OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: LEONARD PORTUONDO, SUPERINTENDENT, FISHKILL CORRECTIONAL FACILITY, Petitioner v. RAY ARGARD

CASE NO.: 98-1170

PLACE: Washington, D.C.

DATE: Monday, November 1, 1999

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ORIGINAL

IN THE SUPREME COURT OF THE UNITED STATES

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LEONARD PORTUONDO, :

SUPERINTENDENT, FISHKILL :

CORRECTIONAL FACILITY, :

Petitioner :

v. : No. 98-1170

RAY AGARD :

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Washington, D.C.

Monday, November 1, 1999

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:01 a.m.

APPEARANCES:

ANDREW ZWERLING, ESQ., Kew Gardens, New Jersey; on behalf of the

Petitioner.

JONATHAN A. NUECHTERLEIN, ESQ., Assistant to the Solicitor General,

Department of Justice, Washington, D.C.; on behalf of the United States, as amicus curiae, supporting the Petitioner.

BEVERLY VAN NESS, ESQ., New York, New York; on behalf of the

Respondent.

C O N T E N T S

P R O C E E D I N G S

(10:03 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument first this morning in Number 98-1170, Leonard Portuondo v Ray Agard. Mr. Zwerling.

ORAL ARGUMENT OF ANDREW ZWERLING

ON BEHALF OF THE PETITIONER

MR. ZWERLING: Mr. Chief Justice, may it please the Court:

A prosecutor should be permitted, even for the first time on summation, to ask the jury to consider the credibility-influencing factor of a defendant's nonsequestered status as a witness, particularly where, as here, it's conceded that such status creates a risk of truth-distortion.

Allowing this would be consistent with the century-old principle articulated by this Court that for impeachment purposes, when a defendant takes the stand, he's to be treated like any other witness. This rule materially advances the fundamental goal of truth-seeking that this Court has often spoken about.

QUESTION: Mr. Zwerling, would the prosecutor have been entitled to a jury instruction that the jury could draw an adverse inference by virtue of the fact -- as to guilt by virtue of the fact that the defendant had

sat in the courtroom the whole time?

MR. ZWERLING: The prosecutor would be entitled to a jury instruction that as for impeachment purposes the jury could consider the effects, if any, of the defendant's status as a nonsequestered witness.

I mean, this Court has recognized since biblical times -- or, not this Court has recognized since biblical times.

(Laughter.)

QUESTION: May I just interrupt? I'm not sure you answered Justice O'Connor's question. You said he could get a different question, but could -- would the prosecutor be entitled to the instruction that she suggested, that they may draw an adverse inference from the fact?

MR. ZWERLING: The short answer is no, Your Honor, the prosecutor would not be entitled to an instruction that as to guilt the jury could consider the effects, if any, of the defendant's nonsequestered status. It would solely be for impeachment purposes.

QUESTION: Could the prosecutor make that remark without correction from the district -- from the trial judge if the defendant's testimony on the stand was in all respects consistent with the testimony -- with his previous statements that he'd given to the police, et

cetera?

MR. ZWERLING: Could the prosecutor still make that remark?

QUESTION: Yes. He said, now, ladies and gentlemen, you know, this man's been here, and so his testimony is pretty well rehearsed. If -- would it be proper for the trial judge to say, ladies and gentlemen of the jury, I just want you to know that the testimony he's given has been consistent with his previous testimony. Could the trial judge interrupt to that effect?

MR. ZWERLING: The prosecutor in the first instance, judge, would not be able to stand up without any factual predicate whatsoever, make the argument to the jury that the defendant's testimony is in some way tailored, simply by virtue of the --

QUESTION: It has to be a factual predicate?

MR. ZWERLING: To make an affirmative claim of tailoring, Your Honor, but I just want to state as a threshold principle that just, much in the way that a jury can consider a defendant's interest in the outcome, you do not need a factual predicate, other than the defendant's exposure to the testimony of the witnesses, to throw out that question to the jury for its consideration as the trier of fact to determine what, if any, impact that exposure had.

QUESTION: The prosecutor wouldn't have much incentive in the case proposed by Justice Kennedy. I mean, that argument is not going to go over with the jury if you say, look, this guy was sitting here all the time and was able to tailor his testimony, and yet his testimony is entirely consistent with all the other witnesses.

MR. ZWERLING: It simply wouldn't be a rational argument, Your Honor.

QUESTION: What if it is -- I'm going to give you a really hard one, Mr. Zwerling. What if the prosecutor knows that his testimony, that the defendant's testimony is entirely consistent with a confession that was given earlier and that has been excluded?

MR. ZWERLING: If the prosecutor, under those circumstances, stood up and said to the jury that a statement, or -- well, this is assuming that the prosecutor relied upon that confession at trial.

QUESTION: No, I'm saying it was excluded and --

MR. ZWERLING: If it's excluded, Your Honor, and the prosecutor stood up as an officer of the court and told the jury that the testimony at trial was the first time that the defendant has stood up to give this particular version, then it would be error.

It wouldn't be error under Griffin analysis. It

would be another form of prosecutorial --

QUESTION: But that wasn't the question, Mr. Zwerling. As I understand your position, you seem to be qualifying it, but I'm not sure, that in any case where the defendant takes the stand, so he's putting his credibility in issue, in any such case -- you said something about the peculiar facts of this case, but I thought your position was, defendant takes the stand, the prosecutor legitimately in summation can say, ladies and gentlemen of the jury, please take into account that defendant was the only witness who sat through this entire trial and therefore could conform his testimony to what others said.

MR. ZWERLING: Yes, Your Honor. In every case where the defendant has been exposed to the testimony of other witnesses, like any other witness, he's subject to the ills of nonsequestration, and therefore it is proper for the prosecutor in every case to throw that question of fact out to the jury in much the same way as a prosecutor is permitted, as this Court has sanctioned, to make the argument that a defendant's interest in the outcome may have affected his credibility as a witness.

QUESTION: Mr. Zwerling, in New York I take it there's a statute that requires the defendant to be present at his trial.

MR. ZWERLING: That is true, Your Honor.

QUESTION: That isn't true in every State, I assume.

MR. ZWERLING: I can't speak for every State, but it's certainly true in Your Honor --

QUESTION: Well, then, how do you deal with the Doyle case?

MR. ZWERLING: A couple of ways, Your Honor. First of all, this particular issue is not properly before the Court. It wasn't raised in the trial court, wasn't raise in any State appellate litigation, or even in the Federal courts below. It was raised for the first time in respondent's brief before this Court.

QUESTION: It's not a different issue. It's just an additional argument. I mean, he has raised the issue of the improper comment by the prosecutor.

MR. ZWERLING: Well, in New York, Your Honor, a defendant can waive his presence at trial upon application to the court. Now, while it's in the discretion of the trial court to grant that application, nonetheless that's an application that could be made by a defendant, and we're not in this particular case in a position to know what the trial court would have done, because no such request was made.

If such a request was made and even denied, then

perhaps a defendant could request a jury instruction to alert the jury --

QUESTION: But your argument is a little extreme in the situation where, by State law, the defendant has to be there, and any time the defendant testifies, even if it's totally consistent with his prior but excluded confession, you say the prosecutor can nonetheless get up in summation and try to use his presence at the trial against him.

MR. ZWERLING: Well --

QUESTION: I mean, that's -- how do you justify --

MR. ZWERLING: Your Honor, for the reason that it's not possible to detect how a witness' testimony might have been affected by the nonsequestered status. Ironically, the Second Circuit in the Jackson case, which we cite in our brief, stated that it's virtually impossible to say how a person's testimony would have been affected, and consistency with pretrial statements is just one factor that can go into discerning whether or not some confabulation took place, or some alteration, intentional alteration took place.

QUESTION: You say it's pretty much like -- I think you've already said, like the trial judge's charge, you may take into consideration the interest of every

witness in the outcome of the proceedings, and that would apply to the defendant as well as to any other witness.

MR. ZWERLING: In the interested witness context, Your Honor, there may very well be defendants whose testimony is unaffected by their interest in the outcome. Nonetheless, they are subjected to an interested witness charge and it's up to the jury, as a trier of fact, to determine what effect, if any, that individual's interest had on their reliability as a witness.

Similarly, here --

QUESTION: Mr. Zwerling, there was an interested witness charge in this case, wasn't there?

MR. ZWERLING: Yes, there was, Your Honor.

QUESTION: So this is doubling, underscoring, or putting it in bold face, for one witness only. The interested witness charge in this case covered the defendant, as it might have covered other witnesses.

MR. ZWERLING: They cover different subjects, Your Honor. The interested witness charge goes to a motive to lie. Exposure to the testimony of other witnesses goes to an opportunity to lie and, even not just lie, there's an issue of confabulation, innocent alterations in testimony, replacing facts --

QUESTION: Yes, but in answer to the Chief's question you equated the two, and now you're telling us,

well, they are indeed different, and you are entitled, rightly, to both.

MR. ZWERLING: I'm not -- I'm saying, Your Honor, I'm using the interested witness charge scenario by analogy. Just as a prosecutor doesn't have to prove or lay a factual predicate that the defendant's interest actually affected his testimony in order to get a charge, a prosecutor doesn't have to actually prove that a defendant's testimony was altered, either innocently or purposefully, as a predicate for getting --

QUESTION: Were there witnesses other than the defendant in fact sequestered in this case?

MR. ZWERLING: In this case, all of the other witnesses was sequestered, Your Honor.

QUESTION: Were sequestered, yes.

MR. ZWERLING: But again, similar to an interested witness scenario, in most cases, or in many cases the defendant is the only witness who has an interest in the outcome. A charge, an interested witness charge isn't singling the defendant out because under the facts of that particular case he happens to be the only one with an interest in the outcome. They're singling out the defendant in that context, and in the context before the Court, because there's some external factor, either a defendant's interest in the outcome, or his exposure to

the testimony of witnesses that may affect his credibility.

QUESTION: Well, with respect to the exposure to the others, I'd like you just to go back to Doyle for a minute. One of the strands of reasoning in Doyle was that the defendant's post Miranda silence was -- I think it was ambiguous. I forget what adjective was -- insolubly ambiguous, I think was the phrase that the court used.

Don't we have an insoluble ambiguity problem in the predicate for the comment in issue here, because to the extent that the testimony of the defendant is, in fact, congruent with that of other witnesses save at some, you know, crucial exculpatory point, we don't know, and I presume in the absence of some affirmative evidence going to the truth or falsity of particular statements, there's no way for a jury to know whether in fact that congruence is the result of truth or the result of tailoring.

So that if a comment like this, let alone an instruction on this point, is given in the absence of some affirmative reason in the evidence to think that there was particular tailoring on a particular point, it sounds to me as though the ambiguity, as in Doyle, would simply give the jury kind of a wild card. What's your answer to that?

MR. ZWERLING: It's two-pronged, Your Honor, one specifically dealing with the facts in Doyle, and then a

more general response.

In response to the Doyle prong of the question, in Doyle in both footnote number 10 of that decision and in the dissenting opinion written by Justice Stevens, it was pointed out that the prosecutor in that case used the defendant's, or the apparent inconsistency between the defendant's testifying at trial and his silence after receiving Miranda warnings as proof of guilt.

It was referred to in footnote 10 that the prosecutor implied guilt, and it was dealt with more specifically in the dissenting opinion that the prosecutor asked the jury, or suggested to the jury that the testimony, or that inconsistency was inconsistent with innocence.

QUESTION: Well, that's true, but whether we're dealing with something that goes to impeachment or whether we're dealing with something that goes to guilt, there is the problem of ambiguity, and it's the ambiguity that's bothering me.

MR. ZWERLING: Yes, Your Honor. In terms of the ambiguity, however, in this particular -- with this particular credibility influencing factor, it's been recognized that it does have effect, have an effect on a witness who's exposed to the testimony of other witnesses, and --

QUESTION: I don't understand why -- maybe I've got the assumption wrong, but are you conceding that there was no cause on the part of the prosecutor to mention this?

I mean, I counted six or seven times in which the defense attorney emphasized the word consistency, three times in which he said -- or maybe it was two or three, the defense attorney says, the defendant told a totally consistent story. He didn't use the word totally, he says a consistent story, and about three or four times in which he said the prosecuting witness' story was inconsistent, so the prosecutor gets up and says, sure it was consistent, he heard all the witnesses.

I mean, is this -- are we supposed to decide this case on the assumption there was no cause for the prosecutor to say, well, he heard the witnesses, that's why he was consistent. He just heard the defense attorney say he was inconsistent.

Well, you know, how are we supposed to decide this case? I don't understand.

MR. ZWERLING: If Your Honor is referring to the specifics of this case, the --

QUESTION: I mean, am I not supposed to look at the specifics of the case when I decide the legal question?

MR. ZWERLING: In terms of the particular facts of this case, the prosecutor's remarks were entirely proper.

QUESTION: All right. Is that -- then why aren't you arguing that?

MR. ZWERLING: They're proper for two reasons, Your Honor. a) they were invited by the remarks of defense counsel, which resounded from the outset of the trial in his opening statement, through his summation, where he argued that the mere fact that the prosecution witnesses were exposed to one another, therefore they tailored their testimony, therefore they fabricated this story against the defendant, and under the particular facts of this case, it was proper for the prosecutor to stand up and say, well, they may have been exposed to one another, but the defendant was exposed to everybody.

Those remarks were invited by the remarks of defense counsel, and the prosecutor's remarks in this case were a reasonable response, and she didn't --

QUESTION: But on that point the Second Circuit disagreed with you and said, if there had been in this case an attempt to show that particular pieces of information were tailored, so be it. But you were making a generic claim, and you answered in response to me that that is your position, that in every case where the

defendant takes the stand, that is the rule the prosecutor can bring out in summation, and now you seem again to be retreating from that.

But I got from your brief, I got from your arguments up until now that you are taking that position, defendant testifies, it's legitimate for the prosecutor to bring out that he heard all the witnesses.

MR. ZWERLING: Your Honor, to make myself clear, for the prosecutor to make the generic argument, to throw the question of fact out to the jury you should consider the effects of the defendant's exposure to testimony. You don't need a factual predicate more than his exposure to the testimony of others.

In this particular case --

QUESTION: He doesn't have to be invited, you're saying.

MR. ZWERLING: Yes, Your Honor. In this particular case, the prosecutor did more than throw out that question of fact to the jury. The prosecutor made an affirmative statement that the defendant tailored, he altered purposefully his testimony, and where a prosecutor is going to do that, there has to be some factual predicate. Either the remarks have to be invited, or as she also did, she laid out a factual predicate.

QUESTION: Am I right that in New York a

defendant has no right to bring out on rebuttal prior consistent statements that the defendant made before he heard the witnesses?

MR. ZWERLING: If they are made after the motive to lie arose.

QUESTION: Well, when would that be in a case like this?

MR. ZWERLING: In this particular case, the defendant could not have brought out his prior consistent statements, Your Honor.

QUESTION: Well, is there any reason why the constitutional doctrine here should follow the niceties of the law of evidence on when you can impeach witnesses?

MR. ZWERLING: No, Your Honor. I think a clear distinction should be drawn. There's the constitutional analysis which the respondent in the Second Circuit had been relying upon, and then there are rules of evidence. The line should be drawn, and it has been drawn by this Court in the past, and I just want to point out that under the facts --

QUESTION: This is not a rule of evidence. This is prosecutorial misconduct in his comments, in argument. No evidentiary question is presented, is it?

MR. ZWERLING: But the question is whether or not Griffin penalty analysis is implicated by virtue of

such comments, and the answer is no, because the prosecutor's comments in no way created the suggestion that the jury should take those comments and rely upon them as proof of guilt in this particular case.

QUESTION: I'm not sure.

MR. ZWERLING: I see the white light has gone on. I'd like to reserve some time for rebuttal if there are no questions from the Court.

QUESTION: Very well, Mr. Zwerling.

Mr. Nuechterlein. Do you pronounce your name Nuechterlein, or Nuechterlein.

MR. NUECHTERLEIN: It's Nuechterlein, that's correct.

QUESTION: Nuechterlein, okay.

ORAL ARGUMENT OF JONATHAN A. NUECHTERLEIN

ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE, SUPPORTING THE PETITIONER

MR. NUECHTERLEIN: Mr. Chief Justice, and may it please the Court:

Like any other witness, a criminal defendant who elects to take the stand is subject to fair comment on his credibility as a witness. Here, the prosecutor's comments restated a basic principle of the common law. That principle is this. If a witness has the opportunity to listen to the testimony of other witnesses before he gives

his own, it will be more difficult for the fact-finder to detect any falsity in the story he tells. That factor is, of course, not dispositive to the witness' credibility, but it is certainly a relevant factor as the common law --

QUESTION: Well, Mr. Nuechterlein, do you take the position that there's just a per se rule, that in every case where a defendant testifies, that it's all right for the prosecutor to make this kind of comment?

MR. NUECHTERLEIN: I think as a general matter this kind of comment is appropriate. There may be special circumstances in which there are unusual indicia of consistency.

QUESTION: Well, is there a -- but you take the position that it would be proper in every case. Is this something that is commonly done by Federal prosecutors, to your knowledge?

MR. NUECHTERLEIN: The issue has come up in a handful of Federal cases. It has not come up in a large number of Federal cases. That could be the result of one of two factors. One is, either the prosecutors don't make this argument that much, or it could also be that defendants recognize the argument as often being fair comment.

QUESTION: Do you think that an instruction to the jury would be appropriate --

MR. NUECHTERLEIN: I --

QUESTION: -- reinforcing this statement?

MR. NUECHTERLEIN: Probably yes, but that would be a closer case, because there are many contexts in which we permit prosecutors to make arguments to the jury in their role as advocates that we do not permit judges to make to the jury in their role as neutral arbiter of the proceedings.

QUESTION: My concern is, is that if we adopt your position, which is not without some strong reasons to recommend it, that although that's -- this comment is not usually made now, a year hence it will be standard.

It will be in every prosecutor's manual, and then the trial judge will have to say, now, ladies and gentlemen of the jury, it would be an extraordinary occurrence were the defendant not present at all phases of the trial. He must be present in order to assist his counsel and be apprised of the charges against him, and therefore you cannot hold that against -- and so we go back and forth.

MR. NUECHTERLEIN: Actually, this comment, Justice Kennedy, is made in a number -- has been made in a number of cases. The court of appeals opinion, for example, cites about a dozen State court cases in which it's come up. The comments in those cases were very

similar to the comments in these, and after the Second Circuit issued its original opinion in this case, there has been a handful of cases in that jurisdiction in which defendants have raised precisely this sort of argument.

QUESTION: Well, excuse me, I don't understand the defendant here to be asserting what those -- that judge's instruction would have told the jury, that you therefore can't take it into account.

MR. NUECHTERLEIN: I had understood Justice Kennedy's question to relate to arguments the prosecutor --

QUESTION: I mean, that's not at issue in this case.

MR. NUECHTERLEIN: That's correct.

QUESTION: Isn't it agreed by both sides that the jury can take account of the fact that he's been sitting in court during the entire argument?

MR. NUECHTERLEIN: That's certainly correct.

QUESTION: And the jury is not entitled to an instruction, as it is with regard to the right, of the Fifth Amendment right of nonincrimination. The jury is not entitled to an instruction that you should not take -- you should not take the defendant's refusal to testify to be an admission of guilt.

MR. NUECHTERLEIN: That's correct.

QUESTION: Well, I suppose a trial judge could go on and say, if you find he altered his testimony by reason of his presence you can take that --

QUESTION: Well, but --

QUESTION: -- into account. But the whole point is, it just seems to me that this is a new area in which we're going to have comment, countercomment, instructions --

MR. NUECHTERLEIN: Justice Kennedy, this is not a new area. In fact, for hundreds of years it has been a principle of the common law that if a witness is exposed to the testimony of other witnesses before giving his own, that gives him an advantage, and it is the sort of advantage that a lawyer has a right to bring to the attention of the jury.

QUESTION: Well, when you get into the area of instructions by the trial court, you also get into the question of whether a defendant would request a particular instruction.

I know when I practiced, long ago, the defense attorney, criminal defense attorneys were split on the question of whether it was an advantage to the defendant to have the judge charge that he was not required to take the stand and they weren't to hold it against him. That was certainly the constitutional law, but it also called

the jury's attention to the fact that the defendant hadn't taken the stand, and maybe made it worse.

So I don't think you should think in terms of automatic charges by the judge. Often, they have to be requested or could -- if a defendant didn't request them, they wouldn't be given.

MR. NUECHTERLEIN: That is correct, and again I just want to reemphasize the point that I believe that a trial judge would have the discretion to give that kind of instruction, but you don't have to agree with me on that in order to reverse the judgment below, because there really are a variety of contexts in which we want to give prosecutors leeway to make effective arguments where we would not permit a judge to make an analogous comment.

QUESTION: Don't you think the Doyle case cuts against your position somewhat?

MR. NUECHTERLEIN: I do not, for two reasons. One, Doyle was significantly limited by subsequent precedent, namely Jenkins v. Anderson and Fletcher v. Weir. In both of those cases this Court observed that Doyle was based on an estoppel principle. The Miranda warning was construed as an implicit assurance that the suspect's silence would not then be used against him. There is no analogous estoppel issue that arises here.

Secondly, in the Doyle context there is some

risk that the jury will view the defendant's prior silence as substantive evidence of guilt. Here, that concern is --

QUESTION: On the other hand, in the Doyle facts there is some inconsistency as a practical matter between the silence at the time of questioning and the contrived story at the time of trial, but here there's no inconsistency, there's just an opportunity, so it seems to me this case is a fortiori from Doyle, and I didn't agree with Doyle, as you may know.

MR. NUECHTERLEIN: What do you mean, Justice Stevens, when you say it's a fortiori --

QUESTION: Well, here the prosecutor can make this comment even though there's no -- nothing in the record that would imply that there's some inconsistency between the testimony and the actual fact, whereas in Doyle, the fact that he was silent is in itself somewhat inconsistent with his having come up with a story later.

MR. NUECHTERLEIN: There are a variety of reasons why a lawyer should have discretion to make comments about the credibility of the witness. One of those is inconsistency, but another one would also be the common law rule that if a defendant is exposed to the testimony of other witnesses before giving his own, that makes it more difficult for the fact-finder to discern

whether there's any falsity in this story.

QUESTION: Well --

QUESTION: Mr. Nuechterlein, if we applied Doyle here, we would again have to instruct the jury not to take account of the fact that he has heard all the testimony. It wouldn't be just a question of whether -- whether the prosecutor can invite the jury's attention to that fact. The jury would be entitled, if we are -- as I understand Doyle, if we are following Doyle, the jury -- the defendant would be entitled to an instruction that you shall not take into account the fact that he's heard all the testimony.

MR. NUECHTERLEIN: If Doyle were the basis of an opinion affirming the judgment below, I imagine there would be arguments analogous to Carter v. Kentucky in which defendants would claim a right to a jury instruction of that kind.

QUESTION: Mr. Nuechterlein --

QUESTION: May I ask one other verify brief question? You refer to all the State cases that's arisen. Am I correct in thinking all of those cases came to the view that this was improper comment?

MR. NUECHTERLEIN: No, that is incorrect, Justice Stevens.

QUESTION: They didn't.

MR. NUECHTERLEIN: At least four of them cited in the court of appeals opinion upheld the comments as fair comment.

QUESTION: I see.

QUESTION: Mr. Nuechterlein, you mentioned in distinguishing Doyle the risk there of the jury's confusing impeachment with proof of guilt. Isn't that risk equally great here?

MR. NUECHTERLEIN: I don't think so. Here is why. In Doyle, a jury might well view a defendant's silence in the face of accusation as substantive evidence of guilt in itself. Here, there is no risk that the jury could conceivably view the defendant's mere presence in the courtroom as evidence of guilt.

QUESTION: No, but the jury is going to go from mere presence to a suspicion of tailoring. Tailoring is lying, and as the old saw has it, a man who will lie will steal, or whatever. I mean, isn't that the risk, that the jury will sort of follow that sequence of reasoning?

MR. NUECHTERLEIN: Justice Souter, I think that reasoning proves too much, because it would eviscerate the line this Court has always drawn between impeachment that goes to credibility and evidence that goes to guilt.

QUESTION: Well maybe it would, but does it also eviscerate the line between Doyle and this case?

MR. NUECHTERLEIN: No, I don't think it does, because the primary basis for this Court's holding in Doyle, as the Court stressed later in Fletcher --

QUESTION: Is the estoppel point.

MR. NUECHTERLEIN: -- and Jenkins is the estoppel point, and there is no analogous problem here.

QUESTION: Mr. Nuechterlein, may I ask a question about your position on brief that Chief Judge Winters' distinction was unworkable, because it seemed to me the Second Circuit worked it out very well in U.S. v. Chako the next time the issue came before them, when they said, look, it's different here. Here, there was a showing of tailoring, not merely opportunity to tailor.

MR. NUECHTERLEIN: Well, I'm not sure whether in Chako there was any actual proof of tailoring, and it's extremely difficult ever to prove tailoring, and I guess our central point is that just as the common law doesn't require a lawyer in other settings to give evidence that a particular witness would have given different testimony had he not been exposed to the testimony of other witnesses, so, too, is it inappropriate here to require the prosecutor to make that sort of showing about a defendant.

QUESTION: Thank you, Mr. Nuechterlein.

Ms. Van Ness, we'll hear from you.

ORAL ARGUMENT OF BEVERLY VAN NESS

ON BEHALF OF THE RESPONDENT

MS. VAN NESS: Mr. Chief Justice, and may it please the Court:

I just would like to focus, if I can, on what happened in this case. I think petitioner has made concessions in their briefs that are really dispositive of the issues in respondent's favor. First of all, the petitioner has conceded many times in their main brief, which I think they properly did, that an affirmative accusation of tailoring was, in fact, made in this case.

In their reply brief and again here at oral argument they've also conceded, as I think they must, that unless you have actual evidence to support a affirmative accusation of tailoring, that you can't use the exercise of this --

QUESTION: I don't understand them to concede that, Ms. Van Ness.

MS. VAN NESS: Your Honor, I think that on pages 2 and 3 of their reply brief --

QUESTION: Yes.

MS. VAN NESS: If I may, they say, nor has petitioner alleged that a tailoring argument may be predicated merely on an accused's presence during the testimony of other witnesses, and on page 3 on the first

full paragraph, 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.

QUESTION: Well, I should add, we don't decide cases on the basis of concessions by the parties.

MS. VAN NESS: I understand that, Your Honor, but I --

QUESTION: Ms. -- more than that, Ms. Van Ness. If that is what this case is about, just a fight over whether in fact the prosecutor made an accusation of tailoring that had no possible basis in fact, you should have made that point, it seems to me, in your opposition to the petition for certiorari. If I had known that's all the case is about, I don't think I would have taken it. We're not interested in deciding that factual question.

The question presented makes it very clear that it's talking about a much more broader, much broader and more important issue.

MS. VAN NESS: Well, regrettably, Your Honor, I did not put that in my --

QUESTION: Well, it's a little late to put it now.

MS. VAN NESS: But it is an alternate ground for affirmance, Your Honor, and I think these concessions

are --

QUESTION: We rarely go off on alternate grounds for affirmance unless there's some very obvious reason why we can't decide the issue that is presented in the question presented, which is whether Griffin should be applied to this case.

MS. VAN NESS: Your Honor, going to the opportunity to tailor argument, I would like to make a particular point on that, which is that the opportunity to tailor argument, the quote, mere opportunity to consider the defendant's ability to do this, is really an invitation to the jury to speculate. You have at best, for the State, you have two inferences that could be drawn from a consistent story by the defendant. One would be that he has tailored his testimony for a number of different -- in a number of different ways, only one of which might be the presence at trial.

QUESTION: But you're always speculating as to whether the witness is telling the truth or not, and you speculate on the basis of various considerations, and you're usually allowed to call those considerations to the jury's -- what if the witness' eyes are shifting all around the courtroom during the testimony. He looks very much like a person who's lying. Can the prosecutor call attention to that?

MS. VAN NESS: Certainly, Your Honor, but --

QUESTION: Of course he can.

MS. VAN NESS: -- you're calling attention to evidence. What my point is, that this is not evidence. At best, this is a possible explanation. If there is evidence that the defendant tailored his testimony --

QUESTION: Well, but it's an important possible explanation. Suppose in this case the prosecutor did not make this argument and, after an hour of deliberation, the jury sends a note to the judge and they say, dear judge, we know the defendant probably should be present at the trial, maybe he has a constitutional right to be at trial, but we think that in this case his presence enabled him to tailor his testimony, can we hold that tailoring against him. What's the judge supposed to do?

MS. VAN NESS: My -- the answer to that would be, if you find that there's evidence of tailoring in the record, jury, you are free to consider that evidence, but not that you are free to consider --

QUESTION: Well, I'm not sure why the prosecutor really argued anything different here.

MS. VAN NESS: Because the prosecutor was using -- the only evidence was that the defendant was there. That evidence -- that's not evidence that he in fact used the opportunity.

QUESTION: So your position is really -- is really, I was erroneous when I said I didn't think either side, that you were making -- you are making the contention that the jury -- not only may the prosecutor not call the jury's attention to it, the jury may not consider it, and presumably you would be entitled to an instruction, ladies and gentlemen of the jury, you should take no account of the fact that the defendant has been sitting here listening to all the testimony, because I don't see any other evidence of tailoring.

MS. VAN NESS: I do think there's a danger in asking the jury to speculate, because the State has the burden of proof, but if a line is to be crossed here, Your Honor, then at the very least this subject must be raised during the defendant's cross-examination to give him the chance to address it.

QUESTION: You're saying in effect that a juror cannot sit in the jury room and say, you know, this guy was very smooth, and the reason he was is because he was there, and that's the way I think. You don't think the jury could do that.

MS. VAN NESS: Well, I don't think it would be --

QUESTION: That's astounding.

MS. VAN NESS: I don't think it would be

appropriate for them to do it, Your Honor, because I don't think they have any proof that that's what happened.

QUESTION: No, but isn't the point, when the question -- when Justice Kennedy's question says, this guy was very smooth, wouldn't that be, in fact, an evidentiary basis? I mean, the suggestion is, sounds a little too smooth, and I don't know that your position requires you to say that that would be inappropriate. Why do you say that is inappropriate?

MS. VAN NESS: Well, Your Honor, I just -- I believe that that's in the nature of an adjective. I don't think that's evidence --

QUESTION: So you're in effect saying that if the testimony is, shall we say, unrealistically smooth, that that may not be considered? He's a very good witness, therefore he must be lying. I mean --

MS. VAN NESS: I think it's --

(Laughter.)

QUESTION: That -- I really don't think that facing that issue is what you necessarily have to do in this case, but maybe I misunderstand you.

MS. VAN NESS: Well, but going back to the Doyle point, Your Honor, the -- another explanation for why a defendant's story is consistent and he can't be shaken is that he's telling the truth, and that's why this --

QUESTION: Oh, that --

MS. VAN NESS: That's why --

QUESTION: You know, that goes to the, you know, the insoluble ambiguity point, but when you start talking about sort of unusual smoothness, I think we are outside -- or at least as I'm using the term, I think we're outside of the kind of testimony which is insolubly ambiguous, and don't you -- isn't that a distinction that can be drawn? It may be a fine line to draw, but isn't that a distinction that can be drawn?

MS. VAN NESS: Maybe I'm misunderstanding Your Honor, but certainly if the -- the prosecutor is free to use anything in the evidence to ask the jury to make -- to draw reasonable inferences from, but what they can't do, what I'm arguing they can't do is to ask the jury to speculate, so if you want to use the --

QUESTION: All right, so all you're saying I think is that it would be -- put it this way. Put it in terms of instructions. You're saying that it would be improper for the court, or you're implying that it would be improper for the court to say, because the defendant in any criminal case has the greatest interest of anyone in the courtroom, or any witness in the courtroom, you should devalue the defendant's testimony for interest greater than you'd devalue the testimony of other witnesses who

may be interested. You're --

MS. VAN NESS: No, I'm certainly not advocating that position.

QUESTION: Okay. What about the position in which the court gives this instruction. People who are in the courtroom and hear other witnesses can tailor their testimony. The defendant has a right to be in the courtroom, as he has done. Therefore, you should devalue the defendant's testimony for that reason, period.

MS. VAN NESS: Well, certainly, I --

QUESTION: You would say that was a wrong instruction.

MS. VAN NESS: Yes, I would.

QUESTION: And you would say it was a wrong instruction because, as I've given the hypothesis, there's no particularized basis in any evidence for applying that rule of devaluation, isn't that your point?

MS. VAN NESS: That's correct.

QUESTION: All right. If there is a particularized basis, whether the eyes are going back and forth in Justice Scalia's example, or whether there is an impression of oily smoothness in Justice Kennedy's example, then it seems to me we are outside the realm of pure speculation. Wouldn't you agree?

MS. VAN NESS: Oh, I -- yes, Your Honor.

QUESTION: Certainly, and the court of appeals would decide whether the Constitution has been violated or not presumably, under what you've accepted, by deciding whether, in fact, the defendant was smooth or too smooth. Is that going to be the critical constitutional fault line, whether he was just smooth smooth or oily smooth?

(Laughter.)

QUESTION: Is that seriously the distinction?

MS. VAN NESS: No, Your Honor, because I think --

QUESTION: And are you accepting the premise that what is wrong in a judge's instruction is also wrong in a prosecutor's argument? Is everything that a prosecutor says in final argument appropriate for a judge to say in instruction?

MS. VAN NESS: No. No.

QUESTION: The prosecutor surely has greater latitude than a judge.

MS. VAN NESS: Yes, the prosecutor certainly has greater -- he has greater latitude, but circumscribed latitude. The arguments that are made must be fair arguments based on the record.

QUESTION: But what about the traditional charge about the interested -- interested party? Now, it seems to me in your answers to Justice Souter's questions, some

of your other statements, would you allow that to be given in the absence of any showing that the defendant was not telling the truth?

MS. VAN NESS: Well, I think there's a fundamental difference between that charge and the issue in this case, because the motive to lie, it's not -- a motive to lie based on interest has not been presented as a tool that the defendant has which gives him any kind of advantage.

It's a charge which applies -- and this is also makes a difference. It's a charge that applies to all witnesses at trial, not simply to the defendant, and it has nothing to do with the exercise of a constitutional right. It's not using the defendant's exercise of his right to testify against him.

QUESTION: Well, supposing that the defendant had been sitting through all the trial but there were two other witnesses, two, for some reason, who had also sat all through the trial and had not been sequestered -- all the other witnesses had been sequestered -- so that the charge, the prosecutor's comment could then be directed to two witnesses as well as the defendant. Would that make any difference?

MS. VAN NESS: Well, I think that comments on other witnesses, depending on the facts of the case,

may -- might be appropriate. Those other witnesses --

QUESTION: But how about the generic comment? It no longer singles out just the defendant. It singles out the defendant and other witnesses who have sat there through the proceedings and not been sequestered.

MS. VAN NESS: Well, as a practical matter, Your Honor, there aren't any, going to be any such witnesses, but if there are --

QUESTION: I've certainly sat in cases where there was some reason for a particular witness not to be sequestered, and it wasn't the defendant.

MS. VAN NESS: Well, all right, Your Honor, but I still wouldn't approve that kind of generic construction, because I think it is fundamentally unfair to the defendant to use his exercise of a right against him without any basis in the record.

QUESTION: Okay, but --

QUESTION: May I ask on that question whether you think it would be fundamentally unfair for the prosecutor at the end of his cross-examination of the defendant, who's the last witness in the case, say, to ask questions -- you were sitting in the courtroom throughout the trial, weren't you, you heard all the testimony, make the point through cross-examination? Would that be permissible?

MS. VAN NESS: Well, certain -- yes. I do believe that. I think if the subject comes up on cross-examination at least it gives the witness an opportunity to address the issue, and to proffer any kind of evidence that they might have that they have not used this opportunity to their advantage. I think --

QUESTION: You've -- I'm sorry.

QUESTION: Well, that wouldn't authorize him to use prior consistent statements though, I don't think, if they were after he'd been arrested.

MS. VAN NESS: I'm sorry, Your Honor, are you talking about the defendant or ordinary witnesses?

QUESTION: I'm talking about the defendant. I'm just asking you if you think, instead of saving the point for argument, closing argument, the prosecutor makes the point at the end of his cross-examination of the witness, of the defendant who's the last witness in the trial, would that create the same constitutional problem?

MS. VAN NESS: Oh, I think it would, because if that's all that's being asked --

QUESTION: Yes.

MS. VAN NESS: -- Mr. Defendant, you were here and listened to A, B, C, and D, right, did you -- did that give you an opportunity to change your testimony, that that's the same problem as --

QUESTION: Well, he doesn't add the latter part. He just says, you've been sitting here in the courtroom during this whole trial, and you listened to all the prior witnesses as they were testifying before you came up here to tell this story, is that right.

MS. VAN NESS: Well, that's not -- that's not --

QUESTION: That's all he says.

MS. VAN NESS: That's not directly assailing his exercise of his constitutional right. It's not --

QUESTION: Oh, so that -- all right.

MS. VAN NESS: It's not saying that the defendant got an advantage out of that, out of being able to hear that testimony.

QUESTION: Now, I don't understand the directly assailing your constitutional right. If -- you cannot put any burden upon the assertion of the constitutional right?

MS. VAN NESS: Well, I think -- I think in some situations you could, but I don't think you can in this situation, because I think that the value that the State could get out of such an argument is extremely slight compared to the very severe burdens that are placed on a defendant by the -- by being -- them being given permission to raise this argument.

QUESTION: I just want to understand your answer. So you're saying that the question Justice Scalia

proposes is proper. The counsel's very sarcastic. It was, now you've been here for 3 days, and you've heard all of these witness -- that's why you're telling the story you're telling.

MS. VAN NESS: I don't --

QUESTION: That's improper?

MS. VAN NESS: I think that it's -- to me, that question shouldn't be asked, because I think it has --

QUESTION: Well, in other words, it's objectionable. You can raise an objection to that question.

MS. VAN NESS: Yes.

QUESTION: Under the Constitution.

MS. VAN NESS: I think it's doing -- it has the same difficulties as the argument that was made on summation in this case. It's exactly the same.

QUESTION: Ms. Van Ness --

QUESTION: Because it impedes his constitutional right. What about his constitutional right to testify. Is that constitutional right impeded by cross-examining him?

MS. VAN NESS: Certainly not.

QUESTION: So you pay the price for exercising that constitutional right. If you testify, you're subject to cross-examination.

MS. VAN NESS: But that goes back to --

QUESTION: If you're present at your trial, you're subject to having the fact that you're present at your trial being pointed out.

MS. VAN NESS: Your Honor, that goes back to a point I was trying to make earlier, which is that this -- the fact that the defendant was there is not evidence that he tailored. The opportunity --

QUESTION: Of course it isn't.

MS. VAN NESS: The question of whether he used that --

QUESTION: Of course it isn't, but that's a question for the jury. It -- you know, it's a factor --

MS. VAN NESS: So --

QUESTION: -- that would enable him to tailor, and the prosecutor's just telling the jury, this is a factor that would enable him to tailor, but take that into account along with everything else.

MS. VAN NESS: If the prosecutor has evidence that the defendant has tailored his testimony, I am not saying that he should not be allowed to use evidence. He can use it on cross, and --

QUESTION: What sort of evidence would one ever get that the person had tailored their testimony?

MS. VAN NESS: Well, for example, if he'd made a

prior inconsistent statement, and he changed his story at trial.

Now, again, this goes back to the fact that a change in story could be based on a variety of explanations. One such explanation could be the defendant heard the witnesses at trial. Another explanation could be that he was given broad discovery rights, knew the State's evidence very well before he got in there, and used that.

Another possibility is that he is -- well, so there are several explanations for why he could have changed his testimony, and listening to the witnesses is only one explanation, and if you don't have evidence that that's why he changed his story, I think it's unfair to ask the jury to assume that he did.

QUESTION: So the mere fact -- even the mere fact that he changes his testimony is not adequate in your view. You'd have to show that he -- somehow the prosecutor during the trial would have to show that he changed his testimony because he was sitting -- he was sitting there and heard the witnesses?

MS. VAN NESS: I think -- yes, because this explanation doesn't advance the case. It's the evidence of the change that advances their case, not the explanation for it, so to not risk them drawing an unfair

conclusion, and to not burden the defendant's exercise of his constitutional right, I think this argument should be forbidden.

QUESTION: What's the constitutional right? I'm having a problem to know how to decide this. I counted the word consistent appearing 11 times in a rather short summation by the defense about half divided between my client's story is consistent, the complaining witness' story is not consistent.

The State of New York said that under those circumstances, no rule of evidence in New York is violated. Now, what in the Constitution of the United States says New York's rule of evidence there is wrong? I mean, don't we have to decide this on the basis of 11 appearances of the word consistency in a short closing argument, and don't we have to take into account the fact that under New York law of evidence, under those circumstances, no rule of evidence is violated?

MS. VAN NESS: I'm not certain I follow your question, Your Honor.

QUESTION: Well, my question is, what is the question before us? If New York's law says it is not a violation of the law of evidence to make this comment, of course his story's consistent, he sat there and heard the witnesses -- that's the law in New York, all right. Now,

what part of the Constitution does that violate? Why?

MS. VAN NESS: Well, I don't believe that is the law in New York.

QUESTION: Ah. I have -- I couldn't find -- New York apparently just didn't say. They didn't discuss it.

MS. VAN NESS: Well, I don't think this constitutional issue has been addressed --

QUESTION: No, no, the law of evidence, not --

MS. VAN NESS: Well --

QUESTION: The law of evidence in New York is that under these circumstances no law of evidence is violated.

MS. VAN NESS: Well, I think it is -- I think under the law of New York there was a violation.

QUESTION: All right, then they made a mistake about that.

QUESTION: Well, why did the New York courts affirm this conviction?

MS. VAN NESS: Well, there were many, many, many issues raised in the appellate division, and this one was not specific --

QUESTION: Well, let's assume Justice Breyer is right. Let's assume Justice Breyer is right that this is permitted under the law of New York. Then what is the answer to his question about the constitutional issue as

you would put it, precisely?

MS. VAN NESS: Well, if this is permitted by the law of evidence in the State of New York, then I think that's an unconstitutional principle that this Court can address.

QUESTION: Because? Look, I mean, what I'm driving at is fairly simple. I'm sure that the prosecution would like a universal law that you could make this comment even no matter what, just make it out of the clear blue sky, and what I'm driving at is, the record before us is not the clear blue sky, at least as I read it, and I'm not using a doctrine of invited error, I'm using a doctrine of no error.

MS. VAN NESS: Well, in this particular case, Your Honor, the prosecutor, as was specifically found by the court of appeals, actually made an accusation of tailoring against the defendant on the basis of the exercise of the right without any evidentiary foundation whatsoever.

QUESTION: Good. I've read the record. I think they're wrong about that. I found 11 instances in which it uses the word consistent. I won't repeat myself. You heard what I said.

MS. VAN NESS: Well, that the defendant's story is consistent doesn't necessarily mean he used his

opportunity to hear the other witnesses --

QUESTION: Yes, I thought that was what you were going to say. I haven't been understanding Justice Breyer's question. You seem to understand it. I don't see what telling a consistent story has anything to do with whether you've heard the prior witnesses and tailored. You can have a consistent story that contradicts the prior witnesses, or you can have a consistent story that is in accord with prior witnesses. Consistency has nothing to do with whether you're tailoring, does it?

MS. VAN NESS: No, because I think that's not --

QUESTION: He didn't say -- they didn't use the word tailoring. I thought what they said was, in a very complicated factual story the lawyer says, look, my client's been consistent, the complaining witness wasn't, and what the prosecutor says is, sure, he sat here, why wouldn't he be consistent?

MS. VAN NESS: Well, the prosecutor went much farther than that, Your Honor. He went on to say that my client received a great benefit and advantage the other witnesses didn't have, and attributed his consistency to the exercise of his right to be present.

QUESTION: I suppose he would be consistent if he had listened to himself testify.

(Laughter.)

QUESTION: That would enable him to be consistent.

QUESTION: She didn't use the word --

QUESTION: But I didn't understand that he was listening to himself testify while he --

QUESTION: What she actually said was, use your common sense. You know, ladies and gentlemen, unlike the other witnesses, he has a benefit, the benefit he has is, he gets to sit here and listen to the testimony of the other witnesses. That's -- all right. Now, she said that in response, I gather, to the defense lawyer saying nonstop, my client's story was consistent, the complaining witness wasn't. I'll stop, because --

QUESTION: May I add one thing to that, because it seems to me we're losing what the Second Circuit decided. As I understand Judge -- Chief Judge Winters' dispositive opinion, it isn't a question of whether, but when.

He narrowed his decision, the Second Circuit's decision to the prosecutor's springing this for the very first time on summation and distinguished and left unanswered. Had it been brought up on cross, when the defendant would have a possibility of rebuttal -- but there was no such statement made in the cross-examination.

It was reserved for when the prosecutor spoke last, and that was all that the Second Circuit addressed, is this proper to make on summation, and we're getting into cross-examine. That was an issue that the Second Circuit explicitly did not decide.

MS. VAN NESS: Precisely, Your Honor. I was addressing cross-examination, but I did want to -- I do want to focus back on --

QUESTION: Why does the constitutionality of this conduct in -- under the Griffin analysis depend on whether it was brought up on cross-examination or whether it was urged on closing argument?

MS. VAN NESS: Because if it's raised for the first time in closing argument it's not -- it's mere speculation, it's not evidence. I can't --

QUESTION: But that doesn't sound like a constitutional argument. That sounds like something you say, the prosecutor shouldn't do that because it's unfair, and Griffin isn't based on unfairness.

MS. VAN NESS: Well, it's based on burdening a constitutional right with no legitimate State interest advanced by that.

QUESTION: What about shifty eyes?

QUESTION: Why couldn't your --

QUESTION: What about shifty eyes? Can you

bring that up in final argument, or you have to give him a chance to respond to that by bringing it up in cross-examination? I mean, he might say, you know, I have nervous tick or something.

MS. VAN NESS: Well --

QUESTION: Does the prosecutor have to bring that up in cross-examine, or can he just say, ladies and gentlemen of the jury, you saw the defendant testify here, did you see the way his eyes darted around the room?

MS. VAN NESS: The State --

QUESTION: This looked like a man who was not telling the truth. Can he not say that? I mean, he has to bring it up --

MS. VAN NESS: Your Honor, I think it's fundamentally different. The State here is seeking to use the defendant's presence as evidence, just -- they're saying, because he was there, you, jury, can infer that he lied. That -- if -- at least --

QUESTION: Not as evidence. It goes to his credibility. It doesn't go to the substance of the crime.

MS. VAN NESS: Well, it --

QUESTION: It goes to whether he was an honest witness, just as shifty eyes do.

MS. VAN NESS: Well, what is the jury supposed to consider in the deliberations room under those

circumstances if there's no supporting evidence? The prosecutor --

QUESTION: Well, I think -- why aren't you entitled -- why aren't you fully protected by an instruction from the court, if you want to ask for it, say ladies and gentlemen of the jury, this defendant has an absolute right to be at the counsel table. He must be there to assist in the prosecution of his case. The mere fact that he's present alone you cannot hold against him. Now, if you think he tailored his testimony, if you find that, then that is relevant to determining his credibility.

What's wrong with that instruction?

MS. VAN NESS: Well, I don't think that effectively cures the problem, because the prosecutor is not merely commenting on his presence. They're commenting on the fact that he used his presence as a tool with which to fabricate, and if there's no evidence --

QUESTION: Suppose he did.

MS. VAN NESS: Well, then -- then, if there's proof of that, like any other impeachment evidence, then the prosecutor is free to use that.

QUESTION: All right. Then there is nothing wrong with the instruction as I gave it to you, that he has a right to be present, the mere fact that he is

present cannot be held against him, if you think that he used his presence in order to tailor his testimony, then that -- then you may consider that.

Now, if you want that instruction, then I suppose you can get it. I'm not sure you'd want it, according --

MS. VAN NESS: I still don't think that the jury is equipped to deal with this situation, because there is no -- there's no -- if there's no evidence before them, but they're being told that if you consider that the evidence, that the defendant has used his opportunity to be here to tailor, then you consider that. It's still asking them to consider the --

QUESTION: Well, don't you think that a jury is entitled to consider the interest of every witness who testifies, and the fact that certainly the defendant is always an interested witness. The defendant wants off the hook, and don't you think the jury can say, gosh, we listened to what the defendant said, but after all, the defendant doesn't want to be convicted, and can't the jury say to itself, and also, the defendant sat there the whole time and listened to everybody else.

I think the jury can maybe reason from that in deciding which witness' testimony they want to give the greatest credibility.

MS. VAN NESS: Well, how could the defendant ever rebut that kind of speculation, though. With the interested witness charge, at least --

QUESTION: Well, the defendant has to -- if the defendant chooses to testify, and many don't, but if the defendant does, the defendant has to try to be as credible as possible on the facts during the testimony, but I would have thought that a jury could consider all of these things in weighing who to believe.

MS. VAN NESS: Well, again, the interest of the witness is neutral in a sense, because not only does it apply to everybody, but it is not perceived as a tool that the defendant has in order to enable him to tell a better lie. A defendant's interested or not, and if he's interested you can't disbelieve him simply because of that fact.

QUESTION: Ms. Van Ness, it seems to me what your principle boils down to is, it's okay for the prosecutor to do it if there is some -- enough evidence to think that there was tailoring, but he can't make this statement if there was not any evidence.

This is a very dangerous constitutional principle, that the prosecutor cannot in his closing statement invite the jury to make any factual determinations, or credibility determinations that the

evidence will not support. Is that a constitutional principle, that if the prosecutor goes beyond what the evidence will support, the whole case can be reversed?

MS. VAN NESS: Well, that --

QUESTION: Don't we give the jury a certain amount of discretion to reject stupid arguments?

MS. VAN NESS: Well, that would be a -- that could be a due process violation which I am alleging occurred here, and as the court of appeals found, but the -- I'm sorry.

QUESTION: I mean, you're just saying there's not enough evidence in toto to prove that this defendant was tailoring. Therefore, the prosecutor could not suggest the possibility of tailoring.

MS. VAN NESS: I am suggesting that a prosecutor can always make a tailoring argument in summation, a tailoring argument in summation, if there is evidence to support it.

QUESTION: Ah, if there is evidence to support it. You condition it on that.

MS. VAN NESS: Well, but what I'm getting at, Your Honor, is I don't believe it's appropriate ever for the prosecutor to tie that tailoring argument, which has an evidentiary foundation, with the defendant's exercise of his right to be present.

QUESTION: So going back to Judge Winters' point that Justice Ginsburg raised, if there had been a prior inconsistent statement here and that had been brought out, I take it you would agree that it would have been perfectly proper, even only at the last minute, in closing argument, for the prosecutor to make the tailoring argument here.

The timing is not crucial to you, Judge Winters' seeming suggestion that it was the fact that this didn't surface --

MS. VAN NESS: Well --

QUESTION: -- this tailoring claim didn't surface until the last minute in the prosecutor's closing argument, when it was too late for them to respond, that is not crucial, I take it, in your view.

MS. VAN NESS: Well --

QUESTION: If there had been a prior inconsistent statement, the word tailoring and the tailoring argument had never come up until the prosecutor's closing argument, I take it on your view the argument would have been proper for the prosecutor, is that correct?

MS. VAN NESS: Well, that would be a due process violation, Your Honor.

QUESTION: Thank you, Ms. Van Ness.

Mr. Zwerling, you have 3 minutes left.

REBUTTAL ARGUMENT OF ANDREW ZWERLING

ON BEHALF OF THE PETITIONER

MR. ZWERLING: Addressing the issue of the insoluble ambiguity, or that in the absence of a particularized showing of actual tailoring, that that gives rise to an invitation to speculate, if the witness in question who was not sequestered is not a defendant, the court can give a jury instruction that they can consider that fact, and to consider the effects, if any, that that nonsequestration had on that particular witness.

So what respondent in the Second Circuit are positing is a possible scenario in which there is more than one nonsequestered witness in addition to the defendant, and that a jury instruction can be given that the jury can consider as to those witnesses the effects, if any, nonsequestration had on their reliability, but no such instruction would be given as to a defendant, and that under those circumstances the jury's going to go into that deliberations room saying, well, I guess we can't hold that against the defendant, we can only hold that against the credibility --

QUESTION: Mr. Zwerling, we're going so far beyond what the Second Circuit decided. They didn't talk about instructions at all. They spoke only about what was

proper for the prosecutor to do in light of the Sixth Amendment and Fifth Amendment.

MR. ZWERLING: Addressing particularly summation comment, the same parallel holds true. That would mean that there would be a scenario in which a defense attorney can stand up, as was done in this particular case, blister the credibility of the prosecution witnesses based upon their exposure to one another, or if they were nonsequestered witness, could blister the credibility of that witness based upon the fact that they weren't sequestered, and then a prosecutor would have to stand up and would be handcuffed and not be able to say anything based upon the fact that another nonsequestered witness, the defendant, was also sitting in that courtroom, and I also want to --

QUESTION: Well, I'm not --

QUESTION: Well, do you --

QUESTION: I'm not sure that that's right, given the Second Circuit's follow-up decision, in which they pointed out that when that happened the judge repeatedly offered to give a curative instruction simply informing the jury that the defendant had not only a right but an obligation to be there.

Defendant rejected that curative instruction, and the Second Circuit said, too bad, but then the

distinction between the defendant, who has a constitutional right to be there and a statutory obligation under New York law to be there, that distinction is presented to the jury, so they get the whole picture of the difference between the defendant, his right and obligation, and other witnesses.

MR. ZWERLING: But so long as the jury is informed that they can consider that fact as it bears upon the defendant's credibility, clearly, you know, additional language in an instruction alerting to the jury that the defendant must be there, for example, under New York law --

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Zwerling. The case is submitted.

(Whereupon, at 10:03 a.m., the case in the above-entitled matter was submitted.)

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

LEONARD PORTUONDO, SUPERINTENDENT, FISHKILL CORRECTIONAL FACILITY, Petitioner v. RAY ARGARD

CASE NO.: 98-1170

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Ann Marie Federico

(REPORTER)