

FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS—PROSECUTOR’S COMMENTS INTIMATING THAT DEFENDANT HAD THE OPPORTUNITY TO ALTER HIS TESTIMONY IN ACCORDANCE WITH OTHER WITNESS TESTIMONY DID NOT VIOLATE DEFENDANT’S FIFTH AMENDMENT, SIXTH AMENDMENT AND DUE PROCESS RIGHTS—*Portuondo v. Agard*, 120 S.Ct. 1119, 1128 (2000).

The Supreme Court of the United States held that a prosecutor’s remarks in her closing argument which impugned the general credibility of the defendant did not unlawfully violate the defendant’s Fifth, Sixth, and Fourteenth Amendment rights. *See Portuondo v. Agard*, 120 S. Ct. 1119, 1128 (2000). The Court reasoned that when a defendant takes the witness stand, his credibility is constantly subject to scrutiny; thus, the defendant’s opportunity to confront witnesses and his right to be present at his own trial is not unconstitutionally impeded. *See id.* at 1127. The Court distinguished the present facts from the situation where there is impermissible insinuation that a non-testifying defendant must be hiding something. *See id.* at 1128. To that end, the Supreme Court has placed its approval on blanket, unfounded attacks on a defendant’s credibility, in a situation where the defendant cannot refute such accusations. *See id.* at 1127.

The defendant-respondent, faced numerous counts of sexual assault, in addition to three counts of weapon possession. *See id.* at 1121. The victim, Nessa Winder along with her friend, testified by rehashing the gruesome details of how the defendant raped and sodomized her. *See id.* In addition, the defendant, Walker, brandished a weapon, threatening both women. *See id.* In his defense, the defendant testified that any sexual intercourse was consensual. *See id.* He admitted to having hit the victim in the face, but denied all allegations of rape or threatening the victim or her friend with a gun. *See id.*

In summation, the defendant’s attorney challenged the veracity of the two victims. *See id.* In contrast, the prosecution emphasized the credibility of the witnesses. *See id.* The prosecutor also addressed the defendant’s prior conviction and his undeniable self-interest in the outcome of the trial. *See id.* However, the prosecutor continued to attack the witnesses’ credibility, but with blanket statements directed to the demeanor of the defendant who supplied an answer or excuse for everything. *See id.* Moreover, the prosecutor, notwithstanding the defense’s objection, attacked the defendant for being the last one to testify. *See id.* The prosecutor impugned the defendant’s credibility by pointing out the tactical advantage the defendant possesses by testifying after all the witnesses, leaving Walker the opportunity to hear such testimony, and accordingly alter the truth to his benefit. *See id.*

Notwithstanding the defense’s objection that such remarks violated Walker’s right to be present at his trial, the trial court denied the claim. The trial judge responded that whether a defendant testifies last is a matter of fact. Thus, the trial court found nothing improper about the prosecutor’s comments as to the defen-

dant's ability to alter his testimony in accordance with prior testimony. *See id.* Ultimately, the jury convicted the defendant on anal sodomy and weapons possession. *See id.*

The defendant petitioned for habeas corpus in federal court, positing that his Fifth and Sixth Amendment and Due Process rights were impinged. *See id.* The district court denied the petitioner's motion. *See id.* Yet, on appeal, the Second Circuit Court of Appeals reversed. *See id.* at 1122 (citing 117 F.3d 696 (1997)).

The Supreme Court granted *certiorari*. *See id.* The Supreme Court held, in a majority opinion authored by Justice Scalia, that the prosecutor's comments did not violate the defendant's constitutional guarantees of the Fifth and Sixth Amendments, nor did it violate the defendant's Due Process rights. *See id.* at 1123. The Court explained that the credibility of a defendant who testifies is constantly under scrutiny; thus, the facts here are inapposite to the case law which proscribed a prosecutor's comments as to the implications associated with a defendant's refusal to testify. *See id.*

Justice Scalia began the majority opinion by isolating the crux of the defendant's argument, particularly that the Court's decision in a prior case was controlling. *See id.* That specific case, *Griffin v. California*, 380 U.S. 609 (1965), as Justice Scalia explained, involved a prosecutor's comments to a jury on a defendant's failure to testify, refute or explain the allegations against him. *See id.*

The majority declined to extend the particulars of *Griffin* to the case at hand. *See id.* The majority cited the historical background of comments concerning the credibility of the defendant as a witness. *See id.* In particular, Justice Scalia noted that, historically, defendants were prohibited to even testify on their own behalf because of the defendant's inherent credibility problems. *See id.* To that end, Justice Scalia assigned the defendant the burden of putting forth relevant case law to demonstrate that the prosecutor's urging was improper. *See id.* at 1123-24.

The majority continued to dismantle the defendant's only substantive position, his analogy to the *Griffin* case. *See id.* at 1124. Justice Scalia suggested that a jury's natural conclusion about a defendant's credibility after hearing his testimony which followed all other witnesses that had taken the stand, is inapposite to a jury's natural reaction to a defendant's refusal to testify. *See id.* The Justice further contended that a jury would inevitably judge the defendant's credibility in relation to previous witnesses, but would not for a defendant who refuses to testify because of the number of legitimate reasons for refusing to take the witness stand. *See id.*

The majority distinguished the comments of the prosecutor in *Griffin*, suggesting that the comments with respect to the defendant's silence implied evidence of guilt. *See id.* at 1125. Here, the Justice stressed that the prosecutor's comments focused only on the credibility of the witness, particularly the defendant as a witness. *See id.* The Court refused to elevate the defendant's status as

a witness, asserting that the defendant's credibility is subject to the impeachment process as with any other witness. *See id.* Justice Scalia discarded the argument that the comments were improper because the comments were generic and failed to particularize the impairment of the defendant's credibility. *See id.* Justice Scalia elicited case support which never mandated comments related to credibility to be specifically detailed. *See id.* at 1126. Furthermore, the majority dismissed the defendant's last argument, making no distinction as to whether the remarks were impermissible because the prosecutor commented during her summation rather than in cross-examination. *See id.* at 1127. Thus, the Court found no significant distinction between cross-examination and summation. *See id.*

The Court lastly discussed the defendant's alleged due process claim, similarly finding little support for his position. *See id.* The Court acknowledged that New York law requires the defendant to be present at trial. *See id.* at 1128. However, even if the defendant had a choice to be present at trial, akin to a defendant who has the option whether to testify on his own behalf, the majority still found no support for the proposition that the impairment of credibility is a violation of due process. *See id.*

In a brief concurrence, Justice Stevens, joined by Justice Breyer, agreed with the majority's ultimate judgment. *See id.* at 1129 (Stevens, J. concurring). However, Justice Stevens disagreed with the majority's approval of the prosecution's remarks. To that end, Justice Stevens condemned the prosecutor's remarks as undermining the defendant's presumption of innocence, but did not see the remarks as necessitating a reversal of the defendant's conviction. *See id.*

Justice Ginsberg, who was joined by J. Souter, dissented. *See id.* at 1129 (Ginsberg, J. dissenting). Justice Ginsberg attacked the majority decision as undermining the truth-seeking function of the Court. *See id.* Justice Ginsberg suggested that generic accusations concerning a defendant's opportunity to "recreate" his own testimony affects the innocent and the guilty. *See id.* Justice Ginsberg acknowledged that general accusations about a defendant's credibility should be permissible, but only to the extent that it is done on cross-examination. *See id.* at 1130 (Ginsberg, J. dissenting). The dissent pointed out that cross-examination would allow the jury to assess the defendant's demeanor when presented with such accusations. *See id.* Moreover, Justice Ginsberg explained that the defendant would be denied the opportunity to present prior consistent statements which could bolster his testimony, if these accusations were raised solely in summation. *See id.* at 1131 (Ginsberg, J. dissenting).

The dissent also criticized the majority for its implication that such comments historically were recognized as constitutional. *See id.* Justice Ginsberg questioned the majority's rationalization that the absence of prior case law prohibiting such comments, places the stamp of constitutionality on remarks like the prosecutor made. *See id.* at 1133 (Ginsberg, J. dissenting). Additionally, Justice

Ginsberg refuted the majority's suggestion that an inference into a defendant's credibility is more "irresistible" or "natural" to the jury than the inference as to why a defendant chose not to take the stand. *See id.* at 1135 (Ginsberg, J. dissenting). Justice Ginsberg ultimately concluded that a prosecutor can attack the defendant's credibility, as long as the prosecution's comments emanate from the relevant evidence and facts present during testimony at trial. *See id.*

ANALYSIS

The Supreme Court's decision in *Portuondo v. Agard*, creates an unacceptable and unnecessary distraction to the current trial system. The majority's use of historical "cases" to bolster its position is unfounded and disingenuous. Unlike Eighteenth and Nineteenth Century case law, today the defendant is presented the opportunity to testify, if he so chooses, to which the presumption of "innocent until proven guilty" applies. However, blanket statements attacking the defendant's credibility, without any basis, serves as a detriment to that presumption.

Often in trial strategy considerable attention is achieved by the concept of recentness. The notion of recentness suggests that the last implication or assertion weighs the heaviest upon a jury's decision. This is confirmed by court procedures which permits the party with the burden of proof the opportunity to close last. To that end, allowing the prosecution to malign a defendant with unfounded remarks will bear some effect upon a jury's ultimate decision. When a question of the defendant's veracity has been raised during the course of trial, the prosecution should have unlimited power to emphasize the inconsistencies or inherent unreliability in the defendant's testimony. However, that power rests on an established foundation, not blanket mudslinging. It is too remote and too "defensive" for a defendant's attorney in his conclusion to guess or counter with an explanation as to the unfounded accusations of the prosecution which are to follow. Thus, the defendant will inevitably be forced to absorb the attack on his credibility.

Whether the remarks in this particular case had some effect on the jury's ultimate determination is unknown. Perhaps, the defendant was lying and just changing his story to further his own self-interests. The point to emphasize is that the Court has now given its stamp of approval to every district attorney to take one final parting shot at the defendant, without any substantiation. Instead of resolving any conflict in favor of the defendant, who is "innocent until proven guilty", the Court has flipped the burden with respect to this particular issue. Hopefully, trial courts will use their discretion to restrict prosecutorial remarks. However, this decision assures the criminal trial system that prosecutors will at least attempt to make such bald conclusions. Guilty or innocent, the defendant

will have no opportunity to refute, explain or deny such allegations.

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