

STEVENS, J., concurring in judgment

SUPREME COURT OF THE UNITED STATES

No. 98–1170

LEONARD PORTUONDO, SUPERINTENDENT,
FISHKILL CORRECTIONAL FACILITY,
PETITIONER v. RAY AGARD

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

[March 6, 2000]

JUSTICE STEVENS, with whom JUSTICE BREYER joins,
concurring in the judgment.

While I am not persuaded that the prosecutor’s summation crossed the high threshold that separates trial error—even serious trial error—from the kind of fundamental unfairness for which the Constitution requires that a state criminal conviction be set aside, cf. *Rose v. Lundy*, 455 U. S. 509, 543–544 (1982), I must register my disagreement with the Court’s implicit endorsement of her summation.

The defendant’s Sixth Amendment right “to be confronted with the witnesses against him” serves the truth-seeking function of the adversary process. Moreover, it also reflects respect for the defendant’s individual dignity and reinforces the presumption of innocence that survives until a guilty verdict is returned. The prosecutor’s argument in this case demeaned that process, violated that respect, and ignored that presumption. Clearly such comment should be discouraged rather than validated.

The Court’s final conclusion, which I join, that the argument survives constitutional scrutiny does not, of course, deprive States or trial judges of the power either to prevent such argument entirely or to provide juries with instructions that explain the necessity, and the justifications, for the defendant’s attendance at trial.

STEVENS, J., concurring in judgment

Accordingly, although I agree with much of what JUSTICE GINSBURG has written, I concur in the Court's judgment.