No. 98-1170

IN THE

Supreme Court of the United States

OCTOBER TERM, 1999

LEONARD PORTUONDO, Superintendent,
Fishkill Correctional Facility,

Petitioner,

—v.—

RAY AGARD,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE PETITIONER

RICHARD A. BROWN
District Attorney, Queens County

ANDREW L. ZWERLING*
JOHN M. CASTELLANO
ELLEN C. ABBOT
Assistant District Attorneys

Queens County District Attorney's Office
125-01 Queens Boulevard
Kew Gardens, New York 11415
(718) 286-5801

**Counsel of Record for the Petitioner*

September 24, 1999

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THE PROSECUTOR'S COMMENT THAT DEFENDANT HAD AND USED THE UNIQUE OPPORTUNITY TO HEAR THE OTHER WITNESSES AT TRIAL PROMOTED THE RELIABILITY OF THE TRUTH-SEEKING PROCESS AND DID NOT IMPERMISSIBLY BURDEN ANY CONSTITUTIONAL RIGHT OF DEFENDANT.

I. Defendant Has Erroneously Framed The Position Advanced By Petitioner.

As detailed at length in petitioner's main brief, a prosecutor may properly comment that a defendant had a unique opportunity to hear the other witnesses at trial. Because exposure to the testimony of others may affect, either innocently or purposefully, a defendant's testimony, a jury should be permitted to consider that fact when assessing the credibility of a defendant. Allowing for such consideration by the trier of fact serves the fundamental societal interest in the determination of the truth. While a factual predicate existed for the prosecutor's argument here that defendant used his unique opportunity to tailor his testimony, no factual predicate – other than a defendant's mere presence during the taking of testimony – was required to comment on defendant's mere opportunity to hear testimony or to alert the jury to the possible ill effects of defendant's status as a non-sequestered witness.

Defendant has dramatically altered the position of petitioner. Defendant incessantly posits that petitioner is arguing that there is a presumption that a testifying defendant has tailored his testimony, and that a prosecutor may, without any factual predicate other than a defendant's mere presence, present this presumption to the jury. The arguments of defendant all flow from and are dependent upon this skewed restructuring of petitioner's arguments.[1]

The flaw in this approach is that at no time has petitioner ever advanced the claim that there is a presumption of tailoring or a presumption that an accused is less worthy of belief solely due to his non-sequestered status, nor has petitioner alleged that a tailoring argument may be predicated merely upon an

1. Among the examples of defendant's attempt, along with amicus, to attribute the "presumption of tailoring" to petitioner are: "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" (emphasis added)(Resp. Bf. at 6); "This is so, petitioner claims, because in *every* case where an unsequestered defendant takes the stand . . . 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" (emphasis added)(Resp. Amicus Bf. at 12); "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*" (emphasis added)(Resp. Amicus Bf. at 21n.9); "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" (emphasis added)(Resp. Bf. at 24); "The comments at issue in this case . . . do *condemn defendants as a group* as unworthy of belief"(emphasis added) (Resp. Bf. at 29); "The jury is, in effect, invited to *presume fabrication* on the defendant's part in every case. . ." (emphasis added)(Resp. Bf. at 29); "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" (emphasis added)(Resp. Bf. at 29).

accused's presence during the testimony of other witnesses. To reiterate, petitioner has simply argued that a jury should be able to assess the impact of a defendant's exposure to the testimony of others and, in its capacity as the trier of fact, draw reasonable inferences from that fact. That exposure may affect the defendant's testimony either consciously, through deliberate tailoring, or subconsciously, through confabulation. Permitting this consideration by the jury does not give rise to a presumption of tailoring. Rather, it merely allows the jury to consider and weigh a circumstance that bears directly on the credibility of a defendant's testimony.

Additionally, contrary to defendant's view, at no time has petitioner argued that a tailoring argument may be built on nothing more than a defendant's mere presence at trial during the taking of testimony. Rather, petitioner explicitly and repeatedly argues that no greater factual predicate is required to comment on the mere opportunity to hear other witnesses and the concomitant impact on a defendant's credibility, not that an affirmative claim of tailoring may be made without foundation.

With the actual analytical framework advanced by petitioner properly restored, many of the arguments rendered by defendant, wholly dependent as they are on the non-existent and baseless "presumption argument," fall by the wayside.

II. Defendant Has Failed To Show That The Prosecutor's Comments Did Not Further the Fundamental Societal Interest In The Determination Of The Truth; Defendant's Attempt To Insulate The Jury From Considering The Possible Impact On Defendant's Credibility Of His Exposure To The Testimony Of Other Witnesses Should Be Rejected.

Comments alerting a jury to a fact touching directly upon the reliability of the evidence at trial, that being a defendant's immunity from the witness-sequestration rule and its concomitant impact on his credibility, materially advance the broad fundamental societal interest in the ascertainment of truth at trial. *See* Pet. Bf. at 14-15, 27-30. This position is assailed by defendant, who argues that reliance on a defendant's exposure to the testimony of other witnesses as an impeachment device should be proscribed. The reasons given by defendant are 1) the risk of a witness "coloring" his testimony is so negligible, as evidenced by codified and other exemptions to the witness-sequestration rule, as to render meaningless the significance of a witness's attendance during the testimony of others; 2) the risk of tailoring by a defendant is even less than that of an ordinary witness and virtually non-existent as to material facts; and, 3) the prosecutor has other options in his arsenal of impeachment weapons. Resp. Bf. at 14-20. Defendant's arguments should fail.

First, this Court has repeatedly recognized the value of the witness-sequestration rule. *See*, e.g., *Perry v. Leeke*, 488 U.S. 272, 281-282 (1989); *Geders v. United States*, 425 U.S. 80, 87 (1976); *Brooks v. Tennessee*, 406 U.S. 605, 607, 611 (1972). *See also* Pet.Bf. at 27-29. While some witnesses are

exempt from the rule by statute or within the discretion of the State trial court, those witnesses are still subject to attack based on their exposure to the testimony of other witnesses. This is in recognition of the risk that their testimony may be affected by their hearing the testimony of others.

Indeed, despite attempts to downplay the value of the witness-sequestration rule, even defendant acknowledges on numerous occasions throughout his brief that the concerns behind the rule of sequestration are justified.[2] If, as defendant concedes, the sequestration rule is designed to hinder "the occasional readiness of the interested person to adapt his testimony" (Resp. Bf. at 17 [citation omitted]), then, as petitioner has argued, a jury should be permitted to determine as the trier of fact whether the witness in question – whether or not it is the defendant – has fallen victim to that inclination.

Notably, even the cases relied upon by defendant (Resp. Bf. at 19-20) state as much. For example, in *Geders v. United States*, *supra*, this Court struck down an overnight ban of contact between a defendant and his lawyer -- designed to eliminate the possibility of unethical coaching -- on the ground that it unduly burdened the right to counsel. Nonetheless, the Court went on to state that the prosecutor could, without unduly infringing upon the right to counsel, bring the fact of the defendant's opportunity for unethical coaching before the jury by cross-examining the defendant about the nature of his contact

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2. These acknowledgements occur at various points in the brief:, "[A]t most, the defendant's opportunity to hear other witnesses *might* serve to explain how he happened to modify or shape his testimony . . ." (Resp. Bf. at 15); "[T]he risk of tailoring based on presence while others testify is *generally* lower for defendants than other witnesses . . ." (emphasis added) (Resp. Bf. at 16); "Defendant does not contend that sequestration has no validity in curbing the tailoring of testimony" (Resp. Bf. at 17).

with his lawyer. 425 U.S. at 89-90.

Similarly, in *Brooks v. Tennessee*, *supra*, this Court struck down a statute that required a defendant who wished to testify to do so before the prosecution witnesses testified, because it unduly burdened a defendant's right to testify. 406 U.S. at 607. But, in addressing the acknowledged "risk of a defendant's coloring his testimony" due to his presence during the testimony of others, this Court added that "our adversary system reposes judgment of the credibility of all witnesses in the jury." 406 U.S. at 611-612. In other words, a jury may consider that risk in assessing a defendant's credibility. This is the argument advanced by petitioner. Thus, in both *Brooks* and *Geders*, this Court held that the prosecution may properly alert the jury to the possibility of a defendant perverting a constitutional protection into an improper litigation advantage without such reference unduly burdening the underlying constitutional right.

Defendant's second argument is no more availing. In a persistent effort to minimize the ill effects of exposure to the testimony of others, defendant assumes that there is a decreased risk of tailoring where the defendant is the witness because of the defendant's greater pre-trial access to information about the case through discovery and his attorney. Resp.Bf. at 6-7, 16-17. Defendant even states that the "risk of tailoring [by a defendant] is virtually non-existent with respect to material facts" (Resp. Bf. at 16). Notably, defendant cites no authority -- other than conjecture -- for this proposition. This Court, however, has explicitly recognized the "risk of coloring" by a defendant. *See, e.g., Brooks v. Tennessee*, 406 U.S. at 611 ("This is not to imply that there may be no risk of a defendant's coloring his testimony to conform to what has gone before"). Moreover, access to information pre-trial does not necessarily dampen an inclination

to tailor testimony, because of the typical deviation between pre-trial statements and trial testimony. Even a defendant "cannot be absolutely certain that his witnesses will testify as expected . . . ." *Brooks v. Tennessee*, 406 U.S. at 609. Most importantly, however, this argument of defendant ignores the innocent side effects of exposure to testimony that might affect a non-sequestered witness, such as confabulation. Even if the risk of tailoring were diminished, this other effect of exposure to other witnesses may still be present.

Third, defendant argues (Resp. Bf. at 14,21) that a prosecutor should not be permitted to rely on a defendant's opportunity to hear testimony as a subject for impeachment because of alternative means by which to impeach a defendant's credibility. But the only "alternative means" identified by defendant is cross-examination based on a lack of conformity between a defendant's pre-trial statements and trial testimony. No other "means" are identified, nor does defendant identify other impeachment options in the usual case where a defendant exercises his right to remain silent and fails to render pre-trial statements. Moreover, even assuming that other impeachment options exist, this credibility factor would still be relevant. Indeed, considering that even defendant concedes that a defendant's exposure to the testimony of others "might" affect his testimony, he is hard-pressed to argue that such a fact is not in and of itself relevant to the jury's resolution of credibility issues, particularly under the liberal definition given to the term "relevant evidence." *See Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 587 (1993). *See also* F.R.E. 401. And, in this case, where, as defendant and amicus for defendant concede, credibility is the dispositive issue, the existence of other impeachment fodder would not render relevant evidence bearing on the issue of credibility "needlessly cumulative." F.R.E. 403. *See District of Columbia v. Clawans*,

300 U.S. 617, 632 (1937); *United States v. Gaskell*, 985 F.2d 1056, 1063 (11th Cir. 1993).[3] Particularly under such circumstances, the prosecution should not be prevented from presenting all available arguments pertaining to a defendant's credibility or be bound to stop after the presentation of minimum evidence on the subject. *Cf. People v. Alvino*, 71 N.Y.2d 233, 245 (1987).

III. Defendant Has Failed To Demonstrate That The Prosecutor's Comments Deprived Defendant Of A Constitutionally Protected Right Or Imposed An Undue Burden On The Exercise Of A Right.

Petitioner demonstrated in its main brief (Pet. Bf. at 30-44) that permitting reference to a defendant's exposure to the testimony of other witnesses and its concomitant impact on his credibility does not impair any constitutional rights of an accused. While such comment deprives a defendant of the fictitious "right to the opportunity to fabricate or conform testimony without comment" referred to by the Second Circuit (Pet. Cert. at 44a n.11), it otherwise does not interfere with a defendant's full expression of his right to confront witnesses, right to testify, and right to due process.

Defendant states that allowing a presumption of tailoring based upon a defendant's mere presence at trial casts an impermissible burden on the confrontation right and the right to testify. This is because, according to defendant (Resp. Bf. at

3. These concessions include: "With credibility the only issue for the jury to decide . . ." (Resp. Bf. at 11); "credibility was the *only* issue for the jury to resolve . . ." (Resp. Bf. at 38); reference to case as a "credibility contest" (Resp. Bf. at 40); "The credibility of these [the prosecution witnesses] was thus at the heart of the case" (Amicus for Resp. Bf. at 3).

12), an accused is powerless to rebut the tailoring presumption in any effective way unless he is willing to forgo the exercise of either his confrontation right or his right to testify. Defendant adds that he is further handicapped by this so-called tailoring presumption because it undercuts the presumption of innocence and thereby improperly aids the prosecution in meeting its burden of proof. Defendant is wrong.

As a threshold matter, this argument, like others of defendant, rests on the mistaken premise that petitioner is advocating a presumption of tailoring. This misplaced reliance alone is reason to discount this argument. Moreover, a jury's mere consideration of the possible effects of defendant's listening to other witnesses, in light of their observations of defendant on the stand and other considerations, does not burden every defendant; rather, it merely allows a factor relevant to credibility to be weighed.

In any event, permitting the fact of the defendant's non-sequestered status to be considered by the jury does not force an election of rights by a defendant. Essentially, this argument of defendant rests on the unsupported belief that it is "virtually impossible" (Resp. Bf. at 7, 12) for a defendant to counter effectively the negative inferences a jury might draw from a defendant's presence during testimony shy of waiving either the right to confront witnesses or the right to testify. In pressing this overstatement, defendant posits (Resp. Bf. at 7, 30-33) a number of unreasonable ways in which a defendant could counter such negative inferences -- e.g., waiving the right to remain silent and issuing pre-trial statements, or waiving the attorney-client privilege and disqualifying his attorney who would then testify concerning defendant's pre-trial statements -- and then highlights the patent flaws in those alternatives.

But an effective remedy overlooked by defendant -- in addition to remedies previously suggested by petitioner (Pet. Bf. at 36-37) -- is the simple expedient of summation comment by defense counsel. A defense attorney can address in summation all arguments that an unfavorable inference should be drawn against the defendant. For example, just as defendant argues now, he can argue in the trial court that a "fit" between the defendant's testimony and that of prosecution witnesses is proof of the defendant's truthfulness, rather than any tailoring. It would be up to the jury to determine the weight to be accorded that argument.

Defendant's suggestion that he cannot anticipate that a prosecutor will make such a tailoring argument or the factual predicate for such an argument must be rejected. In many jurisdictions, it is the role of a defense attorney to anticipate what arguments will be made by the prosecutor, and he must do so routinely, on every matter subject to argument. *See* Pet. Bf. at 37n.15. This is true in New York, where by statute a defense attorney's closing argument precedes that of the prosecutor, and defendant never has an opportunity to respond to a prosecutor's argument after the fact. *See* New York Criminal Procedure Law § 260.30. Requiring him to do so in this context imposes no greater burden on defendant. Additionally, requiring a defendant to anticipate that a prosecutor in summation will refer to his non-sequestered status is functionally indistinguishable from requiring him to anticipate arguments concerning his interested witness status, arguments that are legally sanctioned. *See* Pet. Bf. at 21.

Equally baseless is defendant's notion that the presumption of innocence is undermined or "turned . . . on its head" by a jury's consideration of a defendant's non-sequestered status on the issue of credibility. Resp. Bf. at 7,13,24,27.

Notably, this argument rests on the existence of the "presumption of tailoring," which, to reiterate, is not being advanced by petitioner. In any event, consideration by a jury of this fact is no more detrimental to the presumption of innocence than is the proper consideration of a defendant's interested witness status. *See United States v. Hill*, 470 F.2d 361, 365 (D.C.Cir.1972)("We wholly fail to see how the [interested witness] instruction trespasses upon the statutory authorization or the presumption of innocence since it merely treats his [the defendant's] evidence the same as that of any other witness with a very special interest"). Just as all defendants -- innocent and guilty -- are subject to an interested witness charge, all defendants -- innocent and guilty -- who sit through the testimony of other witnesses are subject to the ills of non-sequestration (e.g., innocent confabulation) and a jury may consider that fact.

Defendant seeks to distinguish comments on a defendant's status as an interested witness from comments on a defendant's ability to hear other witnesses by claiming that interested witness comments do not single out defendants from other witnesses, whereas consideration of a defendant's non-sequestered status does just that. This claim rests on defendant's mistaken belief that exemption from the witness-sequestration rule is a right uniquely afforded a defendant.[4] (Resp. Bf. at 9). The reasoning does not withstand scrutiny. While, unlike other witnesses, only a defendant has a confrontation right, as statutory law and decisional law make

4. *See, e.g.*, "[D]efendants, unlike other witnesses, have confrontation rights, and defendants alone would be subject to a sweeping charge of tailoring grounded on that circumstance" (Resp. Bf. at 9); "[H]e [the defendant] alone has the privilege of listening to others testify . . ." (Resp. Bf. at 27).

plain (see F.R.Cr.P. 615 [5]; Pet. Bf. at 29), exemption from the witness-sequestration rule is not an opportunity solely afforded an accused. And allowing a jury to consider a defendant's unsequestered status where there are no other unsequestered witnesses no more burdens rights of a defendant than allowing a jury to consider a defendant's interest in the outcome when (as is typically the case) there are no other interested witnesses. In such instances, a defendant is not being singled out because of his exercise of a constitutional right, but rather because of factors (a special interest in the outcome or exposure to the testimony of others) that bear directly on his credibility.

IV. The Due Process Issue Is Properly Before This Court.

Defendant contends that petitioner is proscribed from addressing the due process argument because it was not included, as required by Rule 14.1 of the Rules of this Court, in the Question Presented in petitioner's Petition for a Writ of Certiorari.[6] According to defendant, the due process claim represents a basis for affirmance independent of the issue of whether the Second Circuit improperly extended the scope of *Griffin*. The record in this case does not allow for such a conclusion.

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5. F.R.Cr.P. 615 provides: "At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. This rule does not authorize exclusion of (1) a party who is a natural person, or (2) an officer or employee of a party which is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of the party's cause, or (4) a person authorized by statute to be present."

6. Rule 14.1 states, inter alia: "The statement of any question presented is deemed to comprise every subsidiary question fairly included therein. Only the questions set out in the petition, or fairly included therein, will be considered by the Court."

First, the language of the Second Circuit's two decisions leaves no question that the reversal of the conviction -- including the due process issue -- was predicated solely on a *Griffin* analysis, with that analysis serving as the underpinning of the finding of three constitutional violations (involving the right of confrontation, the right to testify, and the right to due process). The *Griffin* decision pervades the Second Circuit's decision; that court repeatedly refers explicitly to *Griffin* in its "Defendant's Right to Confrontation" and "Right to Testify On One's Own Behalf" sections (*see e.g.*, Pet. Cert. at 42a, 43a, 48a). Then, in its section entitled, "Right to Due Process of Law," the Second Circuit (Pet. Cert. at 50a) presupposes error with that error consisting of the *Griffin* violation spoken of in the two previous sections of the decision. As the Second Circuit stated, when "commentary goes to the heart of the constitutionally guaranteed rights to be present at trial and testify on one's own behalf, the very fairness of the entire trial is compromised." Thus, the due process violation found by the Second Circuit was directly predicated on its findings that the prosecutor had violated defendant's *Griffin*-based right of confrontation and right to testify.

If there is any doubt as to this interpretation, it is extinguished upon reference to the Second Circuit's decision upon the petition for rehearing. In that decision (Pet. Cert. at 73a), the Second Circuit refers to the existence of "the constitutional issue" in the singular and then cites only to *Griffin* in characterizing the nature of that issue. That the Second Circuit's analysis under *Griffin* consists of three components does not alter this conclusion.

Second, the dissent below refers to the *Griffin*-based nature of the Second Circuit's decision. At one juncture the dissent speaks of how "my colleagues treat [*Griffin*] as a

guiding star for the grant of relief herein" (Pet. Cert. at 56a).

Third, that the three sub-issues in this case all blend together on some levels and revolve around *Griffin* is evidenced by defendant's own due process analysis. At one juncture (Resp. Bf. at 35), when referring to the due process finding of the Second Circuit, defendant states that the "tailoring argument was found to be fundamentally unfair" and then proceeds to quote language from the Second Circuit's section pertaining to the confrontation claim, which relies heavily on *Griffin*! Thus, even defendant has difficulty trying to separate the Second Circuit's *Griffin* analysis from its due process finding.

Certainly defendant cannot claim "surprise" at the fact that petitioner has included the due process issue in its brief. The Second Circuit explicitly relied upon three grounds -- all *Griffin*-related -- to reverse the conviction. Defendant cannot seriously contend that it was not on notice that petitioner was seeking certiorari on all three grounds as subsumed within the *Griffin* issue; it is nonsensical to suggest that petitioner would only advance within the question presented two of the three grounds necessary to reverse the decision of the Second Circuit. Moreover, in its brief in opposition to the Petition for a Writ of Certiorari, defendant did not argue that this Court should not grant the writ on *Griffin* grounds in view of the "independent" due process ground for affirming the Second Circuit decision. The reason was because of defendant's awareness that the due process ground -- like the confrontation and right to testify issues -- was "fairly included" in the question presented.

Remarkably, while stating that petitioner cannot address the due process issue, defendant claims that it may raise the very same issue as a basis for affirming the ruling of the Second Circuit. While as the prevailing party the defendant may defend

the decision of the Second Circuit on any ground properly raised below (*see Northwest Airlines v. County of Kent, Michigan*, 510 U.S. 355, 365n.8 [1994]), defendant seemingly is arguing that it can raise an issue in favor of affirmance to which petitioner is proscribed from responding. The illogic of that position is manifest.

Against this backdrop, it is clear that the due process question is "fairly subsumed" (*Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 512 [1991]), or "fairly embraced within" (*LeBron v. National R.R. Passenger Corp.*, 513 U.S. 374, 379-380 [1995]), or "fairly included" in the question presented for review. *See R.A.V. v. City of St. Paul, Minnesota*, 505 U.S. 377, 381n.3 (1992); *Greer v. Miller*, 483 U.S. 756, 761n.3 (1987); *Brown v. Socialist Workers '74 Campaign Committee*, 459 U.S. 87, 94n.9 (1982). Certainly, the relationship between the *Griffin* issue and the due process issue is "close enough [for the due process issue] to come, if by the barest of margins, within those 'subsidiary question[s] fairly included' in the principal question on appeal." *Arkansas Elec. Co-op v. Arkansas Pub. Ser. Com'n*, 461 U.S. 375, 382n.6 (1983).[4]

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7. While hesitant to do so, this Court can still consider an issue not raised in the petition for certiorari. *Izumi Seimitsu v. U.S. Philipps Corp.*, 510 U.S. 27, 31-32 (1994). The Court's "power to decide is not limited by the precise terms of the question presented." *Procunier v. Navarette*, 434 U.S. 555, 559n.6 (1978); *Blonder-Tongue Laboratories Inc. v. Univ. of Illinois Foundation*, 402 U.S. 313, 320n.6 (1971). Considering that the issue was presented and ruled upon by the Second Circuit, fully briefed by both parties, and that defendant is relying on it as a basis for affirmance, even if the due process point was not "fairly included" in the question presented, this Court should reach it anyway.

V. The Prosecutor Provided A Factual Basis For Her Comments That Defendant Tailored His Testimony.

Petitioner previously delineated the factual predicate for the prosecutor's claim that defendant tailored his testimony. *See* Pet. Bf. at 45-47. Buried in a footnote is defendant's challenge to the quality of this factual predicate. Petitioner will respond briefly to defendant's claims.

First, defendant states that the prosecutor's characterization of defendant as a "smooth slick character" is merely a "subjective description" and not evidence. As petitioner demonstrates in its main brief (Pet. Bf. at 45-46), a witness's demeanor on the witness stand, however, does indeed constitute evidence to be considered by the jury, and such evidence may alone lead to a conclusion that testimony is tailored.

Second, defendant argues that the prosecutor's statement that defendant's testimony sounded "rehearsed" was not based on defendant having tailored testimony, but rather on his having repeated certain testimony on both direct and cross-examination. Therefore, according to defendant, such testimony was not offered as proof of the tailoring accusation. That testimony is repeated and therefore sounds rehearsed, however, is entirely consistent with it having been thought out in advance and tailored.

Third, defendant states that a "fit" between defendant's testimony and that of the prosecution witnesses was not proof of tailoring but could indicate the truthfulness of defendant's testimony. Certainly, as even the Second Circuit recognized (Pet. Cert. at 72a), such testimonial conformity can indeed be a

sign or evidence of tailoring. Moreover, whether or not such conformity is due to "coloring" of testimony or truthfulness is a question for resolution by the jury as the trier of fact; the possibility that more than one inference can be drawn from such evidence does not eliminate such evidence as proof of tailoring.

Fourth, defendant complains that the prosecutor's statement that defense counsel made a particular argument at trial "because it fits the whole scenario here" did not refer to tailoring by the defendant but merely to argument of defense counsel. Ignored by defendant, however, is that defense counsel's argument was based on an explanation provided by defendant himself during his testimony, which explanation was built around the testimony of the complainant. In stating that defense counsel raised an argument that "fit the whole scenario here," the prosecutor was thus attacking the testimony underlying defense counsel's argument; she was not accusing defense counsel of positing arguments known by defense counsel to be false.

Fifth, defendant argues that the prosecutor could not properly rely on defendant's testimony that he had been slapped by the complainant -- raised for the first time on cross-examination -- as proof of tailoring because the complainant herself never testified to that fact. This argument rests on the erroneous and narrow view of tailoring as only consisting of testimony that conforms to that of other witnesses. Tailored testimony can also consist of testimony that deviates from that of other witnesses in order to explain the existence or occurrence of irrefutable facts, such as when defendant here sought to explain the cause of the complainant's injuries. Indeed, short of a confession on the witness stand, a defendant's tailored testimony can never mirror that of a complainant.

* * * *

Absent defendant's erroneous reliance on the presumption of tailoring, which is not advanced by petitioner, defendant offers no reasonable explanation as to why a jury should not be allowed to consider the impact on a defendant's credibility of his exposure to the testimony of other witnesses. Because this circumstance goes directly to the fundamental goal of truth-seeking, and because it does not realistically impede the exercise of a defendant's rights, a jury may properly consider it, along with other constitutionally permissible evidence that may be used to impeach a defendant.

Respectfully submitted,

RICHARD A. BROWN
District Attorney
Queens County

Andrew Zwerling
John Castellano
Ellen C. Abbot
Assistant District Attorneys
Of Counsel

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