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COMMENT

PORTUONDO V. AGARD: DISTINGUISHING IMPEACHMENT OF CREDIBILITY FROM THE ACT OF BURDENING A DEFENDANT'S CONSTITUTIONAL RIGHTS

INTRODUCTION

The Supreme Court's decision in *Portuondo v. Agard*[1] is the latest in the debate over whether a prosecutor's comments regarding a criminal defendant's decision to exercise his rights under the self-incrimination clause of the Fifth Amendment are a proper method of impeachment, or an improper inference of guilt. Two opposing interpretations exist as to how a defendant's right to remain silent can be treated by an opposing party. The first interpretation takes an expansive view of the defendant's right to silence, and considers any substantive reference to defendant's exercising his immunity as an impermissible, unconstitutional burden. The leading case supporting the expansive view of the self-incrimination clause of the Fifth Amendment is *Griffin v. California.*[2] The second interpretation takes a narrow view of the defendant's right to silence, and contends that once a defendant has waived his privilege by taking the stand, his credibility is open to impeachment. The leading case supporting the restrictive view of the self-incrimination clause of the Fifth Amendment is *Jenkins v. Anderson.*[3]

This Comment will show that the Supreme Court's decision in *Portuondo* was correctly decided along the narrow view of interpretation established by the *Jenkins* line of case law. Accordingly, Part II of this Comment provides the background for the two opposing interpretations of a defendant's rights under the Fifth Amendment by examining the case law leading up to *Portuondo*. Part III provides the facts and procedural history of *Portuondo*, and examines the reasoning behind the majority and dissenting opinions. Finally, Part IV analyzes the holding in *Portuondo*, explaining why it is consistent with the narrow interpretation

1. 120 S. Ct. 1119 (2000).
2. 380 U.S. 609 (1965). *See* discussion infra Part II.A.
3. 447 U.S. 231 (1980). *See* discussion infra Part II.B.

of earlier Supreme Court case law, and suggesting an evidentiary alternative.

I. BACKGROUND

The Fifth Amendment to the United States Constitution protects individuals in criminal cases from being compelled to testify against themselves.[4] The Supreme Court made clear that a criminal defendant has a "right to remain silent."[5] However, a debate exists over whether a defendant's decision to exercise this right is immune from later comments that might infer guilt; or, whether under certain circumstances, the decision can be properly used to impeach his credibility. This debate developed two lines of case law.[6] The first line of cases follows an ex-

4. U.S. Const. amend. V. The Fifth Amendment specifically states, "nor shall [any person] be compelled in any criminal case to be a witnesses against himself..." *Id. See* generally Leonard W. Levy, Article: Origins of the Fifth Amendment and its Critics, 19 Cardozo L. Rev. 821 (1997) (defending on contemporary grounds his 1968 text that is still considered by most to be an exemplar of fifth amendment constitutional law).

5. *See*, e.g., Miranda v. Arizona, 384 U.S. 436, 444 (1966) (requiring police to advise defendant of the right to remain silent); Hoffman v. United States, 341 U.S. 479, 486 (1951) (holding that the self-incrimination clause of the Fifth Amendment shall be given liberal construction); Quinn v. United States, 349 U.S. 155, 162 (1955) (holding the exercise of the Fifth Amendment right to silence does not require use of particular words); but *see* Michigan v. Tucker, 417 U.S. 433, 451 (1974) (holding that statements by defendants are not excluded in all contexts).

6. The circuit courts are split between the more expansive Griffin interpretation and the stricter Jenkins view. The First, Sixth, Seventh, and Tenth circuits follow Griffin. *See*, e.g., Coppola v. Powell, 878 F.2d 1562, 1564-68 (1st Cir. 1989) (holding the use of defendant's statement to police that he was not going to confess was an unconstitutional burden on his Fifth Amendment right when used by the prosecutor in his case in chief); Combs v. Coyle, 205 F.3d 269, 283-86 (6th Cir. 2000) (holding that defendant's statement to police to go "talk to his lawyer" was an exercise of his Fifth Amendment rights and the prosecutor's use of this pre-arrest silence was substantive evidence of guilt and therefore improper); but *see* Seymour v. Walker, 2000 U.S. App. LEXIS 20170, *41-42 (6th Cir.) (limiting the Combs measure and finding permissible and not an inference of guilt a prosecutor's comments, in closing argument, that made reference to the defendant's self-defense theory); Savory v. Lane, 832 F.2d 1011, 1012, 1018 (7th Cir. 1987) (holding it was an error of constitutional magnitude for the prosecutor to comment on defendant's pre-arrest refusal to speak with police); United States v. Burson, 952 F.2d 1196, 1201 (10th Cir. 1991) (finding void under the Fifth Amendment the prosecutor's statement that defendant had not responded to authorities questions, and holding that is was "immaterial" whether the defendant had invoked his privilege to remain silent). The Fifth, Ninth, and Eleventh circuit courts follow Jenkins. *See*, e.g., United States v. Collins, 972 F.2d 1385, 1408 (5th Cir. 1992) (holding that a prosecutor's comments as to the defendant's denial of certain business dealings were not improper because there existed an "equally plausible" reason other than to infer guilt for defendant's not testifying); United States v. Cabrera, 201 F.3d 1243, 1250 (9th Cir. 2000) (holding that the prosecutor's comments during closing argument were not improper and the defendant's Fifth Amendment rights not violated because he chose to take the stand and testify); United States v. Oplinger, 150 F.3d 1061, 1067 (9th Cir. 1998) (holding that the prosecutor's comment, during closing argument, as to defendant's innocence did not violate the self incrimination clause of the Fifth Amendment); United States v. Riveria, 944 F.2d 1563, 1569-70 (11th Cir. 1991) (holding as harmless error the prosecutor's comments made during closing argument that defendant's pre-arrest demeanor was inconsistent with her plea of innocent). For a review of circuit court decisions following Portuondo, *see* infra note 139.

pansive interpretation of the Fifth Amendment, while the second set of cases take a more narrow view.

A. *Expanding the Fifth Amendment: The* Griffin *Line of Case Law*

The Supreme Court established an expansive precedent to interpreting the self-incrimination clause of the Fifth Amendment when it decided *Griffin v. California.*[7] In *Griffin,* the Court held that the self-incrimination clause of the Fifth Amendment prevented the prosecutor from commenting on the defendant's failure to take the stand in a state criminal prosecution.[8] The prosecutor's comments to the jury highlighted the fact that the defendant had not taken the stand.[9] The Court held that allowing the prosecutor's comments would penalize the defendant's right to exercise his Fifth Amendment privilege to remain silent.[10] Moreover, "[i]t cuts down on the privilege by making its assertion costly."[11] The Court distinguished that "[w]hat the jury may infer, given no help from the court, is one thing [but] [w]hat it may infer when the court solemnizes the silence of the accused into evidence against him is quite another."[12]

In *Brooks v. Tennessee,*[13] the Court held unconstitutional a Tennessee law that penalized a criminal defendant's silence because it required him to take the stand first, or not at all.[14] The Tennessee statute required that all criminal defendants "desiring to testify shall do so before any other testimony for the defense is heard by the court trying the case."[15] The Court found the law to be "an impermissible restriction on the defendant's right against self-incrimination . . . ."[16] Moreover, the Court stated that "[a]lthough 'it is not inconsistent with the enlightened administration of criminal justice to require the defendant to weigh such pros and cons in deciding whether to testify,' . . . the choice itself may pose serious dangers to the success of an accused's defense."[17]

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7. 380 U.S. 609 (1965).

8. *Griffin*, 380 U.S. at 615.

9. *See id.* at 610-11. The prosecutor stated, "[w]hat kind of man is it that would want to have sex with a woman that beat up if she was beat up at the time he left? He would know that. He would know how she got down the alley . . . . These things he has not *seen* fit to take the stand and deny or explain." *Id.*

10. *See id.* at 614.

11. *Id.*

12. *Id.* It should also be noted that in the same paragraph of the majority's opinion, the Court cautioned that comments on a defendant's right to remain silent "does not magnify that inference [of guilt] into a penalty for asserting a constitutional privilege." *Id.*

13. 406 U.S. 605 (1972).

14. *Brook*, 406 U.S. at 610.

15. *Id.* at 606 (quoting the Tenn. Code Ann. Section 40-2403 (1955)).

16. *Id.* at 609. *See* also Malloy v. Hogan, 378 U.S. 1, 8 (1964) (holding that "the Fifth Amendment guarantees against federal infringement --the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty . . .").

17. *Id.* (quoting McGautha v. California, 402 U.S. 183, 215 (1971)).

In *Doyle v. Ohio*,[18] the Court held that a prosecutor in a state criminal prosecution could not use the defendants' post-arrest silence for impeachment purposes at trial.[19] The defendants chose to remain silent after receiving their Miranda rights, but at trial testified a police informant had framed them.[20] In affirming the convictions, the Court of Appeals, Fifth District, Tuscarawas County Ohio, held that the evidence of post-arrest silence was not "substantive evidence of guilt but rather [proper] cross examination" of the witnesses' credibility.[21] The Supreme Court rejected the State's argument that use of post-arrest silence could be used for impeachment purposes and was therefore proper cross-examination.[22] The Court stated that "it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial."[23]

In *Carter v. Kentucky*,[24] the Supreme Court addressed whether denial of a jury instruction was in violation of the self-incrimination clause of the Fifth Amendment.[25] The Court found the defendant had a right to request a limiting instruction, which would have explained to the jury that they were to draw no negative inferences from the fact he was not testifying.[26] Placing this case in line with *Griffin*, Justice Stewart held that "[j]ust as adverse comment on a defendant's silence 'cuts down on the privilege by making its assertion costly,' the failure to limit the juror's speculation on the meaning of that silence, . . . exacts an impermissible toll on the full and free exercise of the privilege."[27]

More recently, the Supreme Court extended the *Griffin* precedent to include the sentencing phase of criminal cases.[28] In *Mitchell*, the defendant entered a guilty plea to four counts of cocaine conspiracy.[29] The District Court instructed the defendant that by entering the guilty plea she would be waiving her right to remain silent under the Fifth Amend-

18. 426 U.S. 610 (1976).

19. *Doyle*, 426 U.S. at 617.

20. *See id.* at 611-13.

21. *Id.* at 615.

22. *See id.* at 616-17. But *see* Brown v. United States, 356 U.S. 148, 154-55 (1958) (holding that if a criminal defendant "takes the stand and testifies in his own defense, his credibility may be impeached and his testimony assailed like that of any other witness, and the breadth of his waiver is determined by the scope of relevant cross-examination.")

23. *Id.* at 618.

24. 450 U.S. 288 (1981).

25. *Carter*, 450 U.S. at 289.

26. *See id.* at 305. The instruction was to read: "The defendant is not compelled to testify and the fact that he does not cannot be used as inference of guilt and should not prejudice him in any way." *Id.* at 288.

27. *Id.* at 305 (quoting Griffin v. California, 380 U.S. at 614).

28. Mitchell v. United States, 526 U.S. 314, 330 (1999). For a detailed analysis of the Mitchell decision *see* generally Leading Cases: I. Constitutional Law-Continued, 113 Harv. L. Rev. 244 (1999).

29. *Mitchell*, 526 U.S. at 317.

ment.[30] The Court of Appeals for the Third Circuit affirmed.[31] Justice Kennedy, writing for the majority, affirmed the Third Circuit's holding based on *Griffin* and *Estelle v. Smith.*[32] The Court held, "[t]he concerns which mandate the rule against negative inferences at a criminal trial apply with equal force at sentencing."[33] Furthermore, the Court held that

> [t]he rule against adverse inferences is a vital instrument for teaching that the question in a criminal case is not whether the defendant committed the acts of which he is accused. The question is whether the Government has carried its burden to prove its allegations while respecting the defendant's individual rights.[34]

B. *Limiting the Fifth Amendment: The* Jenkins *Line of Case Law*

The Supreme Court's preference for a narrow interpretation of the self-incrimination clause of the Fifth Amendment dates back to the 19th Century with its decision in *Reagan v. United States.*[35] In *Reagan,* the defendant was found guilty of smuggling cattle from Mexico in to Texas.[36] The defendant appealed his conviction based on the jury instructions.[37] The Supreme Court held that "the court [may] call the attention of the jury to any matters which legitimately affect [the defendant's] testimony and his credibility."[38] However, the Court cautioned that "[t]he fact that he is a defendant does not condemn him as unworthy of belief, but at the same time it creates an interest greater than that of any other witness, and to that extent affects the question of credibility."[39] In reasoning and language consistent with his 21st Century contemporaries, Justice Brewer found that while a jury should not draw negative inferences from a defendant's "deep" personal "interest," it is permissible for the jury, in determining credibility, to consider those interests.[40]

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30. *See id.* at 317-18.

31. *Id.* at 319.

32. *Id.* at 329. *See* also Estelle v. Smith, 451 U.S. 454, 463 (1981) (holding that it is a violation of the defendant's rights under the Fifth Amendment for the state to compel testimony at a sentencing hearing).

33. *Id.* at 329.

34. *Id.* at 330.

35. 157 U.S. 301 (1895).

36. *Reagan,* 157 U.S. at 302.

37. *See id.* at 304. The instruction stated, "The law permits the defendant, at his own request, to testify in his own behalf. The defendant here has availed himself of this privilege. The deep personal interest which he may have in the result of the suit should be considered by the jury in weighing his evidence and in determining how far or to what extent, if at all, it is worthy of credit." *Id.*

38. *Id.* at 305.

39. *Id.*

40. *Id.* at 311. See also Caminetti v. United States, 242 U.S. 470, 494 (1917) (holding "[w]hen [the defendant] took the witness stand in his own behalf he voluntarily relinquished his privilege of silence, and ought not to be heard to speak alone of those things deemed to be for his interest and be silent where he or his counsel regarded it for his interest to remain so, without the fair

In *Fitzpatrick v. United States,*[41] the Supreme Court upheld the conviction of a defendant convicted of murder.[42] The conviction was appealed on grounds that the government was allowed to improperly cross-examine the defendant at trial.[43] The Court rejected this argument, pointing to the fact that the defendant had voluntarily taken the stand to establish his alibi for the time of the murder.[44] The Court held that when a defendant chooses to take the stand and testify, he waives his Fifth Amendment right to silence, and a prosecutor can treat him as any other witness.[45] Furthermore, the Court stated, "[w]hile no inference of guilt can be drawn from his refusal to avail himself of the privilege of testifying, he has no right to set forth to the jury all the facts which tend in his favor without laying himself open to a cross-examination upon those facts."[46]

The Supreme Court reaffirmed *Fitzpatrick,* and strengthened the waiver principle, in its holding in *Raffel v. United States.*[47] In *Raffel,* the defendant was charged and twice tried for violation of the National Prohibition Act.[48] At the first trial defendant chose not to testify, and the jury was unable to reach a verdict.[49] At the second trial, in which a guilty verdict was reached, the defendant elected to take the stand and was questioned as to why he did not do so at the first trial.[50] The question certified to the Supreme Court by the Court of Appeals for the Sixth Circuit was whether it was a violation of the Fifth Amendment to compel the defendant to testify as to his choice to exercise that constitutional right at his first trial.[51] The Court held that the defendant's "waiver is not partial; having once cast aside the cloak of immunity, he may not resume it at will, whenever cross-examination may be inconvenient or embarrassing."[52] The Court conceded, however, "if the defendant had not taken the stand on the second trial, evidence that he had claimed the same immunity on the first trial would be probative of no fact in issue, and would be inadmissible."[53] Yet, the Court made clear that the self-incrimination clause of the Fifth Amendment is a privilege only for those criminal de-

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inference which would naturally spring . . . .").

41. 178 U.S. 304 (1900).
42. *Fitzpatrick,* 178 U.S. at 315.
43. *See id.* at 315.
44. *See id.*
45. *See id.*
46. *Id.*
47. 271 U.S. 494 (1926).
48. *Raffel,* 271 U.S. at 495.
49. *See id.*
50. *See id.*
51. *See id.* at 496.
52. *Id.* at 497.
53. *Id.*

fendants who chose not to testify in their own behalf, and not for defendants who elect to take the stand.[54]

In *Jenkins v. Anderson*,[55] the Supreme Court reasserted its narrow view of the self-incrimination clause of the Fifth Amendment, and in doing so clarified and limited its holding in *Griffin*.[56] In *Jenkins*, the Court upheld the manslaughter conviction and sentence of petitioner Jenkins.[57] Jenkins stabbed and killed a man, then turned himself into authorities two weeks later alleging self-defense.[58] Jenkins' appeal was based on the claim that the prosecutor's comments during closing argument regarding his pre-arrest silence were a violation of his Fifth Amendment rights.[59] The Court rejected Jenkins' Fifth Amendment claims, pointing out the distinguishing fact from *Griffin* was that Jenkins voluntarily took the stand in his own defense.[60] Rather, the Court relied heavily on its holding in *Raffel*, that "recognized that the Fifth Amendment is not violated when a defendant who testifies in his own defense is impeached with prior silence."[61] Moreover, once a defendant has taken the stand and "cast aside his cloak of silence," the "function of the courts of justice to ascertain the truth . . . prevail in the balance of considerations determining the scope and limits of the privilege against self-incrimination."[62]

Thus, while the debate still continues among many lower court tribunals,[63] the *Jenkins* holding clearly limited the *Griffin* line of case law to only those circumstances where the defendant chose not to take the stand. Therefore, it was only a matter of time until the first 21st Century showdown took place between the *Jenkins* and *Griffin* line of case law. That case is now in the books, and we examine it below.

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54. *See id.* at 499.
55. 447 U.S. 231 (1980).
56. *Jenkins*, 447 U.S. at 235.
57. *See id.* at 241.
58. *Id.* at 232.
59. *See id.* at 234. The prosecutor told the jury that Jenkins "'waited two weeks, according to the testimony--at least two weeks before he did anything about surrendering himself or reporting [the stabbing] to anybody.'" (quoting App. transcript at 43).
60. *See id.* at 235.
61. *Id.*
62. *Id.* at 238 (quoting Brown v. United States, 356 U.S. 148, 156 (1958)).
63. *See* supra note 6 and accompanying text.

II. *PORTUONDO V. AGARD*[64]

A. *Facts and Procedural History*

1. State Court

On February 25, 1991, Ray Agard was convicted by a jury in the Supreme Court of the State of New York of one count of first-degree sodomy and two counts of third degree possession of a weapon.[65] The victim, Nessa Winder and key witness, Breda Keegan, testified that Agard physically assaulted, raped, and sodomized Winder, and threatened both women with a handgun.[66] Agard admitted to striking Winder, but denied all other allegations, insisting that he and Winder had engaged in consensual sexual intercourse.[67] What caused this case to make it to the United States Supreme Court were comments made by the prosecutor during her summation. Over objections from Agard's counsel, the prosecutor told the jury:

> You know, ladies and gentlemen, unlike all the other witnesses in this case the defendant has a benefit and the benefit is that he has, unlike all other witnesses, is he gets to sit here and listen to the testimony of all other witnesses before he testifies. . . . That gives you a big advantage, doesn't it. You get to sit here and think what am I going to say and how am I going to say it?[68]

The trial court judge denied Agard's motion for a mistrial, holding that "'the fact that [Agard] was present and heard all the testimony is something that may fairly be commented on. That has nothing to do with his right to remain silent. That he was the last witness in the case as (sic) a matter of fact.'"[69]

On appeal to the Supreme Court of New York, Appellate Division, one of the weapon's possession charges against Agard was dropped, but the remaining charges were affirmed.[70] The appellate court did find that the trial court erred when it prevented Agard's expert witness from testifying, but held that "the error was harmless in view of the overwhelming evidence of defendant's guilt . . . ."[71] As to Agard's constitutional claims regarding the prosecutor's comments, the appellate court held that such

64. 120 S. Ct. 1119 (2000).
65. *See* Agard v. Portuondo, 117 F.3d 696, 698 (2d Cir. 1997).
66. *Portuondo*, 120 S. Ct. at 1122.
67. *See id.*
68. *Id.*
69. *Agard*, 117 F.3d at 707 (quoting People v. Agard, 199 A.D.2d 401, 403 (2nd Dept. 1993).
70. *See* People v. Agard, 199 A.D. 2d 401, 402 (2d Dept. 1993).
71. *Agard*, 199 A.D. at 402.

contentions were without merit.[72] Agard next filed for a leave to appeal with the Court of Appeals of New York, which was denied by Judge Ciparick on April 14, 1994.[73]

2. Federal Court

Agard then filed a petition for a writ of habeas corpus in federal district court for the Eastern District of New York.[74]

Agard appealed three issues before the Second Circuit, but only the third issue regarding the comments made by the prosecutor in closing argument will be addressed below.[75] Agard alleged that his constitutional rights to confront his witnesses and have a fair trial were violated by the prosecutor's comments made during closing arguments of his trial.[76] The Second Circuit agreed with Agard, and based their decision on the expansive *Griffin* line of case law.[77] The court held that the Supreme Court in *Griffin* "recognized that such [prosecutorial] commentary effectively penalizes the defendant for exercising his Fifth Amendment rights . . . ."[78] The majority opinion held that it was unconstitutional "for a prosecutor to insinuate to the jury for the first time during summation that the defendant's presence in the courtroom at trial provided him with a unique opportunity to tailor his testimony."[79]

3. Supreme Court Decision

a. Majority Opinion

Justice Scalia wrote the majority opinion and held that the prosecutor's comments to the jury that the defendant had the opportunity to "tailor" his testimony after hearing other witnesses testify was a proper impeachment of a witness's credibility, and did not violate the defendant's rights under the Fifth Amendment to the Constitution.[80]

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72. *Id.* at 403.

73. *Agard*, 117 F.3d at 698.

74. *Id.*

75. *See id.* at 702-07. Agard also alleged that his constitutional rights were violated because the trial court had prevented his counsel from questioning the victim about her prior sexual history and prohibiting his expert witnesses testimony. *See id.* The court found no error as to the first issue. *See id.* As to the second issue, the court found there was error, but not arising to harmful or constitutional error. *See id.*

76. *See id.* at 698.

77. It is worth noting that the majority opinion by the Second Circuit did not feel it necessary to address the Jenkins line of cases with the exception of a brief mention in footnote 9 at page 710.

78. Agard v. Portuondo, 117 F.3d at 709.

79. *Id.*

80. Portuondo v. Agard, 120 S. Ct. 1119, 1121-23. Chief Justice Rehnquist, and Justices O'Connor, Kennedy, and Thomas joined Scalia in his opinion. It should be noted that the defendant in Portuondo also claimed the prosecutor's comments violated his rights under the Sixth and Fourteenth Amendments. *See id.* The Court rejected these claims with little comment. *See id.* Scalia made it clear that Portuondo boiled down to whether the Court should extend Griffin v. California. *See id.*

The Court began its analysis by distinguishing *Portuondo* from its holding in *Griffin v. California.*[81] Foremost, the Court pointed out that in *Griffin* the prosecutor was asking the jury to do something they were prohibited from doing—inferring guilt due to the silence of the defendant.[82] The difference in this case, according to the Court, is that "it is natural and irresistible for a jury, in evaluating the relative credibility of a defendant who testifies last, to have in mind and weigh in the balance the fact that he heard the testimony of all those who (sic) proceeded him."[83]

Second, the majority distinguished that the prosecutor's comments in *Griffin* were impermissible because of their substantive nature—"*Griffin* prohibited comments that suggest a defendant's silence is [substantive] evidence of guilt."[84] By contrast, the prosecutor's comments in *Portuondo* "concerned respondent's *credibility* as a *witness*, and were therefore in accord with our longstanding rule that when a defendant takes the stand, 'his credibility may be impeached and his testimony assailed like that of any other witness.'"[85]

The Court next established that *Portuondo* was analogous to their holding in *Jenkins v. Anderson.*[86] In *Jenkins,* the Court held that a prosecutor's comments made during closing argument regarding the defendant's silence were permissible for impeachment purposes.[87] The issue of credibility distinguished *Portuondo* from the respondent's analogy to *Geders v. United States*[88] that allowed a defendant to be "treated differently from other witnesses."[89] Justice Scalia made clear that "[w]ith respect to issues of credibility, however, no such special treatment has been accorded."[90]

The Court next addressed the issue of "tailoring." Pointing to its decision in *Brooks v. Tennessee,*[91] the Court held that "arguing credibility to the jury—which would include the prosecutor's comments here—is the preferred means of counteracting tailoring of the defendant's testi-

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For a thorough analysis of why the Sixth Amendment does not apply to Portuondo, *see* generally Brett H. McGurk, Article: Prosecutorial Comment on a Defendant's Presence at Trial: Will Griffin Play in a Sixth Amendment Arena?, 31 UWLA L. Rev. 207, 255 (2000) (concluding that the confrontation clause of the Sixth Amendment is not violated by a prosecutor's comments that the defendant is present in the courtroom; and "unlike Griffin, the prosecutor's comments in Agard materially advanced the fundamental societal interest in the ascertainment of truth at trial.").

81. 380 U.S. 609 (1965).

82. *Portuondo*, 120 S. Ct. at 1124.

83. *Id.*

84. *Id.* at 1125.

85. *Id.* (quoting Brown v. United States, 356 U.S. 148, 154 (1958)).

86. 447 U.S. 231 (1980).

87. *Jenkins*, 447 U.S. at 240.

88. 425 U.S. 80 (1976).

89. *Portuondo*, 120 S. Ct. at 1125. In *Geders*, the defendant was allowed special treatment as to a sequestration order. *Genders*, 425 U.S. at 87.

90. *Portuondo*, 120 S. Ct. at 1125.

91. 406 U.S. 605 (1972).

mony."[92] Furthermore, the Court pointed to its decision in *Reagan v. United States*[93] that allowed the jury to be instructed that the defendant's "deep personal interest" could be considered—"[l]ike the [prosecutor's] comments in this case, [*Reagan*] simply set forth a consideration the jury was to have in mind when assessing the defendant's credibility . . . ."[94] Finally, the Court rejected the dissent's contention that because the prosecutor's comments came during closing arguments, and not during cross-examination, they were impermissible.[95] The Court found no "constitutionally significant distinction" because as in *Reagan*, "the challenged instruction came at the end of the case, after the defense had rested, just as the prosecutor's comments did here."[96]

b. Concurring Opinion

Justice Stevens wrote a concurring opinion that Justice Breyer joined.[97] Justice Stevens, while joining in the majority's final conclusion, found the prosecutor's comments to be demeaning and disrespectful to the "truth-seeking function of the adversary process."[98] Justice Stevens found that while the prosecutor's comments survived constitutional scrutiny, such comments should be "discouraged rather than validated."[99]

c. Dissenting Opinion

Justice Ginsburg dissented from the majority's opinion, arguing in favor of an expansive interpretation of the Fifth Amendment.[100] Such a broad protection of the defendant's rights under the Fifth Amendment is, according to the dissent, supported by the Court's decisions in *Griffin* and *Doyle*.[101] Justice Ginsburg found no distinction with the Court's decisions in *Griffin* and *Doyle*— "[b]oth decisions stem from the principle that where the exercise of constitutional rights is 'insolubly ambiguous' as between innocence and guilt, a prosecutor may not unfairly encumber those rights by urging the jury to construe the ambiguity against the defendant."[102] Ginsburg rejected the majority's contention that the prosecutor's comments were permissible because they were directed at impeachment of the defendant's credibility—"[n]or can a jury measure a defendant's credibility by evaluating the defendant's response to the accusation, for the [comments are] fired after the defense has submitted its

92. *Portuondo*, 120 S. Ct. at 1125.
93. 157 U.S. 301, 304 (1895).
94. *Portuondo*, 120 S. Ct. at 1126.
95. *See id.* at 1126-27.
96. *Id.*
97. *See id.*
98. *Id.* at 1129.
99. *Id.*
100. *Portuondo*, 120 S. Ct. at 1129-30 (Justice Souter joined in the dissent).
101. *See id.*
102. *Id.*

case."[103] Rather, Justice Ginsburg would "rein in a prosecutor solely in situations where there is no particular reason to believe that tailoring has occurred and where the defendant has no opportunity to rebut the accusation."[104]

Furthermore, the dissent found the majority's analysis that distinguished *Griffin* "unconvincing"—"[t]he [substantive] 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."[105] Moreover, Justice Ginsburg contended that "[i]t makes little sense to maintain that juries able to avoid drawing adverse inferences from a defendant's silence would be unable to avoid thinking that only a defendant's opportunity to spin a web of lies could explain the seamlessness of his testimony."[106]

Finally, the dissent rejected the majority's conclusion that the prosecutor's comments were permissible because they were directed at impeaching the credibility of the defendant, and not toward inferring substantive evidence of guilt.[107] Justice Ginsburg argued that such a position is not, as the majority contended, supported by the Court's decisions in *Brooks* and *Jenkins*.[108] Rather, "*Jenkins* supports the proposition that cross-examination is of sufficient value as an aid in finding truth at trial that prosecutors may sometimes question defendants even about matters that may touch on their constitutional rights, and *Brooks* suggests that cross-examination can expose a defendant who tailors his testimony."[109]

III. ANALYSIS

The holding in *Portuondo* has been applauded by those who advocate a narrow, post-*Jenkins* view of the Fifth Amendment; and criticized by those who would prefer an expansive *Griffin* view of the Fifth Amendment. Section A takes a closer look at the facts in *Portuondo*, showing why it is distinguishable from *Griffin*; and then identifies the key similarities between *Portuondo* and the *Jenkins* line of cases. Section B reviews the academic literature on the two views represented by *Griffin* and *Jenkins*. Lastly, Section C offers an evidentiary alternative to resolving *Portuondo*.

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103. *Id.*
104. *Id.* at 1130.
105. *Id.* at 1133.
106. *Portuondo*, 120 S. Ct. at 1133.
107. *See id.* at 1134.
108. *See id.* at 1135.
109. *Id.* (quoting *Jenkins*, 447 U.S. at 238; *Brooks*, 406 U.S. at 609-12).

A. Portuondo: *In the Tradition of* Griffin *or* Jenkins?

The Supreme Court's holding in *Portuondo* correctly placed it among the line of cases following the narrow view of the Fifth Amendment taken in *Jenkins v. Anderson*.[110] A look at the facts reveal why *Portuondo* is clearly distinguishable from the more expansive interpretation found in the *Griffin v. California*[111] line of cases.

First, unlike the defendant in *Griffin*, who elected to exercise his constitutional right to remain silent,[112] the defendant in *Portuondo* elected to take the stand and testify in his own defense.[113] Second, the defendant in *Griffin* was penalized for exercising his right to be silent.[114] The prosecutor's comments in *Griffin* were held to be substantive evidence that encouraged the jury to infer guilt on the silent defendant.[115] The defendant in *Portuondo* was not penalized for exercising his right to be silent.[116] This would have been impossible because the defendant in *Portuondo* did not exercise his Fifth Amendment right.[117] Rather, the defendant took the stand and testified in his own defense.[118] Hence, the facts of *Portuondo* are clearly distinguishable from *Griffin*. Conversely, the facts are much similar to those in *Jenkins*.

Like the defendant in *Jenkins*, the defendant in *Portuondo* chose to take the stand and testify.[119] The Court correctly pointed out that in taking the stand a defendant waives his privilege of immunity afforded him under the self-incrimination clause of the Fifth Amendment.[120] Once the defendant has taken the stand and waived his privilege to remain silent, he can be treated like any other witness, and the opposing party may attack his credibility.[121] The Court's holding in *Portuondo* makes clear that such a waiver is not only open to attack on cross-examination, but equally vulnerable to a prosecutor's closing argument comments.

Therefore, the Supreme Court's holding in *Portuondo* places it among the *Jenkins* line of case law, and establishes the restrictive view of the Fifth Amendment's self-incrimination clause as the preferred method of interpretation for the 21st Century. There remain, however, those who would prefer a *Griffin* revival.

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110. 447 U.S. 231 (1980).
111. 380 U.S. 609 (1965).
112. *See id.* at 609-10.
113. *Portuondo*, 120 S. Ct. at 1122.
114. *Griffin*, 380 U.S. at 614.
115. *See id.* at 610.
116. *Portuondo*, 120 S. Ct. at 1128.
117. *See id.* at 1122.
118. *See id.*
119. *See id.*
120. *See Jenkins*, 447 U.S. at 235 (discussing why the right to remain silent becomes effectively waived when the defendant takes the stand as was established by its precursor Raffel v. United States, 271 U.S. 494 (1926)).
121. *See Jenkins*, 447 U.S. at 235.

B. *Viewing the Opposing Camps:* Jenkins *verses* Griffin

Some critics have argued that the Fifth Amendment must be viewed in an expansive role or it will lose its meaning.[122] Notz contends that the Fifth Amendment is not limited to trial contexts, but rather "the privilege may be asserted in any situation where the defendant might make self-incriminating statements that could be used against her in a future criminal proceeding."[123] Furthermore, in her analysis of *Griffin*, Notz concluded that only "an expansive interpretation of Griffin would prohibit a prosecutor's use of a defendant's decision to remain silent whenever such use could penalize the defendant for exercising her constitutional right."[124] While advocating an expansive *Griffin* view of the Fifth Amendment, Notz admits that the recent Supreme Court's treatment of the "penalty doctrine"[125] in *Griffin* is on "shaky ground."[126]

One of the most recent academic supporters of a *Griffin* revival alleges that the Supreme Court's decision in *Portuondo* takes the Fifth Amendment privilege against self-incrimination "a step backward."[127] In support of his position, Douthat makes three arguments.

First, Douthat accuses the *Portuondo* Court of not providing reasons for why a prosecutor "should" be permitted to impeach a defendant's credibility once they have taken the stand.[128] Yet, in the same breath, he admits that the Court provided reasons why a prosecutor "can" make comments for impeachment purposes.[129] Thus, Douthat's argument is nothing more than an argument about semantics. Douthat's reference to whether a prosecutor *should* make such comments to a jury is more a question of prosecutorial misconduct. Misconduct was not at issue in

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122. Jane E. Notz, Prearrest Silence as Evidence of Guilt: What You Don't Say Shouldn't Be Used Against You, 64 U. CHI. L. REV. 1009, 1013 (1997). *See* also Martin D. Litt, Commentary by Co-Defendant's Counsel on Defendant's Refusal to Testify: A Violation of the Privilege Against Self-Incrimination?, 89 MICH. L. REV. 1008, 1037 (1991) (concluding that the Fifth Amendment should prohibit any and all comments regarding a criminal defendant's decision to take the stand or remain silent).

123. Notz, *supra* note 122, at 1013.

124. *Id.* at 1014-1015.

125. *See* Geoffrey R. Stone, The Miranda Doctrine in the Burger Court, 99 SUP. CT. REV. 145, 146-47 (1977) (coining the phrase "penalty doctrine" and at the same time predicting its demise).

126. Notz, *supra* note 122, at 1016.

127. J. Fielding Douthat, Jr., Commentaries on Mark Tushnet's Taking the Constitution Away From the Courts: Casenote: A Right to Confrontation or Insinuation? The Supreme Court's Holding in Portuondo v. Agard, 34 U. RICH. L. REV. 591, 619 (2000).

128. *See id.* at 618 (quoting from footnote 4 of *Portuondo*: "Our decision . . . is addressed to whether the comment is permissible as a constitutional matter, and not to whether it is always desirable as a matter of sound trial practice.").

129. *Id.* It should be noted that Douthat does not complete the quote of footnote 4 in Portuondo. The last sentence of that footnote answers his question as to why the Supreme Court did not address the "sound trial practice" of a prosecutor's comments. "[T]he desirability of putting prosecutorial comment into proper perspective by judicial instruction, are best left to trial courts, and to the appellate courts which routinely review their work." *Portuondo*, 120 U.S. at 1127 n.4.

Portuondo.[130] The question in *Portuondo* was whether the rights of the defendant were burdened or penalized by the prosecutor's comments.

Second, Douthat ridicules the majority in *Portuondo* for basing its holding largely on a one hundred-year-old precedent, *Reagan v. United States*.[131] Yet, Douthat provides no other basis for this criticism other than the fact that *Reagan* is old. In fact, *Reagan* is actually a one hundred and five year old precedent that is still law. The fact that *Reagan* is still applicable in the 21st Century is evidence for, not against, its reliance by the *Portuondo* Court.[132]

The third argument raised by Douthat is that the holding in *Portuondo* now allows a government prosecutor, without proof, to accuse the defendant of lying.[133] This argument is simply a misstatement of the opinion. Justice Scalia made it clear that *Griffin* was not being overruled, but only limited when he stated:

> It is one thing (as *Griffin* requires) for the jury to evaluate all the *other* evidence in the case without giving any effect to the defendant's refusal to testify; it is something else (and quite impossible) for the jury to evaluate the credibility of the defendant's testimony while blotting out from its mind the fact that before giving the testimony the defendant had been sitting there listening to other witnesses. Thus, the principle respondent asks us to adopt here differs from what we adopted in *Griffin* in one or the other of the following respects: It either prohibits inviting the jury to do what the jury is perfectly entitled to do; or it requires the jury to do what is practically impossible.[134]

Professor Snyder has confirmed that the Supreme Court's decision in *Jenkins v. Anderson* reaffirmed the waiver analysis used fifty-four years earlier in *Raffel v. United States*.[135] Snyder points out the critical fact linking *Jenkins* and *Raffel* is that in both cases the defendant took the

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130. For a detailed analysis on prosecutorial misconduct, *see* generally Tara J. Tobin, Note: Miscarriage of Justice During Closing Arguments By An Overzealous Prosecutor and a Timid Supreme Court in State v. Smith, 45 S.D. L. Rev. 186, 189 (2000) (advocating the need for stricter rules governing closing arguments because of an increase in the "win at all cost" mentality among prosecutors); Rosemary Nidiry, Note: Restraining Adversarial Excess in Closing Argument, 96 Colum. L. Rev. 1299, 1334 (1996) (concluding that trial judges should be given more discretion to limit misconduct of both prosecutors and defense attorneys during closing arguments to the jury); James W. Gunson, Comment: Prosecutorial Summation: Where is the Line Between "Personal Opinion" and Proper Argument?, 46 Me. L. Rev. 241, 282 (1994) (suggesting that only prosecutorial misconduct that is truly egregious should lead to a court overturning a defendant's conviction or sanctioning of a prosecutor).

131. Douthat *supra* note 127, at 618.

132. *See supra* discussion Parts II.B.

133. Douthat, *supra* note 127, at 618.

134. *Portuondo*, 120 U.S. at 1124.

135. Barbara R. Snyder, A Due Process Analysis of the Impeachment Use of Silence in Criminal Trials, 29 WM. & MARY L. REV. 285, 288 (1988).

stand and thus waived his privilege of remaining silent.[136] Moreover, the *Jenkins*' Court reaffirmed that "[i]n determining whether a constitutional right has been burdened impermissibly, it is also appropriate to consider the legitimacy of the challenged governmental practice."[137] As in *Raffel* and *Jenkins*, the defendant in *Portuondo* waived his Fifth Amendment right to immunity by taking the stand to testify. Thus, Professor Snyder's analysis was a correct forecast of the Supreme Court's decision in *Portuondo*.

If the supporters for a *Griffin* revival felt they were on "shaky ground"[138] prior to the Court's holding in *Portuondo,* it is now becoming apparent that *Griffin's* precedent is quickly losing ground.[139]

C. *Seeking a Different Approach: An Evidentiary Analysis of* Portuondo

Although the Supreme Court's holding in *Portuondo* relied on the constitutional precedents established by *Jenkins* and *Raffel*, there is support for the theory that such cases could be resolved on purely evidentiary grounds.[140] The *Portuondo* Court focused much of its opinion on the fact that the defendant, by taking the stand, effectively waived his privi-

136. Snyder, *supra* note 135, at 288-289.

137. *Id.* at 289 (quoting Jenkins v. Anderson, 447 U.S. 231, 238 (1980)).

138. *See* Notz, *supra* at Part IV.B.

139. The following courts have made post-Portuondo rulings: Soering v. Deeds, 2000 U.S. App. LEXIS 15443, at *13-14 (4th Cir. June 30, 2000) (holding that even if the lower court wanted to extend Griffin, the Supreme Court's decision in Portuondo permitted the prosecutor's comments regarding the defendant's refusal to consent to searches); United States v. Ducott, 2000 U.S. App. LEXIS 4680, at *3 (8th Cir. March 24, 2000) (holding that the prosecutor's comments at closing argument that the defendant had lied were proper in light of the Supreme Court's recent decision in Portuondo); United States v. Velarde-Gomez, 2000 U.S. App. LEXIS 22941, at *23-24 (9th Cir. Sept. 13, 2000) (holding that the government's references to the defendant's defense as a "sham" were proper impeachment of the defendant's testimony under the Supreme Court's holding in Portuondo); United States v. Pemberton, 2000 U.S. App. LEXIS 15814, at *16-17 (10th Cir. July 7, 2000) (holding that the prosecutor's comments during closing argument that the defendant had heard every witness in the case and therefore had the opportunity to tailor his testimony were permissible in light of the Supreme Court's decision in Portuondo); United States v. Johnson, 212 F.3d 1313, 1315 (D.C. Cir. 2000) (holding that the prosecutor's comments to the jury that the defendant had the opportunity to tailor his testimony were not improper under the Fifth Amendment following the Supreme Court decision in Portuondo); United States v. Jenkins, 2000 CAAF LEXIS 948, at *35 (C.A.A.F. Aug. 31, 2000) (holding that the defendant's rights were not violated under the Fifth Amendment per the Supreme Court's holding in Portuondo) (Crawford, J., concurring); State v. Alexander, 755 A.2d 868, 872 (Conn. 2000) (holding that the prosecutor's comments during closing arguments that the defendant had the ability to tailor his testimony was not unconstitutional based on the Portuondo decision); State v. Marshall, 4 P.3d 1039, 1044 n.1 (Ariz. Ct. App. 2000) (holding that based on Portuondo, a prosecutor is allowed to point out the fact that a defendant has not presented evidence to support his theory). For a recent analysis advocating the Jenkins line of case law over Griffin, *see generally* Stefanie Petrucci, Comment: The Sound of Silence: The Constitutionality of the Prosecution's Use of Prearrest Silence in Its Case-in-Chief, 33 U.C. DAVIS L. REV. 449, 452 (2000) (concluding that it is constitutional for a prosecutor to use evidence of a defendant's prearrest silence in her case-in-chief).

140. *See generally* Snyder, *supra* at note 135, at 293-301 (providing a detailed evidentiary analysis).

lege to remain silent, and opened himself to impeachment. Moreover, Justice Scalia, writing for the majority, insisted that the issue at trial in *Portuondo* "ultimately came down to a credibility determination."[141] Yet, there have been two significant cases where the Supreme Court rejected the *Raffel* and *Jenkins* waiver test and instead based their holdings on evidentiary principles.[142]

1. Application of *Grunewald v. United States*[143]

In *Grunewald*, the Court found that it was impermissible for the trial court to permit cross-examination of the defendant's choice to exercise his privilege to remain silent at an earlier grand jury appearance.[144] In rejecting the lower court's use of *Raffel*, the Court held that "[*Raffel*] does not, however, solve the question whether in the particular circumstances of this case the cross-examination should have been excluded because its probative value on the issue of the [defendant's] credibility was so negligible as to be far outweighed by its possible impermissible impact on the jury."[145] Thus, in reaching its holding in *Grunewald*, the Court essentially applied an evidentiary analysis now codified in the Federal Rules of Evidence.[146] Indeed, the Court acknowledged this fact when it stated, "[w]e are not unmindful that the question whether a prior statement is sufficiently inconsistent to be allowed to go to the jury on the question of credibility is usually within the discretion of the trial judge."[147]

2. Application of *United States v. Hale*[148]

In *Hale*, the Court held that it was impermissible "prejudicial error for the trial court to permit cross-examination of respondent concerning his silence . . . ."[149] Again, the Court rejected the reference to *Raffel*, disagreeing with the government's position that the defendant's silence was "similarly probative and should therefore be admissible for impeachment

141. *Portuondo*, 120 S. Ct. at 1122.

142. *See* infra Parts 1 and 2.

143. 353 U.S. 391 (1957).

144. *Grunewald*, 353 U.S. at 424.

145. *Id.* at 420.

146. "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . . " Fed. R. Evid. 403. For a recent review of the case law utilizing Rule 403, *see* generally Steven J. Halasz, Annotation, Propriety Under Rule 403 of the Federal Rules of Evidence, Permitting Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time, of Attack on Credibility of Witness For Party, 48 A.L.R. Fed. 390, 392 (1980) (explaining that prior to the adoption of the balancing test under Rule 403, the courts utilized what was known as "collateral impeachment").

147. *Grunewald*, 353 U.S. at 423-24 (the Court went on to add, "[b]ut where such evidentiary matter has grave constitutional overtones, as it does here, we feel justified in exercising this Court's supervisory control to pass on such a question.").

148. 422 U.S. 171 (1975).

149. Hale, 422 U.S. at 181.

purposes."[150] The Court held that "the probative value [of] . . . silence in this case was outweighed by the prejudicial impact of admitting it into evidence."[151] Furthermore, in deciding *Hale* on evidentiary principles, the Court admitted, "we have no occasion to reach the broader constitutional question that supplied an alternative basis for the [lower court's] decision below."[152]

Professor Snyder explains that the Supreme Court's holdings in *Grunewald* and *Hale* both reasoned that "the probative value of the evidence of silence was outweighed by its prejudicial effect."[153] However, Professor Snyder rejects the Court evidentiary analysis, calling it "a constitutional analysis in disguise."[154] In support of this criticism, Snyder cites to the Court's holding in *Griffin v. California.*[155] Given the Court's holding in *Portuondo,* which severely limits the *Griffin* precedent, Snyder's comment is turned on its head.

In *Portuondo*, the probative value of the prosecutor's comments (reminding the jury that the defendant had an opportunity to tailor his testimony) was not outweighed by its prejudicial effect (penalizing or burdening the defendant's right to exercise his right to silence). This is further supported by two additional facts in *Portuondo*. First, there was a proper limiting instruction given to the jury.[156] Second, the defendant chose to take the stand and testify in his own defense, which effectively waived his Fifth Amendment privilege. Moreover, it took the *Griffin* penalty test out of play because now the prosecutor's comments are not substantive in nature. Rather, the prosecutor's comments are merely pointing out a procedural rule of evidence—that the defendant took the stand last. Thus, the holdings in *Grunewald* and *Hale* provide an evidentiary alternative to the Court's ruling in *Portuondo.*

CONCLUSION

The Supreme Court's decision in *Portuondo* was correctly decided following the strict interpretation of the self-incrimination clause of the Fifth Amendment. The defendant in *Portuondo* voluntarily chose to take the stand and testify in his own defense. In doing so, the defendant effectively waived the immunity afforded him under the Fifth Amendment.

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150. *Id.* at 175.

151. *Id.* at 173.

152. *Id.*

153. Snyder, *supra* note 135, at 300.

154. *Id.* at 301.

155. *Id.* at 301 n.93 (concluding that the Supreme Court's holding in Griffin rejected, on Fifth Amendment constitutional grounds, California's evidentiary rule that would have allowed the jury to consider the fact that Griffin had failed to testify).

156. *See Portuondo*, 120 S.Ct. at 1127 (quoting from transcript at 834 ("A defendant is of course an interested witness since he is interested in the outcome of the trial. You may as jurors wish to keep such interest in mind in determining the credibility and weight to be given to the defendant's testimony.")).

Moreover, the defendant's right to exercise his silence was never burdened, nor in any manner penalized. Once the defendant in *Portuondo* elected to take the stand, he opened the door for the prosecutor to impeach his credibility. The Court correctly established that there is no distinction between the prosecutor electing to impeach the defendant on cross-examination, or waiting until closing argument.

Furthermore, *Portuondo* is clearly distinguishable from the Court's more expansive holdings in the *Griffin* line of case law. In *Griffin*, the prosecutor's comments were impermissible because they encouraged the jury to infer guilt based on the defendant's decision to remain silent. The Court correctly held that such substantive inference was an impermissible burden that penalized the defendant for exercising his constitutional right. In *Portuondo*, the prosecutor's comments were not substantive in nature. Rather, the comments sought to remind the jury what the instruction had already pointed out—that they could consider the fact that the defendant testified last. Because the defendant had waived his right to silence by taking the stand, the prosecutor's comments were permissible for impeachment of credibility; and, in no manner burdened or penalized the defendant. Therefore, the Supreme Court's decision in *Portuondo* was correctly decided following the more narrow interpretation of the self-incrimination clause of the Fifth Amendment.

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