law to attend his trial, the prosecutor's adverse comments on his exercise of the right to be present violated fundamental notions of fairness and offended due process.

As the dissent noted below (Pet.App. 59a), the defendant has the duty as well as the right to be present at trial. *See Taylor v. United States*, 414 U.S. 17, 20 (1973). In New York, the obligation is codified by statute (N.Y.Crim.Proc.Law 260.10, 340.50; *see* Practice Commentaries to C.P.L. 340.50, p.129 ["As a general rule, a defendant not only has the right to be present but must be present"]). The same rule obtains in federal court, pursuant to Fed.R.Crim.Proc. 43 (with limited exceptions, defendant "shall be present" and has "the obligation to remain"); *see In re United States v. Cannatella*, 597 F.2d 27, 27-28 (2nd Cir. 1979) ("Normally a judge can and should compel a defendant to be present at all stages of a felony trial pursuant to Rule 43[a]"; there is only "a residue of judicial discretion in unusual circumstances where good cause is shown . . . to permit temporary absence"); *United States v. Moore*, 466 F.2d 547, 548 (3rd Cir. 1972) (defendant has no "right of absence").[10]

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[10] In New York, similarly, the defendant "must obtain the permission of the Trial Judge to be absent from a trial" (*People v. Winship*, 309 N.Y. 311, 314 [1955]), and the court's ruling is reviewed under an abuse of discretion standard. *People v. Williams*, 92 N.Y.2d 993, 996 (1998) (defendant's request to waive presence at sidebar questioning of prospective jurors should have been granted, as there were sound "strategic reasons" for such a waiver). Indeed, the primary purpose of bail statutes is to ensure the defendant's appearance in court (N.Y.Crim.Proc.Law 500.10[1]-[3]; 510.30[2][a]), and a bench warrant may be issued

Since the government thus imposes an affirmative duty on the defendant to be present at trial, it would be fundamentally unfair to then punish him for his compliance. *Cf. Doyle v. Ohio, supra,* 426 U.S. 610, 618 (*Miranda* warnings provide implicit assurance that silence will not be penalized, and it thus "would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach [him at trial]"); *Cox v. Louisiana,* 379 U.S. 559, 571 (1965) (where city officials had given defendant permission to demonstrate in certain location, it was violation of due process to convict him for picketing "near" courthouse; this was form of entrapment by the State); *see also Jenkins v. Anderson, supra,* 447 U.S. 231, 240 (impeachment with pre-arrest silence does not violate due process, since "no governmental action induced petitioner to remain silent before arrest"). Clearly, if "to punish a person because he has done what the law plainly *allows* him to do is a due process violation of the most basic sort" (*Bordenkircher v. Hayes,* 434 U.S. 357, 363 [1978] [emphasis added]), it necessarily offends due process to impose a penalty for doing what is *required* by the State.

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The court of appeals found that the prosecutor's comments on summation violated respondent's rights under the Fifth, Sixth and Fourteenth Amendments (Pet.App. 36a-52a). For all the reasons stated, its conclusion that constitutional error was committed is well-

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for his arrest, and his pre-trial confinement ordered, if he breaches his obligation (*see* N.Y.Crim.Proc.Law 510.50, 530.60[1], 530.70) (the federal analogue is 18 U.S.C. § 3142).

founded. The State has not challenged, either in its certiorari petition or its brief on the merits, the court's additional finding that the error was not harmless under the standard enunciated in *Brecht v. Abrahamson,* 507 U.S. 619, 637-38 (1993) (reviewing court must determine whether error had a "substantial and injurious effect or influence in determining the jury's verdict") (*see* Pet.App. 52a-54a; *see also* Solicitor General's amicus curiae brief in support of petitioner, p.25, n.14 [acknowledging that certiorari petition "present[s] only [the] question of whether court of appeals erred in extending *Griffin*"]). Accordingly, that issue should not be reconsidered by this Court. *See Wainwright v. Greenfield,* 474 U.S. 284, 295, n.13, and 296, 301 (concurring opinion of Rehnquist, J.) (1986) (government did not challenge lower court's conclusion that error was not harmless, and that issue was not considered by Supreme Court); *United States v. Hale,* 422 U.S. 171, 175 at n.3 (1975) (same); *cf. United States v. Hastings,* 461 U.S. 499, 506 at n.4 (1983) (Court reviewed harmless error issues rather than conclusion that error in fact occurred: "The question on which review was granted assumed that there was error and the question to be resolved was whether harmless-error analysis should have applied"); *see also, e.g.,* U.S.Sup.Ct. Rule 14.1(a); *Yee v. Escondido,* 503 U.S. at 535-38; *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.,* 510 U.S. at 31-32.

CONCLUSION

THE JUDGMENT OF THE COURT OF APPEALS SHOULD BE AFFIRMED.

Respectfully submitted,

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