DISSENTING OPINION BY ACOBA, J., IN WHICH DUFFY, J., JOINS

I respectfully dissent.

The majority's decision in this case unduly burdens a defendant's right to confront witnesses under article I, section 14 of the Hawaiʻi Constitution,[1] thereby undermining a fundamental principle of our justice system.[2] Although the

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[1] Article I, section 14 of the Hawaiʻi Constitution states in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the district wherein the crime shall have been committed, which district shall have been previously ascertained by law, or of such other district to which the prosecution may be removed with the consent of the accused; to be informed of the nature and cause of the accusation; to be confronted with the witnesses against the accused[.]

(Emphasis added.)

[2] It should be noted that in State v. Sisneros, 2002 WL 31888186 (Haw. Dec. 24, 2002) (SDO), this court addressed the same issue presented in the instant case, but declined to publish its holding. In Sisneros, the defendant argued "that the trial court erred in denying his motion for mistrial premised upon the prosecutor's comments that Sisneros tailored his testimony to that of the other witnesses." Id. at *1. The majority "assum[ed] arguendo" that the tailoring argument amounted to constitutional violations, but concluded that the presentation of the tailoring argument was harmless error inasmuch as "(1) there was overwhelming evidence of Sisneros's guilt; and (2) any adverse effect on Sisneros's credibility resulting from the prosecutor's argument was minimal as compared to the numerous instances where Sisneros's credibility was legitimately called into question." Id.

The dissent in Sisneros disagreed, concluding that the accusation of tailoring was not harmless. Id. at *20 (Acoba, J., dissenting, joined by Ramil, J.). In addressing the rule set forth by the majority in Portuondo v. Agard, 529 U.S. 61 (2000), the dissent stated:

> [S]imply because a jury has a "natural or irresistible" inclination to draw the inference that a defendant who testifies has tailored his or her own testimony, "it would not follow that prosecutors could urge juries to draw it[,]" id. at 86 [(Ginsburg, J., dissenting, joined by Souter, J.)], or that the jury should go uninstructed as to such matters. As Justice Ginsburg points out, although arguably a jury may be inclined to infer something about a defendant, such as a defendant's choice to remain silent after receiving Miranda warnings, and a defendant's failure to testify, a jury instruction will direct them not to draw it.

Sisneros, 2002 WL 31888186, at *21 (Acoba, J., dissenting, joined by Ramil, J.) (citing Portuondo, 529 U.S. at 85-87 (Ginsburg, J., dissenting, joined by Souter, J.)). The dissent also noted that it would have been better to publish this court's decision in Sisneros because it addressed two issues of first impression, i.e., whether tailoring arguments were constitutional and

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majority purports to adopt the position of the dissent in Portuondo, 529 U.S. at 76 (Ginsburg, J., dissenting, joined by Souter, J.), this approach, as shown by several state decisions, provides little protection to defendants who not only have the constitutional right to be present at trial, but, as in our jurisdiction, are required by law to do so. The better rule, which is set forth in State v. Daniels, 861 A.2d 808 (N.J. 2004), discussed infra, would prohibit the prosecution from explicitly referring "to the fact that the defendant was in the courtroom or that he heard the testimony of other witnesses, and was thus able to tailor his testimony." Id. at 819.

Accordingly, I would hold that all accusations of tailoring at any stage of the trial, including cross examination and summation, impermissibly burden a defendant's right to be present at trial and confront witnesses against him. Such a rule leaves ample opportunity for the prosecution to impeach the credibility of a defendant based on specific instances of inconsistent testimony and allows the trier of fact to draw its own reasonable inferences based on the evidence, rather than to rely, even in part, on accusations that the defendant was able to shape his testimony simply because he was present, as he had a right to be, at his own trial. Although the constitutional right

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whether a court restricting access to counsel during a court recess violated the defendant's right of representation by counsel. Id. at *2. In Sisneros, the prosecutor made a "generic" tailoring comment, drawing the jury's attention to the defendant's presence throughout the trial without pointing to any specific inconsistencies indicating that the defendant had actually tailored his testimony to match that of other witnesses. Id. at *22 In the instant case, the prosecutor did allude to specific inconsistencies between the testimony of Petitioner/Defendant-Appellant Joseph Mattson, III (Petitioner) and prior statements that Petitioner had made to the police.

to confront witnesses should be sufficient to justify a rule barring accusations of tailoring, the additional fact that Hawai'i Rules of Penal Procedure (HRPP) Rule 43 (2008) mandates defendants, such as Petitioner, to be present at all stages of the trial further compels prohibiting such accusations. Also, the same rationale which would prohibit the use of tailoring arguments at trial requires that courts "provide juries with instructions that explain the necessity, and the justifications, for the defendant's attendance at trial." Portuondo, 529 U.S. at 76 (Stevens, J., concurring, joined by Breyer, J.).

I.

The following essential matters, some verbatim, are from the record and the submissions of the parties.

A.

In relevant part, on October 24, 2007, Petitioner was charged by complaint as follows:

> [COUNT I:] On or about the 13th day of October, 2007, in the City and County of Honolulu, State of Hawaii, [Petitioner] threatened, by word or conduct to cause bodily injury to Joey Hayashi [(Joey)], with the use of a dangerous instrument, in reckless disregard of the risk of terrorizing said [Joey], thereby committing the offense of Terroristic Threatening in the First Degree in violation of Section 707-716(1)(e) of the Hawaii Revised Statutes [(HRS)].[3]

(Emphasis added.)

A jury trial was conducted from January 9, 2007 through January 11, 2007. At trial, Joey, Petitioner's son, Valerie

[3] Petitioner was also charged in Count II as follows but was acquitted of that charge:

> COUNT II: On or about the 13th day of October, 2007, in the City and County of Honolulu, State of Hawaii, [Petitioner] did intentionally, knowingly, or recklessly physically abuse [Joey], a family or household member, thereby committing the offense of Abuse of Family or Household Members, in violation of Sections 709-906(1) and (5) of the [HRS].

Kumia (Val), Petitioner's roommate, Officer Ashlene Gormley (Gormley), Officer Theodore Merrill (Merrill) and Officer Thomas Smith (Smith) testified for Respondent/Plaintiff-Appellee State of Hawaiʻi (Respondent), and Petitioner testified on his own behalf. The testimony of the three percipient witnesses at trial was conflicting as to the events of October 13, 2007.

B.

The following testimony was given by Joey at trial. In October 2007, Joey was staying temporarily with Petitioner and Val in Wahiawa, while Joey completed a two-week construction job in Haleiwa.

In the afternoon on Saturday, October 13, 2007, Joey returned to Petitioner's home from work, and consumed vodka and soda cocktails. At around 9:00 or 9:30 p.m., Joey and Petitioner were watching television while Joey waited for his friend, Josh, to pick him up. Joey had borrowed Petitioner's cellular telephone at the time. Petitioner's phone rang and Josh's number was displayed, but when Petitioner answered, it was Joey's girlfriend. The caller hung up on Petitioner, which upset Petitioner, who began cursing and making threatening and disparaging comments regarding Josh. Petitioner believed that the caller had been Josh, who was with a female.

Joey thought it was likely his girlfriend calling and that Josh's number had only appeared because they called at the same time. Joey told Petitioner that Josh was not with a female. Joey grabbed the phone in order to call Josh, but Petitioner took the phone from Joey. Joey attempted to get the phone back, and

loudly and angrily shouted at Petitioner to give him the phone, while cursing and saying hurtful things.

Joey placed Petitioner in a headlock, causing him to choke. Joey was standing and Petitioner was on his knees. Petitioner did not attempt to strike Joey, but instead yelled for Val, who was in her bedroom. Val entered the living room and told Joey to release Petitioner. Joey complied.

Petitioner then grabbed a knife from a table, opened it, and began swinging the knife at Joey. Joey backed up against a wall, and Petitioner missed Joey and stabbed some cardboard behind Joey. Joey then tripped over something on the floor and fell.

Petitioner began to choke Joey, and tried to stab his leg. Joey asked Petitioner to drop the knife and fight "like a man," but Petitioner said, "You tried to kill me, and I'm going to kill you now." Joey grabbed Petitioner's right hand, in which the knife was held, and Petitioner punched Joey in the face several times with his left hand.

Petitioner's phone rang, and he ceased fighting to answer it. It was Joey's girlfriend calling, and Petitioner threw the phone at Joey. When Joey hung up the phone, Petitioner told Joey he was going to harm Josh. A car's headlights appeared through the window, and Petitioner went toward the front door, believing Josh had arrived. Joey attempted to stop Petitioner, but retreated because Petitioner still had the knife.

Joey looked out the window and saw it was not Josh's car and therefore, closed and locked the front door with Petitioner outside. Joey told Val to lock the back door and to call the police. Joey called Josh to tell him not to come. Joey then went into Val's room, where Petitioner was reaching through a window. Petitioner had cut the window screen and was attempting to pull out the louvers. Petitioner swung the knife at Val while she attempted to close the window.

Joey went to the living room to get an unloaded gun and a hatchet. Joey told Petitioner he was loading the gun, but never actually loaded it because he only wanted to scare Petitioner. Joey aimed the gun at Petitioner and told him to leave. Petitioner laughed and said Joey was going to be arrested. Joey set the gun down, and helped Val attempt to close the window, but Petitioner continued to swing the knife through the window, and therefore Joey hit Petitioner's hand with the back of the hatchet. After being struck by the hatchet, Petitioner pounded on the window, demanding entry. The police then arrived and placed Petitioner under arrest.

Joey was subsequently interviewed by a police detective over the telephone. Joey told the detective about the argument between Petitioner and himself, the knife, Petitioner's threats, and the various phone calls, but did not inform the detective about the gun, fearing he would be arrested for having brandished it. Joey spoke with the detective again a few hours later, and when specifically asked if there was a gun involved, admitted that he had used a gun. Joey had also stated initially that

Petitioner had not requested him to leave prior to grabbing the knife, but later admitted that Petitioner had asked him to leave before threatening him with the knife, and that Joey had refused.

C.

The following testimony was given by Val at trial. Val testified that she resided in a one-bedroom apartment with Petitioner, and that in October 2007, Joey stayed with them for about two weeks. On October 13, 2007, Val observed that Joey was intoxicated -- slurring his words, and unsteady on his feet, as he had made himself a strong alcoholic beverage upon returning from work at about 3:15 p.m.

Around 9:30 p.m., Val smoked a cigarette on the back porch, while Petitioner and Joey watched television in the living room. Val heard Petitioner call for her, but ignored it at first. Upon hearing him call a second time, she rushed to the living room, because he sounded desperate. Val saw Joey choking Petitioner, who was on his knees. Concerned that Petitioner would lose consciousness due to a medical condition, she ordered Joey to let him go. Joey eventually complied, following which, Petitioner rose and grabbed a pocket knife from the table.

Petitioner approached Joey with the knife, and Joey backed up and fell over some boxes on the floor. According to Val, Petitioner did not swing his knife at Joey, although she conceded that she had stated to the contrary in her prior written statement to the police, and had also stated that Petitioner shoved Joey into the corner of the room. Joey attempted to get up and shouted, "Dad, don't cut me."

Val went to her room to call 911, and from her bedroom, she could hear Petitioner and Joey yelling at each other. After finishing her 911 call, Val heard the front door slam, and returned to the living room. Petitioner was yelling outside, asking for his keys and cell phone.

Joey told Val to lock the back door, and both of them proceeded to the bedroom to lock the door. Petitioner tried to enter through a back window. Val heard Joey yelling from the living room, "Dad, I'm getting my gun. I'm going to shoot you." Val, surprised that Joey had a gun, went to the living room, where she observed Joey loading her gun. Val then heard the screen on the back window being torn, and returned to the bedroom to secure the louvers.

According to Val, because she and Joey were initially interviewed together by the police, she only included in her written statement those facts that had been mentioned by Joey, and, thus, her statement was based on Joey's statement.

D.

Officers Gormley, Merrill, and Smith testified at the trial. On October 13, 2007, at about 9:30 p.m., officers Gormley and Merrill were dispatched to Petitioner's home, after being advised that there was an argument involving a knife. Upon arriving at Petitioner's home, Gormley saw Joey come out the front door, shouting, "He's got a knife." Merrill heard Joey say, "He tried to stab me." Petitioner then came out from the behind the building, and Gormley told him to stop. Merrill

pointed his pistol at Petitioner, and commanded him to lie down, which Petitioner did.

Joey was shaking and upset. After calming him down, Gormley took a statement from Joey, and then interviewed Val. Both Joey and Val provided written statements. Petitioner was arrested and then taken to the hospital, because he had cuts on his hands and complained of pain.

Merrill discovered a knife at the scene, hidden underneath the corner of a washing machine on the lanai behind Petitioner's apartment.

Smith interviewed Petitioner on October 14, 2007. Subsequently, Smith contacted Joey because he had never mentioned that a gun was involved. Joey then admitted that there had been a gun.

E.

Petitioner was the last to testify. According to Petitioner, on October 13, 2007, he had gone to work at around 6:00 a.m., and had offered Joey a ride to Kapolei, but he declined. Joey, who normally resides in Waianae, had been staying with Petitioner for about two weeks. Joey was supposed to have left Petitioner's home the previous evening, October 12, 2007, but had not.

On the evening of October 13, 2007, Petitioner arrived home at around 5:00 p.m. Joey, who was intoxicated, fell asleep around 7:00 p.m. Petitioner's cell phone rang, and he answered it. It was for Joey, so Petitioner wakened Joey and told him a female was on the phone for him.

Petitioner related that Joey swore and yelled at the caller and, upon hanging up, threw the phone down between him and Petitioner. Petitioner told Joey not to be disrespectful with his phone, and that he did not approve of Joey's tone while on the phone. Joey cursed at Petitioner, and Petitioner warned him that if he was unhappy with the circumstances, he should not use the phone and should leave Petitioner's home.

Petitioner's phone rang again, and Joey tried to take it from Petitioner, but Petitioner told Joey it was his phone and he would answer it. Petitioner answered, the same female asked to speak to Joey, and Petitioner handed the phone to Joey. Again, Joey yelled and cursed during the conversation, and upon finishing the call, threw the cell phone down. Petitioner told Joey to "watch his language" and respect his property, and again that he should leave if he continued to act disrespectfully.

Joey asked to call Josh, who was supposed to be picking him up. Petitioner allowed Joey to use the phone, and heard Joey asking "where are you" and "why are you not here yet." Upon finishing the call, Joey gave the phone to Petitioner.

The phone rang again, and both Petitioner and Joey reached for it. Again, Petitioner reminded Joey that it was his phone and he would answer it. Petitioner answered, and again it was a female. Joey reached for the phone, believing it was his friend calling, and Petitioner informed him that it was a female. Petitioner heard the female laughing before she hung up.

Joey became upset, and "yanked" the phone from Petitioner. Joey then called Josh and asked whether a girl was

with him, and Josh said no. Joey then accused Petitioner of lying and began saying derogatory things to him. Petitioner became upset and told Joey to leave. Joey refused, and challenged Petitioner to a fight. Again, Petitioner asked Joey to leave. Joey did not leave, and proceeded to put Petitioner in a headlock. Petitioner began choking and called to Val for help. Petitioner continued to yell until he could not make a sound, and then lost consciousness.

When Petitioner revived, Joey was standing over him, still upset. Petitioner grabbed his knife from the table, and, while holding the knife closed, told Petitioner to leave. Joey remained and stated, "You fucking pussy, you need one knife now?" Petitioner moved toward Joey believing that Joey had made advances toward him, and Joey moved backward and fell over something on the floor. There was a box of glasses near Joey, and Petitioner, feeling concerned that Joey might be cut, walked over to Joey to help him up, but Joey began kicking and punching. According to Petitioner, he never opened the knife.

Petitioner then noticed a light outside, and opened the door to speak with the building's owner and another tenant. Petitioner returned inside and told Joey to be quiet, but Joey kept shouting. Petitioner then saw headlights appear outside, and believed Josh had arrived. Petitioner went outside to let Josh know that Joey was intoxicated and should be taken straight home, but, upon approaching the car, realized it was not Josh.

Petitioner returned, but the door had been locked, presumably by Joey. Petitioner, having decided to leave, knocked

and requested his keys and company phone. No one responded, so Petitioner went to the back door, but it was also locked. He went to an open window and attempted to remove the screen, and because he was unable to remove it, Petitioner took out his knife and cut the screen, and also attempted to remove the louvers.

Val came to the window, and Petitioner asked her for his phone and keys, but she asked him to leave. Petitioner then closed his knife, placed it on a table on the back porch, and reached through the window in order to prevent Val from closing it. Val attempted to close the window and then Joey appeared, threatening Petitioner that he would chop off his fingers if he refused to leave. Petitioner felt something strike his hand, and pulled it back slightly, while keeping it inside the window to ensure the window would remain open until he obtained his keys and phone.

Petitioner then saw that Joey had a gun. Joey pulled the hammer back and said he would shoot. Petitioner decided to leave and walk to his uncle's house nearby. When Petitioner walked to the front of the building, he was arrested by the police, and taken to the hospital for treatment of his injuries.

F.

At trial during cross-examination of Petitioner, the prosecution questioned Petitioner as to his presence during the presentation of evidence by Respondent.

> [PROSECUTOR]: Your memory of what happened, would you agree with me, was better the day after it happened than it is today?
> [PETITIONER]: Yes and no.
> Q. How is it not better?
> A. I didn't get no sleep.

> Q. Okay. Or is it that you had opportunity to see what [Respondent] does have in evidence?
> A. No.
> Q. So you haven't had an opportunity to see what [Respondent] has in evidence?
> A. Only unit the [c]ourt. [sic]
> Q. Okay. And you have had the opportunity to sit through the evidence that's been presented?
> [DEFENSE COUNSEL]: Objection, Your Honor. That's going into [*State v. Maluia*, 107 Hawaiʻi 20, 108 P.3d 974 (2005)].
> THE COURT: Overruled.
> Q. You had the opportunity to sit through the evidence that's been presented?
> A. Yes.
> Q. And you're now testifying in court, right?
> A. Yes, ma'am.
> Q. After you know what [Respondent] had?
> A. Yes, ma'am.
> Q. Okay. On October 15 --
> [DEFENSE COUNSEL]: Your Honor, we're going to object to this line of questioning under the 4th, 5th and 16th [sic] amendment.
> THE COURT: Overruled.

(Emphases added.) The prosecutor went on to question Petitioner about the veracity of his statement to the police and whether inconsistencies between that statement and his testimony at trial were the result of Petitioner being present at trial.

> [PROSECUTOR]: On October 15th, when you gave the statement to the police officer, you told the police officer what happened, right?
> [PETITIONER]: Yes.
> Q: You told them what you remember happening?
> A: Yes.
> Q: And you were truthful, right?
> A: Yes.
> Q: If you weren't, let me know. But I'm just asking, were you truthful?
> A: I just don't know. Because like I said, I couldn't sleep. So I know I was answering questions.
> Q: But when you were answering questions did you make stuff up?
> A: Some of it.
> Q: You made up some of it?
> A: A few things.
> Q: Like what?
> A: I just didn't want to tell him -- I just wanted to get my point of what happened. Not what--he was there. He was there, from what I seen, to prosecute me.
> Q: Okay. What I'm asking is what part of your statement did you make up?
> A: I don't know how to answer that one.
> Q: Is the whole statement a lie?
> A: No
> Q: So parts of it are true?
> A: Yes.
> Q: Only the parts that are helpful to you are true.

> A: Well, when I made my statement, I only wanted to make the statement that helped me.

(Emphases added.)

At the close of the trial, the prosecutor stated the following, inter alia, in her closing argument:

> [PROSECUTOR]: Now, this is the same knife that [Petitioner] is telling you that he just placed on the back table as he was leaving.
>
> He told you he lied before. He had a chance to sit through the evidence. He had to make his story gibe with what you've heard. What is in evidence. What [Val] even had to admit to, because she --
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> [DEFENSE COUNSEL]: Objection, Your honor. Burden shifting.
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> THE COURT: Overruled.
>
> [PROSECUTOR]: He sat through the evidence. There is a 911 tape. [Val's] statement. Joey's statement. Based on all that, he is not telling the truth. All of a sudden he remembered that he grabbed the knife.

(Emphases added.) As noted, Petitioner objected to the prosecution's comments on Petitioner's presence at trial.

G.

Following the jury trial, on January 14, 2008, Petitioner was found guilty of Count I, Terroristic Threatening in the First Degree. On April 22, 2008, Petitioner was sentenced to an indeterminate five-year prison term.

II.

On May 20, 2008, Petitioner appealed. On appeal, Petitioner argued that

> (1) the [court] erred in allowing the prosecutor to comment during closing argument that [Petitioner's] presence during trial enabled him to tailor his testimony to match the evidence; (2) the prosecutor's improper argument amounted to prosecutorial misconduct and deprived him of his right to due process and a fair trial, in violation of article I, sections 5 and 14 of the Hawaiʻi Constitution, and the fifth and fourteenth amendments to the U.S. Constitution; and (3) the [court] plainly erred in failing to instruct the jury that [Petitioner] had a constitutional right to be present throughout trial and the jury must not draw any unfavorable inference regarding [Petitioner's] credibility simply on the basis of his presence at trial.

State v. Mattson, 2009 WL 1416795, at *1 (Haw. App. May 21, 2009)

(SDO) (emphases added). The ICA rejected Petitioner's arguments, holding:

> (1) The United States Supreme Court's decision in Portuondo [], 529 U.S. 61 [], forecloses [Petitioner's] claim that the prosecutor's argument violated his rights under the U.S. Constitution.
> (2) The prosecutor's argument in this case was not improper under the Hawaiʻi Constitution. See State v. Apilando, 79 Hawaiʻi 128, 142, 900 P.2d 135, 149 (1995) (holding that "when a defendant takes the stand to testify, his or her credibility can be tested in the same manner as any other witness," and therefore, it was not improper for the prosecutor to comment that "because [the defendant] had the highest stake in the outcome of the case, he had the greatest motive to lie").
> (3) We decline to conclude that the [court] committed plain error in failing to instruct the jury, sua sponte, that [Petitioner] had a constitutional right to be present throughout trial and the jury must not draw any unfavorable inference regarding [Petitioner's] credibility simply on the basis of his presence at trial.

Id. (emphases added).

Petitioner filed a petition for certiorari on September 9, 2009 (Application).

III.

Petitioner listed the following questions in his Application:

> 1. Whether the ICA gravely erred in holding that [Respondent's] accusation during closing argument that [Petitioner's] presence during trial enabled him to tailor his testimony to match the evidence presented was not improper under the Hawaiʻi Constitution.
> 2. Whether the ICA gravely erred in holding that [the court] did not commit plain error in failing to instruct the jury that [Petitioner] had a constitutional right to be present throughout the trial and the jury must not draw any unfavorable inference regarding [Petitioner's] credibility simply on the basis of his presence at trial.

(Emphases added.)

Respondent did not file a memorandum in opposition.

IV.

The majority asserts that Petitioner's conviction should be affirmed because the prosecutor's comments in the

instant case comport with the <u>Portuondo</u> dissent rule allowing specific tailoring arguments on summation. The majority notes that, in her closing argument, the prosecutor highlighted "specific evidence adduced at trial that was directly contradictory to [Petitioner's] testimony." Majority opinion at 37. Namely, the prosecutor pointed to the inconsistencies between Val's and Joey's testimony with that of Petitioner, the 911 call made by Val, and Petitioner's testimony, as well as Petitioner's admission that he had not told the truth in his statement to the police. <u>Id.</u> at 37-38. According to the majority, the prosecution's attack on summation was permissible under the <u>Portuondo</u> dissent rule because "the prosecution referred to specific evidence presented at trial <u>in addition</u> to referring to [Petitioner's] presence at trial[.]" <u>Id.</u> at 38 (emphasis in original).

Furthermore, according to the majority, because "the prosecutor's comments did not violate [Petitioner's] rights, it was not necessary for the trial court to <u>sua</u> <u>sponte</u> instruct the jury regarding [Petitioner's] right to be present at trial." <u>Id.</u> at 39. Thus, the majority concludes that the court did not plainly err in "failing to instruct the jury that [Petitioner] 'had a constitutional right to be present throughout the trial and that the jury must not draw any unfavorable inference regarding [Petitioner's] credibility simply on the basis of his presence at trial.'" <u>Id.</u> In my view the majority is wrong for the reasons that follow.

V.

In Apilando, this court "explicitly held that the [constitutional] right of confrontation includes an accused's right to a literal face-to-face confrontation with the witnesses who testify against him or her at trial[.]" 79 Hawaiʻi at 136, 900 P.2d at 143. This court noted that the right to face adverse witnesses and the right to cross-examine are inherent in the confrontation clause.

> The confrontation clause of the Hawaiʻi Constitution provides in pertinent part that "in all criminal prosecutions, the accused shall enjoy the right to be confronted with the witnesses against the accused." Haw. Const. art. I, § 14. The confrontation clause in the sixth amendment to the United States Constitution, made applicable to the states through the fourteenth amendment, is virtually identical.
>
> The right of confrontation affords the accused both the opportunity to challenge the credibility and veracity of the prosecution's witnesses and an occasion for the jury to weigh the demeanor of those witnesses. The Confrontation Clause provides two types of protections for a criminal defendant: the right physically to face those who testify against him or her, and the right to conduct cross-examination. The Clause confers a right to meet face to face all those who appear and give evidence at trial.

Id. at 131, 900 P.2d at 138 (brackets and ellipsis omitted) (some quotation marks and citations omitted) (first emphasis in original) (second emphasis added). This court has also held that "[a] defendant's right to testify in his or her own defense is guaranteed by the constitutions of the United States and Hawaiʻi." Tachibana v. State, 79 Hawaiʻi 226, 231, 900 P.2d 1293, 1298 (1995) (quoting State v. Silva, 78 Hawaiʻi 115, 122, 890 P.2d 702, 709 (App. 1995).

> The right to testify in one's own behalf arises independently from three separate amendments to the United States Constitution. It is one of the rights guaranteed by the due process clause of the fourteenth amendment as essential to due process of law in a fair adversary process. The right to testify is also guaranteed to state defendants by the compulsory process clause of the sixth amendment as applied through the fourteenth amendment. Lastly, the opportunity to testify is also a necessary corollary to the

> Fifth Amendment's guarantee against compelled testimony, since every criminal defendant is privileged to testify in his or her own defense, or to refuse to do so.
>
> Because the texts of sections 5, 14, and 10 of article I of the Hawaiʻi Constitution parallel the fourteenth, fifth, and sixth amendments to the United States Constitution, the right to testify is also guaranteed by these parallel provisions of the Hawaiʻi Constitution.

Id. at 231-32, 900 P.2d at 1298-99 (quoting Silva, 78 Hawaiʻi at 122-23, 890 P.2d at 709-10) (emphasis added) (brackets and ellipses omitted) (formatting altered). Additionally, HRS § 801-2 (1993) protects the right of confrontation and the right to testify:

> In the trial of any person on the charge of any offense, he shall have a right to meet the witnesses, who are produced against him, face to face; to produce witnesses and proofs in his own favor; and by himself or his counsel, to examine the witnesses produced by himself, and cross-examine those produced against him; and to be heard in his defense.

(Emphases added.) Thus, a defendant's constitutional right to meet accusers face-to-face, as well as to testify, are well-established under the Hawaiʻi Constitution and by statute.

This court has held that it is inappropriate for the prosecution to impermissibly burden the right to testify, stating that

> [i]t has long been recognized that every criminal defendant has a right to testify in his own defense. That right is basic in our system of jurisprudence and implicitly guaranteed by the Due Process Clause of the Fourteenth Amendment. While technically the defendant with prior convictions may still be free to testify, the admission of prior convictions to impeach credibility is a penalty imposed by courts for exercising a constitutional privilege. That penalty cuts down on the right to testify by making its assertion costly.

State v. Santiago, 53 Haw. 254, 259, 492 P.2d 657, 660-61 (1971) (internal quotation marks and citations omitted).[4] Therefore,

[4] In Santiago, HRS § 621-22 (1968) "seemed on its face to authorize use of all prior convictions to impeach credibility[.]" 53 Haw. at 260, 492 P.2d at 661. This court required that the statute "be read in light of the basic rules of evidence[,]" and held that prior convictions "could be used [to (continued...)

this court "h[e]ld that to convict a criminal defendant where prior crimes have been introduced to impeach his credibility as a witness violates the accused's constitutional right to testify in his own defense." Id. at 260, 492 P.2d at 661.

VI.

In addressing the permissibility of a prosecutor's argument that a defendant was able to tailor testimony because of his presence at trial, courts have drawn distinctions between "generic" and "specific" tailoring arguments. A generic tailoring argument occurs when a prosecutor states that the defendant was able to sit through the trial and hear the testimony of other witnesses, thereby allowing the defendant the opportunity to shape his or her testimony to fit that of other witnesses, even when there is no evidence that defendant has actually done so. See Portuondo, 529 U.S. at 78 (Ginsburg, J., dissenting, joined by Souter, J.). In contrast, a specific tailoring argument is made when the prosecution alludes to facts indicating that a defendant has tailored "specific elements of his testimony to fit with particular testimony given by other witnesses[.]" Id. Furthermore, in assessing whether tailoring arguments are permissible, courts have considered the point in the proceedings at which such arguments are presented.

[4](...continued)
attack credibility] only if, like perjury and offenses 'involving dishonesty or false statement,' the prior crime 'rationally carries probative value on the issue of the truth and veracity of the witness.'" Id. at 260, 492 P.2d 661 (quoting in Asato v. Furtado, 52 Haw. 284, 293, 474 P.2d 288, 295 (1970)). It was in this context that the court concluded the use of "prior crimes . . . to impeach . . . credibility . . . violated the . . . constitutional right to testify in [one's] own defense." Id. at 260, 492 P.2d at 661.

A.

In Portuondo, the United States Supreme Court considered so-called "generic" comments made in summation and determined that, under the United States Constitution, a prosecutor's comment upon a defendant's presence throughout the trial does not impinge upon a defendant's right to confrontation under the sixth amendment.[5] In that case, during closing arguments, defense counsel asserted that both prosecution witnesses were lying, and the prosecution challenged the defendant's credibility. See id. at 63. The prosecution stated, over the objection of the defense, that the defendant had the "big advantage" of sitting through the testimony of the witnesses:

> You know, ladies and gentleman, unlike all the other witnesses in this case[,] the defendant has a benefit and the benefit that he has, unlike all the other witnesses, is he gets to sit here and listen to the testimony of all the 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? How am I going to fit it into the evidence.

Id. at 64 (internal quotation marks and citation omitted). The defendant in Portuondo argued that those comments unfairly burdened his right to be present at trial. The New York Supreme

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[5] The Sixth Amendment states:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

U.S. Const. amend. VI.

Court upheld the conviction and the New York Court of Appeals denied the defendant's further appeal. Id. The defendant subsequently filed a habeas corpus petition in federal court. The district court denied the defendant's petition, but the Second Circuit Court of Appeals reversed, holding that the prosecutor's statements on summation that the defendant tailored his testimony to match that of other witnesses was impermissible because it infringed on the defendant's constitutional right of confrontation. Id.

On certiorari, a majority of the Court reversed, holding that all testifying witnesses should be treated the same, and, thus, such comments did not violate the defendant's constitutional rights. See id. at 65, 73. The Portuondo majority explained that, because the jury will likely conclude on its own that a defendant who testifies last will tailor his or her testimony, a prosecutor's comments to that effect are not improper.

> [I]t 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 [or she] heard the testimony of all those who preceded him [or her]. . . . [I]t 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 the other witnesses.

Id. at 67-68 (emphasis added). According to the Portuondo majority, prohibiting the prosecution from arguing to the jury that a defendant's position allows him to tailor his testimony "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." Id. at 68.

Despite joining the majority's result, Justice Stevens's concurrence strongly condemned the prosecution's argument in Portuondo because it degraded the criminal law system and encouraged disrespect of a defendant's constitutional rights.

> 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.

Id. at 76 (Stevens, J., concurring, joined by Breyer, J.) (emphasis added). Arguably, acts "demeaning" to constitutional principles should result in vacation of a conviction. However, it is worth noting Justice Steven's statement that the Supreme Court's decision "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." Id. (emphasis added).

The Portuondo dissent characterized the majority's holding as "transform[ing] a defendant's presence at trial from a Sixth Amendment right into an automatic burden on his credibility." Id. at 76 (Ginsburg, J., dissenting, joined by Souter, J.). Justice Ginsburg relied upon that court's earlier decisions in Griffin v. California, 380 U.S. 609 (1965), which held that a defendant's refusal to testify at trial may not be used as evidence of his guilt, and Doyle v. Ohio, 426 U.S. 610 (1976), holding that a defendant's silence after receiving Miranda warnings did not warrant a prosecutor's attack on his

credibility. Based on those cases, Justice Ginsburg contended 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." Portuondo, 529 U.S. at 77 (Ginsburg, J., dissenting, joined by Souter, J.). Justice Ginsburg reasoned that, simply because a jury has a "natural or irresistible" inclination to draw the inference that a defendant who testifies has tailored his or her own testimony, "it would not follow that prosecutors could urge juries to draw it." Id. at 86.

Although Justice Ginsburg would have prohibited generic tailoring arguments during summation when the defendant was not able to rebut that argument, her position still allowed for the use of such arguments during cross-examination. Id. at 78. Under Justice Ginsburg's approach, "on cross-examination, a prosecutor would be free to challenge a defendant's overall credibility by pointing out that the defendant had the opportunity to tailor his testimony in general, even if the prosecutor could point to no facts suggesting that the defendant had actually engaged in tailoring." Id. Thus, the only limitation on the use of tailoring arguments, according to Justice Ginsburg, is that generic arguments may not be made on summation when the defendant has no opportunity to rebut them. Id. Apparently in Justice Ginsburg's view, specific tailoring arguments are permissible at all stages of the trial. Id.

B.

This court has held that the prosecution is permitted to attack a defendant's credibility. See Apilando, 79 Hawai‘i at 142, 900 P.2d at 149. In Apilando, the prosecutor argued to the jury that "because Apilando had the highest stake in the outcome of the case, he had the greatest motive to lie." Id. It was held that the comments were not improper because "when a defendant takes the stand to testify, his or her credibility can be tested in the same manner as any other witness." Id. (citing State v. Pokini, 57 Haw. 17, 22, 548 P.2d 1397, 1400 (1976)); see also State v. Clark, 83 Hawai‘i 289, 305, 926 P.2d 194, 210 (1996) (holding that the prosecutor's argument in closing that "[w]hen the defendant comes in here and tells you that he was not on cocaine that night, that just - it's a cockamamie story[,]" was a permissible attack on the defendant's credibility). However, prosecutors are prohibited from making comments that infringe upon a defendant's constitutional rights. State v. Wakisaka, 102 Hawai‘i 504, 515, 78 P.3d 317, 328 (2003).

VII.

A.

This court may afford greater protection under the state constitution than that required by the federal constitution "when the United States Supreme Court's interpretation of a provision present in both the United States and Hawai‘i Constitutions does not adequately preserve the rights and interests sought to be protected[.]" State v. Bowe, 77 Hawai‘i 51, 57, 881 P.2d 538, 544 (1994) (internal quotation marks,

citations, and brackets omitted). Because it appears that neither the Portuondo majority nor dissent affords adequate protection for the constitutional rights to be present at trial, to confront witnesses, to present witnesses, and to testify, see Bowe, 77 Hawaiʻi at 57, 881 P.2d at 544, this court should adopt a standard under the Hawaiʻi Constitution, as Justice Stevens suggests, that would prohibit the prosecution from "entirely" making arguments that a defendant tailored his or her testimony.

B.

Other state courts have concluded that prosecutors' comments regarding a defendant's trial presence do infringe upon the right to confrontation. See, e.g., Daniels, 861 A.2d at 819; Hart v. United States, 538 A.2d 1146, 1149 (D.C. App. 1988); State v. Hemingway, 528 A.2d 746, 748 (Vt. 1987). These courts have prohibited generic tailoring comments in closing arguments by the prosecution which invite the jury to draw inferences based simply upon the defendant's presence at trial.

1.

In Hemingway, the prosecutor argued in closing argument that the defendant had

> the opportunity, unlike any other witness, to sit here and hear all the other evidence. So therefore he has a chance to hear all the evidence, fill in gaps, modify testimony he desires to, to fit any contingency, any discrepancy, that might come up here; so I'd like to think that after you look at all the evidence you'll come back with a guilty verdict.

528 A.2d at 747 (ellipsis omitted) (emphases added). The Vermont Supreme Court held that, although "[t]he defendant's credibility is [] a proper subject for comment[,]" "[i]n this case, . . . the State's comment on the defendant's credibility in its closing

argument strayed beyond the confines of the evidence presented at trial[,]" and was therefore improper. Id. at 748. That court noted that the tailoring argument was presented on rebuttal argument, at a point when the defendant could not respond, and that nothing in the record supported such an argument.

> [T]he State argued in closing that the defendant corrected his description of the route taken before the traffic stop to ensure that his testimony conformed with his friend's statement. Standing alone this argument would not have been improper, as it was an inference drawn directly from the evidence. The State, however, went beyond casting this doubt about the substance of the defendant's testimony, and asked the jury to infer the defendant's lack of credibility from the manner in which he presented his testimony. . . . [T]his innuendo was introduced in conclusory form during rebuttal argument, without evidentiary support in the record, and at a point when the defendant could not respond other than by an objection. There was no testimony that the defendant and his friend had collaborated, or that the defendant purposefully used the timing of his testimony to ensure his story coincided with that of his friend. This correction did not follow additional testimony by the friend, rather, defendant's direct and redirect examination both followed the friend's testimony. The State's inference that the defendant placed himself in the position to "fill in gaps" thus was not drawn from the testimony, and was improper.

Id. (first emphasis added) (second emphasis in original). Hemingway concluded that it was insufficient that the court "generally charged the jury with assessing the credibility of the witnesses," and the error was not harmless because the "determination [of guilt] turned on the jury's assessment of the credibility of the respective witnesses, and its ability to consider the prosecutor's improper comment on the defendant's credibility must be seen as having tainted those deliberations." Id. (emphasis added).

2.

In Daniels, the New Jersey Supreme Court reversed the defendant's conviction and remanded for a new trial based upon the prosecutor's improper "suggest[ion] during summation that

[the] defendant tailored his testimony to meet the facts testified to by other witnesses." 861 A.2d at 811. The defendant in Daniels was convicted of second degree robbery. At trial, evidence was adduced that the defendant was driving a vehicle that had been used in a robbery and that the vehicle still contained the stolen property when he was arrested by police. Id. The defendant denied involvement in the robbery, testifying that he had been met by his friends earlier on the day of the robbery who then asked him to drive the vehicle, and that the stolen property was already in the car when police arrested him. Id. at 811-12. At defendant's trial, the prosecutor commented on the defendant's presence in the courtroom throughout the receipt of testimony:

> Now, I said that the defendant in his testimony is subject to the same kinds of scrutiny as the State's witnesses. But just keep in mind, there is something obvious to you, I'm just restating something you already know, which is all I do in my summation, the defendant sits with counsel, listens to the entire case and he listens to each one of the State's witness[es], he knows what facts he can't get past. The fact that he was in the SUV. The fact that there's a purse in the car. The fact that a robbery happened. But he can choose to craft his version to accommodate those facts.

Id. at 812 (emphases in original).

The appellate court held "that the prosecutor's comments did not meet [the] standard for reversal because they were directed to defendant's credibility as a witness," and "that, by taking the stand, defendant waived his right to remain silent and subjected himself to an attack on his credibility." Id. at 813 (internal quotation marks and citations omitted). However, on certiorari, the New Jersey Supreme Court disagreed, recognizing that the defendant is a unique type of witness. "[A] criminal defendant is not simply another witness. Those who face

criminal prosecution possess fundamental rights that are essential to a fair trial." Id. at 819 (internal quotation marks and citation omitted).

That court explained that "a criminal defendant has the right to be present at trial, to be confronted with the witnesses against him and to hear the State's evidence, . . . to present witnesses and evidence in his defense, . . . [and] to testify on his own behalf." Id. (internal citations omitted). Further, Daniels maintained that the "[p]rosecutorial comment suggesting that a defendant tailored his testimony inverts those rights, permitting the prosecutor to punish the defendant for exercising that which the Constitution guarantees." Id. (emphasis added). As such, it was concluded that "[a]lthough, after Portuondo, prosecutorial accusations of tailoring are permissible under the Federal Constitution, we nonetheless find that they undermine the core principle of our criminal justice system - that a defendant is entitled to a fair trial." Id. (emphasis added).

Daniels stated, "We agree with Justice Stevens that generic accusations of tailoring debase the 'truth-seeking function of the adversary process,' violate the 'respect for the defendant's individual dignity,' and ignore 'the presumption of innocence that survives until a guilty verdict is returned.'" Id. (quoting Portuondo, 529 U.S. at 76 (Stevens, J., concurring, joined by Breyer, J.)). According to Daniels, "[w]e simply cannot conclude that generic accusations are a legitimate means to bring about a just conviction. Therefore, pursuant to our supervisory authority, we hold that prosecutors are prohibited

from making generic accusations of tailoring during summation." Id. (internal quotation marks and citation omitted).

In so concluding, Daniels set forth a rule that prohibits prosecutors from presenting tailoring arguments to the jury. The rule states that "[t]he prosecutor's comments must be based on the evidence in the record and the reasonable inferences drawn therefrom." Id. (citation omitted). The prosecution is only free to comment on the evidence supporting the inference of tailoring and "may not refer explicitly to the fact that the defendant was in the courtroom or that he heard the testimony of other witnesses, and was thus able to tailor his testimony." Id.

C.

As noted before, in final argument the prosecutor in this case stated that

> [Petitioner] told you he lied before. He had a chance to sit through the evidence. He had to make his story gibe with what you've heard. What is in evidence. What [Val] even had to admit to, because she -- . . .
>
> He sat through the evidence. There is a 911 tape. [Val's] statement. Joey's statement. Based on all that, he is not telling the truth. All of a sudden he remembered that he grabbed the knife.

(Emphases added.) While it was permissible for the prosecutor to point out that Petitioner's statements conflicted with those of the other witnesses, that Petitioner's trial testimony conflicted with his prior statement, and also that Petitioner admitted that he had lied previously, the prosecutor's general statements directly attacking Petitioner's presence at trial, and his concomitant ability therefore to "make his story gibe" wrongly infringed on Petitioner's rights to be present at trial and to testify. The prosecution's argument did not merely "state, discuss, and comment on the evidence as well as [] draw all

reasonable inferences from the evidence[,]" Clark, 83 Hawaiʻi at 304, 926 P.2d at 209, but constituted a direct attack on the exercise of Petitioner's confrontation right.

As stated previously, under the Daniels rule, "the prosecutor may not refer explicitly to the fact that the defendant was in the courtroom or that he heard the testimony of other witnesses, and was thus able to tailor his testimony." Daniels, 861 A.2d at 819. The standard applied in Hemingway and Daniels is necessary to adequately protect the constitutional rights incident to being present and to testifying at trial, while still allowing the prosecution leeway to comment directly on the evidence presented. Therefore, the prosecution's accusations of tailoring during summation violated Petitioner's constitutional right of confrontation.

VIII.

A.

The majority criticizes the Portuondo majority's decision because under such a rule "the prosecution can permissibly make a comment that is related only to the defendant's presence in the courtroom and not to his actual testimony." Majority opinion at 33-34 (citing Portuondo, 529 U.S. at 73) (emphasis in original). However, this ignores the fact that Justice Ginsburg's dissent allows tailoring questions and comments to be presented at other stages of trial. Under this approach, prosecutors are allowed to (1) present "generic" accusations of tailoring at trial so long as that argument is presented on cross-examination while a defendant has the

opportunity to rebut such an argument or (2) "at any stage of a trial to accuse a defendant of tailoring specific elements of his testimony[.]" Portuondo, 529 U.S. at 78.

Justice Ginsburg's justification for allowing generic tailoring questions on cross examination is as follows:

> The truth-seeking function of trials may be served by permitting prosecutors to make accusations of tailoring--even wholly generic accusations of tailoring--as part of cross-examination. Some defendants no doubt do give false testimony calculated to fit with the testimony they hear from other witnesses. If accused on cross-examination of having tailored their testimony, those defendants might display signals of untrustworthiness that it is the province of the jury to detect and interpret. But when a generic argument is offered on summation, it cannot in the slightest degree distinguish the guilty from the innocent. It undermines all defendants equally and therefore does not help answer the question that is the essence of a trial's search for truth: Is this particular defendant lying to cover his guilt or truthfully narrating his innocence?

Id. at 79 (Ginsburg, dissenting, joined by Souter, J.) (emphases added). But Justice Ginsburg's arguments against accusations of tailoring in summation are just as applicable to accusations during cross-examination because they "undermine[] all defendants [who choose to testify,] equally[.]" Id. It does not logically follow that because a defendant is able to respond to an accusation of tailoring during cross-examination, that the accusation is warranted or will enable the jury to better assess the defendant's credibility.

In that regard, the Daniels court also discussed whether it was permissible for a prosecutor's cross-examination to refer to a defendant's presence at trial, stating that, "[a]lthough not raised by defendant at trial or before this [c]ourt, we recognize that both trial courts and litigants may have questions as to whether, and to what extent, our opinion concerning prosecutorial summation applies to cross-examination

by the State." Daniels, 861 A.2d at 820. Thus, that court declared that, "[f]or future guidance, the same analysis that we have provided for summations applies also to cross-examination. The foundational principle in that framework is that a prosecutor must have reasonable grounds for posing questions during cross-examination that impugn a witness's credibility." Id. (internal quotation marks and citation omitted) (emphasis added).

Daniels reiterated that "if there is evidence in the record that a defendant tailored his testimony, the prosecutor may cross-examine the defendant based on that evidence. However, at no time during cross-examination may the prosecutor reference the defendant's attendance at trial or his ability to hear the testimony of preceding witnesses." Id. Thus, Daniels rejected the notion raised in Justice Ginsburg's dissent that the jury is aided by allowing reference to a defendant's presence at trial during cross-examination.

B.

In the instant case, on cross-examination the prosecution commented on Petitioner's ability to listen to the testimony of the witnesses. The prosecutor asked Petitioner whether his memory of the events was better at trial than when he gave his statement to the police because he had been able to sit through trial and see the evidence against him, implying that Petitioner was tailoring his testimony.[6] These questions by the

[6] In his opening brief, Petitioner argued that the prosecutor's statements on both cross-examination and summation infringed upon his right to confront witnesses and testify under the Hawaiʻi Constitution. But in his Application, Petitioner did not raise this argument with respect to cross-examination. To limit discussion of tailoring comments to the prosecutor's (continued...)

prosecutor are an example of a specific tailoring comment inasmuch as they were made in the context of Petitioner having given a different account of the events at trial than the one he gave to police after being arrested. As stated previously, the approach of Justice Ginsburg adopted by the majority allows prosecutors on cross-examination or "at any stage of the trial to accuse a defendant of tailoring specific elements of his testimony[.]" Portuondo, 529 U.S. at 78 (Ginsburg, J., dissenting, joined by Souter, J.). Although the majority

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[6](...continued)
summation only, however, would defeat the purpose of prohibiting tailoring comments. The effect of such a prohibition on summation would be rendered meaningless if tailoring questions or comments were condoned during other stages of the trial. As the New Jersey Supreme Court observed in Daniels, although the matter of cross-examination was not before it, it was necessary that that court set forth a rule entirely prohibiting tailoring comments during cross-examination pursuant to its supervisory powers over lower courts in order to adequately protect the right of confrontation. Daniels, 861 A.2d at 819.

Similarly, this court could recognize plain error with respect to cross-examination. See, e.g., State v. McGriff, 76 Hawaiʻi 148, 155, 871 P.2d 782, 789 (1994) (citing Hawaiʻi Rules of Appellate Procedure 28(b)(4)) (explaining that, although this court was "not obligated to consider the 'points of error' purportedly raised on appeal[,]" it would examine the admission of evidence at trial under the plain error standard); State v. Grindles, 70 Haw. 528, 530, 777 P.2d 1187, 1189 (1989) (stating that this court has "'the power to sua sponte notice plain errors or defects affecting substantial rights'" and addressing a due process claim that "Appellant did not raise on appeal") (quoting State v. Hernandez, 61 Haw. 475, 482, 605 P.2d 75, 79 (1980)). Or this court could invoke its supervisory power to cover the various permutations of tailoring comments, as the New Jersey Supreme Court did in Daniels. See, e.g., State v. Wilson, 92 Hawaiʻi 45, 54-55, 987 P.2d 268, 277-78 (1999) (recognizing that courts have "'inherent supervisory power to curb abuses and promote a fair process which extends to the preclusion of evidence'" and holding that "the illegally obtained evidence 'must be suppressed under the authority of this court's supervisory powers in the administration of criminal justice in the courts of our state.'" (quoting State v. Pattioay, 78 Hawaiʻi 455, 468 n.28, 469, 896 P.2d 911, 924 n.28, 925 (1995))); State v. Ito, 85 Hawaiʻi 44, 48, 936 P.2d 1292, 1296 (1997) ("The supreme court shall have the general superintendence of all courts of inferior jurisdiction to prevent and correct errors and abuses therein where no other remedy is expressly provided by law.") (Quoting HRS § 602-4 (1993).); see also State v. Moniz, 69 Haw. 370, 373-74, 742 P.2d 373, 376 (1987) (invoking supervisory power over lower courts because existence of potential danger to public and conflict in interpretations of statute by lower courts constituted compelling circumstances); State v. Estrada, 69 Haw. 204, 228, 738 P.2d 812, 828 (1987) (exercising supervisory powers to declare judge's usual practice of personally entering the jury room to answer the jurors' questions improper and prejudicial).

correctly characterizes the prosecution's tailoring arguments as specific, as opposed to generic, the distinction has little practical value inasmuch as the approaches of both the majority and dissent in Portuondo afford no meaningful protection of a criminal defendant's constitutional right to confrontation.

In that regard, the prosecution was free to refer to the specific inconsistencies in Petitioner's testimony without referring to his presence at trial. The only explanation offered by the Portuondo dissent and, thus, the majority in this case for allowing specific tailoring arguments, is that a jury may find it useful to observe a defendant's demeanor when he or she is accused of tailoring because he or she "might display signals of untrustworthiness." Id. at 79. As Daniels recognized, even in cases where there are no inconsistencies, the "close or perfect symmetry between a defendant's testimony and other witnesses' testimony, or other evidence of tailoring, may prompt the jury's scrutiny." 861 A.2d at 820. Because prosecutors may already cite to specific facts indicating a defendant's lack of trustworthiness and a defendant whose testimony perfectly matches that of other witnesses may be regarded with suspicion by the jury, there is no reasonable justification for placing a tailoring burden on a defendant.

Moreover, the notion that generic accusations serve a "truth-seeking function" is unconvincing. By their nature, "generic" accusations apply to all defendants and do nothing to illumine the specific facts of a case, regardless of the stage of trial at which they are presented, be it at cross-examination or

in closing argument. The adoption of such an approach by the majority in this case will only encourage generic accusations inasmuch as there is no prohibition against doing so on cross-examination or at other stages of the trial. As discussed supra, adopting the position of the Portuondo dissent does not afford adequate protection under the confrontation clause inasmuch as the majority's rule in allowing tailoring comments in other parts of the trial affords no realistic protection of confrontation rights.

IX.

A.

In Daniels, the trial court gave the jury a standard instruction that "[a]ny arguments, statements, remarks in the opening or summations of counsel are not evidence and must not be treated by you as evidence." 861 A.2d at 821. Daniels concluded that this instruction did not suffice to cure the harm of the prosecutor's comments because the instruction "made no mention of the prosecutor's accusations of tailoring." Id.

To reiterate, Justice Stevens noted in his concurring opinion in Portuondo that, "[t]he Court's final conclusion . . . does not, of course, deprive States or trial judges of the power [] to . . . provide juries with instructions that explain the necessity, and the justifications, for the defendant's attendance at trial." Portuondo, 529 U.S. at 76 (Stevens, J., concurring, joined by Breyer, J.); see also Teoume-Lessane v. United States, 931 A.2d 478, 495 n.14 (D.C. 2007) (noting that "[u]pon request, a trial judge may instruct the jury that a defendant has a

constitutional right to be present throughout his/her trial"); State v. Alexander, 755 A.2d 868, 874 n.10 (Conn. 2000) (noting that "[i]t may be necessary in particular circumstances for a trial court to remind a jury of a defendant's constitutional right to be present at trial"); State v. Rose, 622 A.2d 78, 79 (Me. 1993) (disapproving of the prosecutor's remarks, but declining to reverse where the defendant failed to move for a new trial and "the court instructed the jury that [the defendant] had 'an absolute legal right afforded all defendants by law to be present through the entire trial and to review any reports that the State may have generated'") (ellipses omitted); State v. Buscham, 823 A.2d 71, 83 (N.J. Super. A.D. 2003) (noting that "the trial court might have been advised, in light of the [prosecutor's] comment, to instruct the jury as to a defendant's right to be present during the entire course of the trial," but declining to recognize plain error where there was no objection to the comments); Hemingway, 528 A.2d at 747 (holding that general instruction as to assessing credibility of witnesses was insufficient to cure taint from prosecutor's comments); cf. Maez v. State, 530 N.E.2d 1203, 1208 (Ind. Ct. App. 1988) (concluding, as to whether court's instruction on the defendant's right not to testify was appropriate, that "[h]ere, Maez was not present at trial[, and t]hat fact was obvious to those who were present[, therefore, u]nder these circumstances, we agree with the State's contention that the jury had to have some guidance in the matter") (emphasis added).

B.

This court should also require that the jury be instructed as to a defendant's right to be present throughout the trial. Although in the instant case the court instructed the jury that statements made by the prosecutor "were not to be considered evidence and that the jury was not bound by counsel's recollections or interpretations[,]" this instruction failed to address the tailoring statements and to notify the jury that Petitioner had both a right and legal duty to be present at trial.

Such an instruction is warranted where a defendant opts to exercise his right to testify because, as recognized by the Portuondo majority, "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 preceded him." Portuondo, 529 U.S. at 67-68 (emphasis omitted). Such an inference is improper, inasmuch as the defendant has a right to testify. Cf. State v. Mainaaupo, 117 Hawaiʻi 235, 254, 178 P.3d 1, 20 (2008) (holding that the prosecutor's argument in favor of an "unreasonable inference that [the defendant] was guilty in light of his post-arrest silence" "were not legitimate because[] [it] contraven[ed the defendant's] fundamental right to remain silent") (quotation marks omitted) (emphasis added); State v. Horne, 869 A.2d 955, 961 (N.J. Super. A.D. 2005) (holding that "a jury may not[] infer guilt based on a defendant not testifying at trial") (emphasis added).

Thus, when the defendant testifies at trial, in conjunction with the general instruction as to the jury's ability to adjudge the witnesses' credibility, a defendant is entitled to an instruction indicating that a defendant has a constitutional right to be present throughout trial and while other witnesses are testifying, and that the jury must not draw any unfavorable inference regarding the credibility of the defendant simply on the basis of the defendant's presence at trial.

X.

While not determinative of the constitutional right to confront and testify, Petitioner had not only a constitutional right to be at trial, but a legal duty to be present. Hawaiʻi Rules of Penal Procedure (HRPP) Rule 43 (2008) provides in relevant part:

> (a) Presence Required. <u>The defendant shall be present at the arraignment, at the time of the plea, at evidentiary pretrial hearings, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by this rule</u>.
>
> (b) Continued Presence Not Required. The further progress of a pretrial evidentiary hearing or of the trial to and including the return of the verdict shall not be prevented and the defendant shall be considered to have waived the right to be present whenever a defendant, initially present,
>
> (1) <u>is voluntarily absent</u> after the hearing or trial has commenced (whether or not the defendant has been informed by the court of the obligation to remain during the trial); or
>
> (2) engages in conduct which is such as to justify exclusion from the courtroom.
>
> . . . .
>
> (d) Presence May be Waived. In prosecutions <u>for offenses other than a felony</u>, the court may:
>
> (1) conduct arraignment, accept a plea of not guilty, or conduct an evidentiary pretrial hearing in the defendant's absence, provided the defendant consents in writing or the defendant's counsel orally represents that the defendant consents.

(Emphases added.) Manifestly, HRPP Rule 43 requires persons charged with a felony to be present at all stages of the trial.

Petitioner was charged with a class C felony. Thus, Petitioner was required by law to be present during trial.

This requirement compounds the burden that the majority's ruling in the instant case places on the right of confrontation. By court rule defendants must be present at trial. Yet mandated presence becomes a detriment to a defendant because the prosecution is free to impugn his credibility should he choose to testify on his own behalf.

XI.

A.

In examining whether the prosecutor's comments were so prejudicial as to warrant vacating Petitioner's conviction, this court considers the nature of the conduct, the promptness of a curative instruction, and the weight of the evidence against Petitioner. See Maluia, 107 Hawaiʻi at 24, 108 P.3d at 978. In this case, all three of those factors weigh in favor of vacation.

First, the prosecutor's conduct was particularly concerning. Although this court has allowed the prosecution wide latitude in closing remarks, this leeway pertains only to comments upon the evidence and not to direct attacks on a defendant's constitutional rights. In Clark, this court stated that

> a prosecutor, during closing argument, is permitted to draw reasonable inferences from the evidence and wide latitude is allowed in discussing the evidence. It is also within the bounds of legitimate argument for prosecutors to state, discuss, and comment on the evidence as well as to draw all reasonable inferences from the evidence.

83 Hawaiʻi at 304-05, 926 P.2d at 209-10. Under Hawaiʻi law, the prosecution, then, is permitted to discuss the evidence and

inferences from the evidence. As noted before, however, a prosecutor's comments may not infringe on a defendant's constitutional rights. See Wakisaka, 102 Hawaiʻi at 515, 78 P.3d at 328.

In Wakisaka, this court held that, "[a]s a rule, the prosecution cannot comment on the defendant's failure to testify because this infringes on the defendant's right not to be a witness against her- or himself." Id. (citing Haw. Const. art. I, § 10). With regard to the prosecutor's comments during the rebuttal argument in that case, this court stated that

> [the defendant] did not testify in his own defense. During rebuttal argument, the prosecution stated: "Who was alone with her? He was alone with her. He was there. He would know. If he doesn't tell us, we can only look to Shirlene and see what her body tells us." [The defendant's] counsel did not object to these statements, and the court did not sua sponte give a curative instruction.

Id. at 513, 78 P.3d at 326 (emphasis added). It was concluded that the prosecution's comments in that case were improper because they intentionally led the jury to draw the inferences that the defendant had something to hide simply from the defendant's exercise of his right against self incrimination.

> By reminding the jury that [the defendant] did not testify, and by implying that [the defendant] had information he was withholding from the jury, the prosecution manifestly intended the jury to note that [the defendant] did not testify; furthermore, given the language used, the jury would naturally and necessarily interpret the prosecution's rebuttal argument as a comment on [the defendant]'s failure to testify.

Id. at 516, 78 P.3d at 329 (emphasis added). Consequently, if a prosecutor's comments infringe on a defendant's constitutional rights, those comments may amount to prosecutorial misconduct. In Wakisaka, the comments were not harmless beyond a reasonable doubt, because, (1) "no curative instruction was given" and

(2) "the evidence was not so overwhelming that we are convinced the prosecution's intrusion on [the defendant's] rights under article I, section 10 of the Hawaiʻi Constitution may not have contributed to [the defendant's] conviction." Id. Thus, this court concluded that the defendant was "entitled to a new trial as a result of the prosecutorial misconduct[.]" Id.

Second, applying Maluia, no curative instruction was given. Indeed the error was compounded because the court overruled Petitioner's objections to this line of questioning during cross-examination, as well as to the prosecutor's comments made in the closing argument, leaving the jury with the incorrect impression that Petitioner's presence at trial may be sufficient to discredit his testimony.

As to the weight of the evidence, this case turns on credibility, as the testimony of the three primary witnesses was in conflict. Petitioner was the only witness for the defense. The prosecutor's comments on tailoring were particularly harmful to Petitioner, especially in light of the fact that the credibility of the adverse witnesses rested on accounts of the events that conflicted with their own prior statements and that of others. For example, Val testified that she saw Joey loading his gun, but Joey testified that he did not load his gun. Nor did Joey disclose his threats to use a gun in his initial discussion with the police, and also changed his story in regard to whether Petitioner had asked him to leave prior to threatening him with a knife. Val changed her account of the incident, first indicating that Petitioner did swing the knife at Joey, but later

testifying that Petitioner did not swing the knife at Joey. Val also testified that, when she prepared her written statement, she only included those facts that Joey had mentioned and that her statement was based on Joey's statement. These inconsistencies highlight the important role that credibility played in the jury's determination of guilt.

In such a case, especially where Petitioner was the only defense witness, the prosecution's statements infected the entirety of Petitioner's testimony, therefore, there is a reasonable possibility, absent the improper comments, the jury would have believed Petitioner's version of the facts, and thus, the result might have been different. As in Wakisaka, "the evidence was not so overwhelming [that] . . . the prosecution's intrusion on [Petitioner's] rights under article I, section[s 5, 10 and 14] of the Hawaiʻi Constitution may not have contributed to [Petitioner's] conviction." 102 Hawaiʻi at 516, 78 P.3d 317, 329.

B.

However, the prosecutor's statements in this case were not "so egregious" as to bar re-prosecution under the double jeopardy clause, see Maluia, 107 Hawaiʻi at 26, 108 P.3d at 980, especially in light of the fact that there was little precedent available to guide the prosecution on this issue. Thus, retrial would be the appropriate remedy. See id.

XII.

As the Supreme Court of New Jersey stated, "[t]hose who face criminal prosecution possess fundamental rights that are

'essential to a fair trial.'" Daniels, 861 A.2d at 819 (quoting Pointer v. Texas, 380 U.S. 400, 403 (1965)). Daniels rightly concluded, as noted before, that "[p]rosecutorial comment suggesting that a defendant tailored his testimony inverts those rights, permitting the prosecutor to punish the defendant for exercising that which the Constitution guarantees." Id. By limiting arguments to "evidence in the record and the reasonable inferences drawn therefrom[,]" id., the Daniels approach prevents burdening the credibility of a defendant simply because he chose to testify.

Under Maluia, Petitioner's conviction should be vacated and the case remanded for a new trial in which tailoring comments must be prohibited entirely, with an instruction to be given to the jury that Petitioner has both the constitutional right and statutory obligation to be present at trial. This court should reject an interpretation of a defendant's right to confrontation and to testify under the Hawaiʻi Constitution that permits accusations of tailoring and presents the defendant with a Hobson's choice of exercising his right to be present at trial and to testify, or sequestering himself in order to prevent the taint of that accusation. Allowing the prosecution to comment upon the defendant's presence as an opportunity to tailor his or her testimony carries significant and even decisive weight in cases where the credibility of the witnesses is an important issue and, thus, precludes a fair trial.