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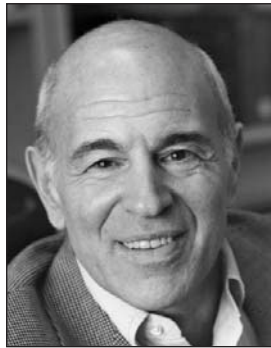
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# Burdening Constitutional Rights: The Supreme Court's License to Prosecutors

By Bennet L. Gershman

In *Portuondo v. Agard*,<sup>1</sup> decided last March, the Supreme Court ruled that it is permissible for a prosecutor to argue to a jury that a defendant's testimony at trial should be disbelieved because his presence at trial gave him a unique opportunity to tailor his testimony to that of all the other witnesses. The Court reversed the decision of the Second Circuit Court of Appeals which found, apparently in a case of first impression in the federal system, that such generic comment violated the defendant's right to confrontation, to testify, and to receive due process and a fair trial.<sup>2</sup>



The Second Circuit reasoned that the prosecutor's remark invited the jury to consider the defendant's exercise of his right to confrontation as evidence of his guilt, and penalized him for exercising that right. Such comment, according to the Second Circuit, implies that a truthful defendant would have stayed out of the courtroom before testifying, or would have testified before other evidence was presented. The prosecutor's conduct, in essence, forces a defendant either to forgo his right to be present at trial, his right to testify on his own behalf, or risk the jury's suspicion.

A bare majority of the Supreme Court disagreed. It found that the Second Circuit's decision lacks historical support, is distinguishable from precedents forbidding prosecutors to place burdens on a defendant's exercise of constitutional rights, and is inconsistent with the central function of the trial to discover the truth.

The prosecutorial tactic of burdening a defendant's exercise of constitutional rights has appeared in a variety of contexts. Prosecutors have asked juries to infer guilt based on a defendant's decision not to testify,<sup>3</sup> not to call witnesses,<sup>4</sup> to remain silent after being given *Miranda* warnings,<sup>5</sup> to go to trial,<sup>6</sup> to secure the assistance of counsel,<sup>7</sup> to refuse to consent to a warrantless search,<sup>8</sup> and to testify.<sup>9</sup> In all of these instances, courts have found the prosecutor's remarks to constitute misconduct.

Constitutional limitations on a prosecutor's ability to make such comments originated in the Supreme

Court's decision in *Griffin v. California*,<sup>10</sup> as reinforced by *Doyle v. Ohio*.<sup>11</sup> In *Griffin*, the Court held that allowing a prosecutor to comment on a defendant's failure to testify violated the Fifth Amendment privilege against self-incrimination. "It is a penalty imposed by courts for exercising a constitutional privilege," the Court stated. "It cuts down on the privilege by making its assertion costly."<sup>12</sup> Rejecting the argument that such inference by a jury was "natural and irresistible," the Court observed that while a jury might make such inference on its own, neither a court nor a prosecutor should be allowed to affirmatively encourage it to do so.<sup>13</sup>

Following *Griffin*, the Supreme Court held in *Doyle* that a prosecutor violates due process when he uses a defendant's post-arrest, post-*Miranda* silence against him either in examining witnesses or argument to the jury. The Court observed that "post-arrest silence is insolubly ambiguous" because such silence during custodial interrogation can be interpreted either to indicate reliance on *Miranda* rights or to support the inference that a later exculpatory story was a fabrication.<sup>14</sup> Because the *Miranda* warnings contain an implicit "assurance that silence will carry no penalty," use of that silence to infer guilt denies the defendant due process.

*Griffin* and *Doyle* stand for the principle that where the exercise of constitutional rights is "insolubly ambiguous" as between innocence and guilt, a prosecutor may not encourage the jury to construe the ambiguity against the defendant. By forcing a defendant either to forgo the exercise of a constitutional right or be penalized for exercising it, the prosecutor violates the constitution and commits misconduct. Applying this principle to *Portuondo v. Agard*, the prosecutor committed misconduct when she insinuated that the defendant's presence in court and testimony on his own behalf—the exercise of the Sixth Amendment right of confrontation and the Fifth Amendment right to testify—should be taken by the jury as a basis for concluding that the defendant gave false testimony.

Five members of the Supreme Court saw the prosecutor's conduct differently. Justice Scalia wrote the majority opinion, joined by Chief Justice Rehnquist and Justices O'Connor, Kennedy, and Thomas. The majority initially noted an absence of historical support for the defendant's position that his constitutional rights were

violated by the prosecutor's conduct. Justice Scalia observed that defendants were disqualified from testifying under oath until well into the 19th century, so there would be no occasion at that time to make such comments. It was only after the Court's decision in *Griffin v. California* that such a comment was challenged.<sup>15</sup> Justice Scalia concluded, without any data to support this assertion: "Evidently, prosecutors were making these comments all along without objection; *Griffin* simply sparked the notion that such commentary *might* be problematic."<sup>16</sup> As Justice Ginsburg correctly observed in her dissent, "the absence of old cases prohibiting the comment that the Court now confronts thus scarcely indicates that generic accusations of tailoring have long been considered constitutional."<sup>17</sup>

In addition to asserting the absence of historical support, the majority attempted to distinguish *Griffin*. The majority observed that *Griffin* prohibited the jury from doing something that they were not permitted to do—infer guilt from a defendant's silence. And such prohibition is reasonable, according to the majority, because the inference of guilt from silence is not always "natural and irresistible." There may be many reasons why an innocent defendant chooses not to testify. By contrast, according to Justice Scalia, it is entirely "natural and irresistible," as well as entirely proper, for a jury to evaluate the credibility of a defendant who testifies last by considering and weighing in the balance the fact that the defendant heard the testimony of all witnesses who preceded him.<sup>18</sup> Thus, according to the majority, prohibiting a prosecutor from advising a jury about the defendant's ability to tailor his testimony from his presence in the courtroom differs from *Griffin* in that it prohibits a jury to do that which it is perfectly entitled to do, or requires a jury to do something that is practically impossible.

Moreover, according to the majority, *Griffin* prohibited comment that suggested that a defendant's silence is evidence of guilt. The prosecutor's comments in *Agard*, by contrast, concerned the defendant's credibility as a witness and were therefore, according to the majority, in accordance with the longstanding rule that when a defendant takes the stand, his credibility may be impeached like that of any other witness. Of course, as Justice Ginsburg noted in her dissent, an argument that goes to the defendant's credibility also goes to his guilt.<sup>19</sup> For as Justice Scalia noted in the first sentence of his opinion, the defendant's trial "ultimately came down to a credibility determination."<sup>20</sup>

Moreover, the majority noted, the generic comment that the *Agard* prosecutor made is not that different from the instruction that a judge routinely gives a jury, namely, that in weighing the defendant's credibility, the

jury may consider the defendant's deep personal interest in the outcome of the case.<sup>21</sup> The prosecutor's comment, in short, is "appropriate—and indeed, given the inability to sequester the defendant, sometimes essential—to the central function of the trial, which is to discover the truth."<sup>22</sup>

Finally, Justice Scalia addressed defendant's claim that by being required to be present at trial pursuant to New York statutory law,<sup>23</sup> the defendant was denied due process because of the prosecutor's comment on that forced presence. The defendant claimed that such comment is prohibited by *Doyle*, which held that a prosecutor's comment on the defendant's silence after being given *Miranda* warnings violated due process because the *Miranda* warnings contain an implicit "assurance that silence will carry no penalty." However, according to the majority, it is not possible to believe that a similar assurance of impunity is implicit in New York's statute requiring the defendant to be present at trial. Moreover, according to Justice Scalia, there is "no authority whatever for the proposition that impairment of credibility, if any, caused by mandatory presence at a trial violated due process."<sup>24</sup>

Justices Stevens and Breyer concurred in the result, essentially because of the "high threshold" necessary to establish that a state trial was constitutionally unfair. Nevertheless, these Justices strongly disagreed with the Court's "implicit endorsement of [the prosecutor's] summation."<sup>25</sup> The two concurring Justices accused the Court of "demeaning" the adversary process, "violating the respect" for a defendant's individual dignity, and "ignoring" the presumption of innocence. These Justices urged federal and state trial judges to bar prosecutors from making such arguments, or to explain to juries the necessity and justification for a defendant's attendance at trial.

According to the dissent by Justice Ginsburg, joined by Justice Souter, the Court's decision "transforms a defendant's presence at trial from a Sixth Amendment right into an automatic burden on his credibility."<sup>26</sup> The prosecutor, according to the dissent, unfairly burdened the defendant's constitutional rights by urging the jury to construe the "insolubly ambiguous" exercise of those rights against the defendant. As Justice Ginsburg noted, "It is no more possible to know whether the defendant used his presence at trial to figure out how to tell potential lies from the witness stand than it is to know whether an accused who remains silent had no exculpatory story to tell."<sup>27</sup>

The Court's decision, according to Justice Ginsburg, does not advance the search for truth because it allows a prosecutor to make a generic accusation at the defendant's ability to use his presence to tailor his testimony

whether the defendant is guilty or innocent. The prosecutor did not tie her accusation to any specific testimony by the defendant, which if factually based probably would have been proper.<sup>28</sup> Instead, the prosecutor's "broadside," fired after the defense submitted its case and completed its summation, constituted an "irrebuttable observation" that could be made about any testifying defendant, guilty or innocent. Moreover, by making such argument on summation after the defendant's summation, a prosecutor effectively prevents a defendant from answering the charge.<sup>29</sup>

*Griffin* and *Doyle* are indistinguishable from *Agard*'s case, despite the Court's attempt to isolate them. First, the inference of guilt from silence is certainly "natural and irresistible" in most cases.<sup>30</sup> That is why the jury must be instructed not to draw such inference.<sup>31</sup> The inference involved in *Griffin* is at least as "natural and irresistible" as the inference the prosecutor in *Agard*'s case invited the jury to draw. There are reasons why an innocent defendant might not wish to testify. And there are reasons why an innocent person might choose to remain silent after arrest. But in each of these instances, something beyond the defendant's innocence must be hypothesized in order to explain the defendant's behavior.

Not so in *Agard*'s case. If a defendant appears at trial and gives testimony that fits the rest of the evidence, complete innocence could explain such behavior. As Justice Ginsburg explained: "Unless one has prejudged the defendant as guilty, or unless there are specific reasons to believe that particular testimony has been altered, the possibility that the defendant is telling the truth is surely as good an explanation for the coherence of the defendant's testimony as any that involves wrongful tailoring."<sup>32</sup>

The *Agard* decision is wrong in principle, and wrong as policy. Prosecutors, at least in the federal criminal justice system, now are afforded broad license to denigrate a defendant's testimony simply by insinuating that his mere presence in the courtroom during his trial gave him a chance to tailor his testimony. Given the usual respect and confidence that jurors have for the prosecutor,<sup>33</sup> such argument, although potentially very misleading, can be devastating to a defendant's chance for a fair trial. Prosecutors are not barred from cross-examining the defendant by asking specific questions that might be relevant to the accusation of tailoring. Nor is a prosecutor barred from arguing during summation about such fact-specific reasons that might suggest the existence of tailoring. What the Second Circuit disallowed, and the Supreme Court licensed, is a generic argument that states, in essence, that if a defendant chooses to testify, his testimony always may be assailed as a fabrication because he sat through the trial and had

an opportunity to hear the testimony of all the other witnesses. The only ways the defendant can avoid such innuendo is either by absenting himself from the trial—not a realistic option—or by testifying prior to the testimony of all the other witnesses, including government witnesses, not a permissible option.

*Agard* is not an isolated instance of the Court adding to the prosecutor's already formidable arsenal of power. It is simply another example of a trend over the past 30 years that has further skewed the balance of power in the criminal justice system in the prosecutor's favor.<sup>34</sup> This unsettling trend can be seen in the prosecutor's investigatory, charging, convicting, and sentencing powers.<sup>35</sup> Moreover, the judiciary has, in effect, shifted its focus from an attempt to deter prosecutorial misconduct to affording prosecutors increasing license to "strike foul blows."<sup>36</sup> This can be seen in the expansion of harmless error, the demise of supervisory power, and the absence of meaningful standards to guide prosecutorial discretion. In addition, attempting to control prosecutorial misconduct through professional discipline is virtually non-existent.

In conclusion, the Supreme Court's *Agard* decision is deeply troubling. It seems so inconsistent with earlier precedents such as *Griffin* and *Doyle*, and insidious as a matter of criminal justice policy. But the decision is completely in keeping with the increasingly *laissez-faire* attitude by the Supreme Court towards prosecutors. State courts, of course, can impose more rigorous standards on prosecutors than the federal judiciary. And although unlikely, lawmakers troubled by an increasingly distorted criminal justice system may see the need for legislative reforms either to correct the imbalance, or make prosecutors who misconduct themselves more accountable.

## Endnotes

1. 120 S. Ct. 1119 (2000).
2. *Agard v. Portuondo*, 117 F.3d 696 (2d Cir. 1997), *affirmed on rehearing*, 169 F.3d 140 (2d Cir. 1999).
3. *Griffin v. California*, 380 U.S. 609 (1965). The test of whether a prosecutor's language constitutes an improper comment on the defendant's failure to testify is whether the comment is "manifestly intended" or is of such character that the jury would "naturally and necessarily" take it as a comment on the failure to testify. See *U.S. v. Hasting*, 461 U.S. 499 (1983) (Stevens, J., concurring); *U.S. v. Knoll*, 16 F.3d 1313 (2d Cir. 1994).
4. *U.S. v. Williams*, 739 F.2d 297 (7th Cir. 1984); *U.S. v. Merryman*, 630 F.2d 780 (10th Cir. 1980).
5. *Doyle v. Ohio*, 426 U.S. 610 (1976).
6. *Cunningham v. Zant*, 928 F.2d 1006 (11th Cir. 1991).
7. *Hill v. Turpin*, 135 F.3d 1411 (11th Cir. 1998).
8. *U.S. v. Thame*, 846 F.2d 200 (3d Cir. 1988).
9. *State v. Shinn*, 704 A.2d 816 (Conn. 1997).

10. 380 U.S. 609 (1965).
11. 426 U.S. 610 (1976).
12. *Griffin*, 380 U.S. at 614.
13. *Id.* at 614-15.
14. *Doyle*, 426 U.S. at 617.
15. *State v. Cassidy*, 672 A.2d 899 (Conn. 1996); *People v. Buckey*, 378 N.W.2d 432 (Mich. 1985); *Jenkins v. U.S.*, 374 A.2d 581 (D.C. App. 1977).
16. *Agard*, 120 S. Ct. at 1124 (emphasis in original).
17. *Id.* at 1133.
18. *Id.* at 1124.
19. *Id.* at 1134.
20. *Id.* at 1122.
21. *Reagan v. U.S.*, 157 U.S. 301 (1895).
22. *Agard*, 120 S. Ct. at 1127.
23. N.Y. Crim. Proc. Law §§ 260.20, 340.50.
24. *Agard*, 120 S. Ct. at 1128.
25. *Id.* at 1129.
26. *Id.* at 1129.
27. *Id.*
28. *U.S. v. Chako*, 169 F.3d 140 (2d Cir. 1999).
29. Assuming a timely objection, one possible corrective would for the court to instruct the jury that a defendant's presence should not be used against him. Another corrective would be to permit defense counsel an opportunity for rebuttal argument. Another would be to allow the defendant to introduce a prior consistent statement. See Fed. R. Evid. 801(d)(1)(B).
30. What the Court said in *Griffin* is that the inference is not "always" natural and irresistible. 380 U.S. at 615.
31. *Carter v. Kentucky*, 450 U.S. 288 (1981) (defendant entitled to have trial court give such instruction); *Lakeside v. Oregon*, 435 U.S. 333 (1978) (jurors routinely draw inference of guilt from silence).
32. *Agard*, 120 S. Ct. at 1134.
33. *U.S. v. Modica*, 663 F.2d 1173 (2d Cir. 1981) (prosecutor's argument typically makes a strong impression on jury).
34. See Gershman, *The New Prosecutors*, 53 Pitts. L. Rev. 393 (1992).
35. *Id.*
36. *Berger v. U.S.*, 295 U.S. 78, 88 (1935).

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