No. 24-

In the Supreme Court of the United States

DAVID ASA VILLARREAL,

Petitioner,

v.

TEXAS,

Respondent.

On Petition for a Writ of Certiorari to the Court of Criminal Appeals of Texas

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a trial court abridges the defendant's Sixth Amendment right to counsel by prohibiting the defendant and his counsel from discussing the defendant's testimony during an overnight recess.

RELATED PROCEEDINGS

Court of Criminal Appeals of Texas: *Villarreal v. State*, No. PD-0048-20 (Oct. 9, 2024)

Court of Appeals of Texas: *Villarreal v. State*, No. 04-18-00484-CR (Dec. 27, 2019)

Texas District Court, 186th Judicial District, Bexar County: *Villarreal v. State*, No. 2016-CR-0549 (June 25, 2018)

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PETITION FOR A WRIT OF CERTIORARI

David Asa Villarreal respectfully petitions for a writ of certiorari to review the judgment of the Court of Criminal Appeals of Texas.

OPINIONS BELOW

The opinion of the Court of Criminal Appeals of Texas will be published at --- S.W.3d --- (Tex. Crim. App. 2024) and is currently available at 2024 WL 4446740). The opinion of the Court of Appeals of Texas is published at 596 S.W.3d 338 (Tex. App. 2019).

JURISDICTION

The Court of Criminal Appeals entered its judgment on October 9, 2024. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment provides, in relevant part: "In all criminal prosecutions, the accused shall enjoy the right … to have the assistance of counsel for his defence."

STATEMENT

In *Geders v. United States*, 425 U.S. 80 (1976), the Court unanimously held that a trial court abridges the defendant's Sixth Amendment right to counsel by barring the defendant from conferring with his counsel during an overnight recess that takes place in the middle of the defendant's testimony. The question in this case is whether the outcome is any different where the trial court's order bars the defendant from conferring with counsel about defend-

ant's testimony but allows the defendant to confer with counsel about other matters. This question has given rise to a deep lower court conflict. It has been 36 years since the Court last addressed the Sixth Amendment implications of such orders barring attorney-client consultation during a trial. *See Perry v. Leeke*, 488 U.S. 272 (1989). The Court should grant certiorari and reverse.

1. David Villarreal was on trial for murder. He was the only defense witness at the guilt phase. His direct testimony began shortly before noon. App. 5a. After about an hour, in the middle of Villarreal's testimony, the trial court declared a recess and dismissed the jury for the day, because the court had a previously scheduled administrative commitment. *Id.*

The court instructed Villarreal and his attorneys that during the ensuing 24-hour recess, they should pretend that Villarreal was still on the witness stand and should not discuss any topics that would be off-limits in that context, particularly Villarreal's testimony:

> THE COURT: Mr. Villarreal, we're in an unusual situation. **You are right in the middle of testimony. Normally your lawyer couldn't come up and confer with you about your testimony in the middle of the trial and in the middle of having the jury hear your testimony. And so I'd like to tell you that you can't confer with your attorney but the same time you have a [Sixth] Amendment right to talk to your attorney.**

So I'm really going to put the burden on [Defense Counsel #1] to tell you the truth. [Defense Counsel #1] and [Defense Counsel #2], too, as well. **I'm going to ask that both of you pretend that Mr. Villarreal is on the stand. You couldn't confer with him during that time.**

Now, Mr. Villarreal, if -- puts us in an odd situation. **But I believe if you need to talk to your attorneys, I'm not telling you, you can't talk to them. But I'm going to rely on both [Defense Counsel #1] and [Defense Counsel #2] to use your best judgment in talking to the defendant because you can't -- you couldn't confer with him while he was on the stand about his testimony.** So I'm going to leave it to both of your good judgment of how you manage that, if for some reason he believes that he needs to confer.

[DEFENSE COUNSEL #1]: All right. So just so I am clear and don't violate any court orders, that – because he is still on direct and still testifying, that it is your ruling that we cannot confer with our client?

THE COURT: Let me help you with that. **For instance, suppose we go into a sentencing hearing and you need to start talking to him about possible sentencing issues, you can do that. Does that make sense? I don't want you discussing what you couldn't discuss with him if he was on the stand in front of the Jury.**

[DEFENSE COUNSEL #1]: Okay.

THE COURT: **His testimony. I'm not sure whatever else you'd like to talk with him about while he's on the stand. But ask yourselves before you talk to him about something, is this something that -- manage his testimony in front of the jury?** Does that make sense to you?

[DEFENSE COUNSEL #1]: Sure, it does.

[DEFENSE COUNSEL #2]: We aren't going to talk to him about the facts that he testified about.

THE COURT: All right. Fair enough. But at the same time **-- I'm going to put the burden on the lawyers, not on him, because he has a constitutional right to confer with you. At the same time, all lawyers are under -- they're under different rules than the defendants are.**

[DEFENSE COUNSEL #1]: Certainly.

THE COURT: And not that I'm saying this about Mr. Villarreal, but, you know, if - - for instance, his attorney-client privilege is safe, but if any defendant or potential client or something like that, comes to a lawyer and talks about committing a future crime, there's no privilege –

[DEFENSE COUNSEL #1]: Sure.

THE COURT: -- for that. And so I'm just using that as an analogy.

[DEFENSE COUNSEL #1]: Sure.

THE COURT: **And you're going to have to decide, if he asks you any questions and such, is this something that is going to be**

> **considered to be conferring with him on the witness stand while the jury is there or not**.
>
> [DEFENSE COUNSEL #1]: Okay. All right. I understand the Court's judgment and just -- just for in the future, I'm just going to make an objection under the Sixth Amendment that the Court's order infringes on our right to confer with our client without his defense.
>
> THE COURT: Objection noted. All right. Folks, then we will see you-all again tomorrow.

Id. at 6a-8a (boldface and brackets supplied by the Court of Criminal Appeals).

Villarreal resumed his testimony approximately 24 hours later. *Id.* at 8a. He was convicted of murder and sentenced to a 60-year prison term. *Id.* at 41a.

2. A divided Court of Appeals of Texas affirmed. *Id.* at 41a-69a.

a. The Court of Appeals began by observing that this Court has decided two cases involving the constitutionality of limitations on a defendant's ability to confer with counsel during a recess. *Id.* at 46a-48a. *Geders v. United States*, 425 U.S. 80 (1976), held that a trial court violates the Sixth Amendment by prohibiting the defendant from speaking with his counsel during an *overnight* recess between the defendant's direct and cross-examination. *Id.* at 46a-47a. But *Perry v. Leeke*, 488 U.S. 272 (1989), held that a trial court does not violate the Sixth Amendment by prohibiting the defendant from consulting his counsel during a *fifteen-minute* recess between his direct and cross-examination. *Id.* at 47a.

The Court of Appeals noted that in Villarreal's case, "the trial court tried to thread the needle" between *Geder* and *Perry* by allowing Villarreal to speak with his counsel during the overnight recess, but not about any matters that they would not be allowed to discuss while Villarreal was still on the stand. *Id.* at 48a. The Court of Appeals observed that "[i]n the years since the *Perry* decision, the Supreme Court has not squarely addressed the precise question here—*i.e.*, whether the trial court abuses its discretion by permitting the defendant to consult his counsel during an overnight recess about any topic except his ongoing testimony." *Id.*

Without any guidance on the question from this Court, the Court of Appeals explained, "courts in other states and the federal circuit courts of appeals have addressed it and reached opposing conclusions." *Id.*

On one side of the conflict, "[s]everal state supreme courts have held that while the trial court may not prohibit all communications between a testifying defendant and his attorney during an overnight recess, it may prohibit communications specifically about the defendant's ongoing testimony." *Id.* at 49a (citing *Beckham v. Commonwealth*, 248 S.W.3d 547 (Ky. 2008); *State v. Conway*, 842 N.E.2d 996 (Ohio 2006); and *Webb v. State*, 663 A.2d 452 (Del. 1995)).

On the other side, "several federal circuit courts of appeals have held any restriction on communication with counsel during an overnight recess is impermissible." App. 49a (citing *United States v. Triumph Capital Grp., Inc.*, 487 F.3d 124 (2d Cir. 2007); *United States v. Sandoval-Mendoza*, 472 F.3d 645 (9th

Cir. 2006); *United States v. Santos*, 201 F.3d 953 (7th Cir. 2000); and *United States v. Cobb*, 905 F.2d 784 (4th Cir. 1990)).

The Court of Appeals sided with the former group of decisions. "Although *Geders* instructs that the trial court had no discretion to prohibit Villarreal and his attorneys from discussing 'anything,'" the Court of Appeals reasoned, "it did not do so. Rather, the trial court expressly recognized Villarreal's constitutional right to confer with his counsel and put the onus on counsel to ensure any discussions avoided the topic of Villarreal's testimony." App. 49a-50a.

b. Justice Martinez dissented. *Id.* at 50a-69a.

Like the Court of Appeals majority, Justice Martinez recognized that the issue is "governed by two seminal Supreme Court cases," *Geders* and *Perry*. *Id.* at 52a. In *Perry*, she explained, this Court held that "an overnight recess is an 'interruption ... of a different character' and, thus, a defendant has a constitutionally protected right to discuss a 'variety of trial-related matters' during an overnight recess that 'will *inevitably* include some consideration of the defendant's ongoing testimony.'" *Id.* at 56a-57a (quoting *Perry*, 488 U.S. at 281, 284). She concluded that "[c]onsultation between a defense attorney and his client cannot be neatly divided into discussions about testimony and those about other matters." App. 57a (internal quotation marks omitted).

Justice Martinez pointed out that Villarreal's case was a good example of the impossibility of partitioning a lawyer's advice to the defendant into two categories, one involving testimony and the other encompassing everything else. "Here," she noted,

> the overnight recess occurred after the State had rested and during Villarreal's direct-examination while Villarreal was testifying to the alleged altercation that precipitated the stabbing of the victim. Discussions between Villarreal and his counsel, as *Perry* recognized, would thus inevitably include some consideration of Villarreal's testimony, particularly since the entirety of the defense's case-in-chief rested solely on Villarreal's testimony of self-defense. This is supported by the fact that on the day following the overnight recess, Villarreal's testimony on direct concerned the defensive wounds Villarreal had allegedly received from the altercation that led to the stabbing of the victim. Thus, the trial court's order prevented Villarreal from conferring with counsel about defensive matters that were inextricably intertwined with his previous testimony on direct. Because Villarreal's entire defensive theory hinged on his testimony, Villarreal may have needed advice on demeanor or speaking style, a task made more difficult if specific testimony could not be mentioned.

Id. at 57a-58a (citations and internal quotation marks omitted).

Justice Martinez therefore concluded that "the trial court's order prohibiting Villarreal from conferring with his attorney during an overnight recess deprived him of his Sixth Amendment right to assistance of counsel." *Id.* at 61a.

3. A divided Court of Criminal Appeals of Texas affirmed. *Id.* at 2a-40a.

a. The Court of Criminal Appeals, like the Court of Appeals, framed the issue as governed by the "two guideposts" erected by this Court, *Geders* and *Perry*. *Id.* at 2a-3a. According to *Perry*, "[a] no-conferral order during a 15-minute recess does not violate the Sixth Amendment right to counsel." *Id.* at 3a. But according to *Geders*, "a no-conferral order during an overnight recess violates this constitutional right." *Id.*

"This case provides a twist," the court continued, "with the trial judge issuing a limited no-conferral order during an overnight recess. The order restricted Appellant's ability to confer with counsel regarding his ongoing testimony, while allowing discussion on all other aspects of the criminal proceeding." *Id.*

Like the Court of Appeals, the Court of Criminal Appeals recognized the conflict among the lower courts on this question. The court observed that "[o]ur sister state supreme courts have generally agreed that such a situation does not violate the right to counsel." *Id.* at 3a & n.1 (citing *Beckham v. Commonwealth*, 248 S.W.3d 547 (Ky. 2008); *State v. Conway*, 842 N.E.2d 996 (Ohio 2006); and *Bailey v. State*, 422 A.2d 956 (Del. 1980), but noting that two state high courts have reached the opposite holding—*People v. Joseph*, 646 N.E.2d 807 (N.Y. 1994), and *Petty v. United States*, 317 A.3d 351 (D.C. Ct App. 2024)). The court acknowledged that "federal circuits have reached the opposite conclusion"—that is, they found a Sixth Amendment violation in these circumstances. App. 3a-4a & n.2 (citing *United States v. Sandoval-Mendoza*, 472 F.3d 645 (9th Cir. 2006); *United States v. Santos,* 201 F.3d 953 (7th Cir. 2000); *United States v. Cobb*, 905 F.2d 784 (4th

Cir. 1990); and *Mudd v. United States*, 798 F.2d 1509 (D.C. Cir. 1986)).

The Court of Criminal Appeals concluded: "We side with our sister states and hold that Appellant's Sixth Amendment right to counsel was not violated under these facts." App. 4a.

The court conceded that "[a]t first glance, the length of the recess appears to be the determining variable between *Geders* and *Perry*." *Id.* at 11a. "However," the court continued, "the type of communication being restricted is the true controlling factor." *Id.* The court determined that "'when a defendant becomes a witness, he has no constitutional right to consult with his lawyer while he is testifying.'" *Id.* (quoting *Perry*, 488 U.S. at 281). "But a court may not block 'matters that the defendant does have a constitutional right to discuss with his lawyer, such as the availability of other witnesses, trial tactics, or even the possibility of negotiating a plea bargain.'" App. 11a (quoting *Perry*, 488 U.S. at 284).

The Court of Criminal Appeals held that "the trial judge's order did not intrude upon constitutionally protected communications between Appellant and counsel during the overnight recess." App. 15a. The court concluded that "the language used by the judge complied with *Perry*," because the judge "cabined his admonishments to conferring about the ongoing testimony." *Id.* The trial court's order "allowed counsel to discuss whatever issues for the potential punishment phase that arose from Appellant's testimony until that point (and everything else that occurred so far at the trial)." *Id.* at 16a.

b. Judge Yeary concurred. *Id.* at 18a-21a. He accepted that the majority opinion had done "the best

it can with what the United States Supreme Court has given it to work with." *Id.* at 18a. "This does not mean it is an ideal choice," he continued. *Id.* at 19a. "The line between defense counsel conferring with his client about the content and direction of his ongoing testimony and conferring about the derivative effects of that ongoing testimony is a nebulous one at best," he worried. *Id.* (brackets and internal quotation marks omitted). He predicted that this line would prove unworkable in practice. "I do not envy the defense lawyer who risks being held in contempt while trying to navigate this murky distinction," he explained. *Id.* "How is the most ethically compliant lawyer supposed to determine how to communicate with his client about information made relevant by the day's testimony or the significance of the day's events or trial tactics or the advisability mid-trial of negotiating a plea bargain without some reference, however fleeting or indirect, to the substance or tenor of his client's as-yet-unfinished appearance on the witness stand?" *Id.* (brackets and internal quotation marks omitted).

Judge Yeary lamented that "the Supreme Court's guidance in this area is, in my view, no better than that offered by Justice Potter Stewart for identifying 'hard-core pornography': 'I know it when I see it.'" *Id.* at 20a (quoting *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring)). Judge Yeary invited this Court "to revisit this area of the law and draw a bright line rule." App. 20a. "For evidence of why," he suggested, "just look at the varied opinions cited in footnotes 1 and 2 of the Court's opinion," the decisions constituting the lower court conflict. *Id.* He concluded that "[t]his is no way to navigate a right

as important as the constitutional right to counsel." *Id.* at 21a.

c. Judge Keel concurred, joined by Judge McClure. *Id.* at 21a-26a.

Judge Keel concluded that under *Geders* and *Perry*, "during an overnight break, a defendant has a right to unrestricted access to his attorney, even if his testimony is ongoing; forbidding his attorneys from talking with him about anything overnight—even his testimony—violates the Sixth Amendment right to counsel." *Id.* at 21a. He reasoned that "[n]ormal consultation overnight includes discussions about various trial-related topics, including those made relevant by the defendant's testimony." *Id.* at 22a. He summarized the line drawn by *Geders* and *Perry* as "[s]hort recess—no right [to consult with counsel]. Overnight recess—unrestricted right." *Id.* at 23a.

Judge Keel nevertheless concurred in the judgment because he considered the error harmless. *Id.* at 25a.

d. Judge Walker dissented. *Id.* at 26a-40a.

Judge Walker agreed with Judge Keel that in navigating between *Geders* and *Perry*, "all that matters is the length of the recess." *Id.* at 32a. He explained that "[t]he significance of *Perry* is the fact that the recess was only a fifteen-minute break in the testimony, such that the only thing that would be discussed would be the ongoing testimony." *Id.* Under *Geders*, by contrast, "[w]here the recess is long enough, such that how the trial was going and trial strategy would be discussed in addition to the testimony, there can be no conferral ban." *Id.*

During an overnight recess, Judge Walker continued, any discussion of trial strategy between a defendant and counsel would "'inevitably include some consideration of the defendant's ongoing testimony.'" *Id.* (quoting *Geders*, 425 U.S. at 91). He concluded that "[t]he trial court's overnight prohibition was essentially the same as the unconstitutional order in *Geders*." App. 37a.

Judge Walker added that because *Geders* treated the deprivation of the right to counsel as a structural error requiring reversal, the same outcome was required in this case. *Id.* at 37a-39a.

REASONS FOR GRANTING THE WRIT

It has been a few decades since the Court decided *Geders* and *Perry*. In that time, the lower courts have divided over whether a trial court may bar the defendant from discussing his testimony with counsel during an overnight recess. As Judge Yeary suggested below, it is time for the Court to resolve the conflict. This case provides an ideal opportunity.

I. The lower courts are divided 9-4 over whether a trial court abridges the defendant's Sixth Amendment right to counsel by prohibiting the defendant and his counsel from discussing the defendant's testimony during an overnight recess.

The decision below deepens a preexisting conflict among the lower courts over whether the Sixth Amendment guarantees a defendant the right to confer with his attorney about matters relating to his testimony during an overnight recess. Both decisions

below recognized this conflict, *id.* at 3a-4a, 48a-49a, but they understated its magnitude. On one side of the split, six federal circuits and three state high courts hold that the Sixth Amendment does guarantee such a right. On the other side, four state high courts—now including the Texas Court of Criminal Appeals because of the decision below—hold that the Sixth Amendment does not guarantee this right.

These cases all involved the same fact pattern as our case. In each, the trial court declared an overnight recess in the middle of the defendant's testimony. In each, the trial court ordered the defendant and his counsel not to discuss matters relating to the defendant's testimony during the recess. In nine jurisdictions, the trial court's order was held to violate the Sixth Amendment, while in the other four it was held not to.

A. Nine lower courts hold that the Sixth Amendment guarantees a defendant the right to confer with his attorney about his testimony during an overnight recess.

This issue has been addressed by six of the federal courts of appeals. All six held that the Sixth Amendment bars a trial court from prohibiting the defendant and his counsel from discussing the defendant's testimony during an overnight recess. These six circuits are joined by three state high courts which have reached the same holding. These decisions are all based on the same rationale: Banning the discussion of testimony prevents counsel from offering advice on a wide range of important subjects, because the defendant's testimony is inti-

mately connected with virtually every aspect of the defense.

In *United States v. Triumph Capital Grp., Inc.*, 487 F.3d 124, 132 (2d Cir. 2007) (Calabresi, J.), the Second Circuit observed that "all of the federal circuit courts that have considered the issue have concluded that under *Perry* and *Geders* a district court may not order a defendant to refrain from discussing his ongoing testimony with counsel during an overnight recess, even if all other communication is allowed." The Second Circuit agreed with this consensus. *Id.* at 133. The court explained that "a defendant's constitutional right to consult with his attorney on a variety of trial-related issues during a long break, such as an overnight recess, is inextricably intertwined with the ability to discuss his ongoing testimony. Thus, a ban on discussing testimony during a substantial recess does materially impede communication of a constitutional quality." *Id.* (internal quotation marks omitted). On the facts of the case, however, the Second Circuit found that the trial court cured the Sixth Amendment violation by rescinding the ban on consultation shortly after imposing it, which allowed the defendant plenty of time during the overnight recess to confer with his attorney about his testimony. *Id.* at 135-36.

In *United States v. Cobb*, 905 F.2d 784, 791 (4th Cir. 1990), the Fourth Circuit held that "the trial court's order prohibiting [the defendant] from discussing his cross-examination testimony with his attorney during the weekend recess deprived him of his Sixth Amendment right to counsel." The Fourth Circuit explained that it would be impossible in practice to separate matters relating to testimony

from other matters. "To remove from Cobb the ability to discuss with his attorney any aspect of his ongoing testimony effectively eviscerated his ability to discuss and plan trial strategy," the court observed. *Id.* at 792. "To hold otherwise would defy reason. How can competent counsel not take into consideration the testimony of his client in deciding how to try the rest of the case?" *Id.*

In *United States v. Santos*, 201 F.3d 953, 965 (7th Cir. 2000) (Posner, J.), the Seventh Circuit described the trial court's order barring discussion of the defendant's testimony as a "serious error." The Seventh Circuit held that "while the judge may instruct the lawyer not to coach his client, he may not forbid all consideration of the defendant's ongoing testimony during a substantial recess, since that would as a practical matter preclude the assistance of counsel across a range of legitimate legal and tactical questions, such as warning the defendant not to mention excluded evidence." *Id.* (citation and internal quotation marks omitted).

In *United States v. Sandoval-Mendoza*, 472 F.3d 645 (9th Cir. 2006), the Ninth Circuit likewise held that an order barring the defendant from discussing his testimony during an overnight recess abridged the defendant's Sixth Amendment right to counsel. "We conclude that any overnight ban on communication falls on the *Geders* side of the line and violates the Sixth Amendment," the court explained. *Id.* at 651. "That seems the fairer reading of *Perry,* which only permitted prohibitions on communication between a defendant and his lawyer during a brief recess." *Id.* (footnote and internal quotation marks omitted).

The Ninth Circuit pointed out that "*Perry* recognized a defendant has a constitutional right to discuss matters other than his own testimony with his lawyer, such as the availability of other witnesses, trial tactics, or even the possibility of negotiating a plea bargain, during an overnight recess." *Id.* (footnote and internal quotation marks omitted). "And it conceded that such discussions will inevitably include some consideration of defendant's ongoing testimony." *Id.* (footnote and internal quotation marks omitted). "Indeed," the Ninth Circuit observed, "it is hard to see how a defendant's lawyer could ask him for the name of a witness who could corroborate his testimony or advise him to change his plea after disastrous testimony, subjects *Perry* expressly says a defendant has a right to discuss with his lawyer during an overnight recess, without discussing the testimony itself." *Id.*

In *United States v. Cavallo*, 790 F.3d 1202, 1212 (11th Cir. 2015), the trial court instructed the defendant that during the overnight recess he could not discuss his testimony with anyone, but that he could confer with his lawyer about his "constitutional rights." While the Eleventh Circuit was uncertain about what this order meant, *id.* at 1216, the court held that it was inconsistent with *Geders* if it meant that the defendant and his lawyer could not discuss the defendant's testimony, even if they could discuss a broad array of other subjects. *Id.* (citing *Perry*'s observation, 488 U.S. at 284, that "the 'fact that such discussions will inevitably include some consideration of the defendant's ongoing testimony does not compromise' a defendant's right to assistance of counsel during an overnight recess"). *See also United*

States v. Romano, 736 F.2d 1432, 1436-37 (11th Cir. 1984) (similarly finding a Sixth Amendment violation where the trial court barred the defendant from discussing his testimony with counsel during an overnight recess), *vacated on other grounds*, 755 F.2d 1401 (11th Cir. 1985).

In *Mudd v. United States*, 798 F.2d 1509, 1510 (D.C. Cir. 1986), the D.C. Circuit held that "an order that denies a criminal defendant the right to consult with counsel during a substantial trial recess, even though limited to a discussion of testimony, is inconsistent with the sixth amendment of the Constitution." The court observed:

> While the order in this case was indeed more limited than the one in *Geders,* the interference with sixth amendment rights was not significantly diminished. Even though Mudd was free to discuss strategy and tactics, there are obvious, legitimate reasons he may have needed to consult with counsel about his upcoming cross-examination. For example, Mudd's lawyer may have wanted to warn defendant about certain questions that would raise self-incrimination concerns, or questions that could lead Mudd to mention excluded evidence. More generally, defendant may have needed advice on demeanor or speaking style, a task made more difficult if specific testimony could not be mentioned. While many of the benefits of counsel outlined by *Geders* are not related to testimony *per se,* an order such as the one in this case can have a chilling effect on cautious attorneys, who might avoid giving advice on non-testimonial matters for fear of violating the court's directive. Con-

> sultation between lawyers and clients cannot be neatly divided into discussions about "testimony" and those about "other" matters.

Id. at 1512. *See also id.* at 1515 (Scalia, J., concurring in part and concurring in the judgment) ("I agree with the majority that the District Court's order prohibiting defendant from discussing his testimony with his attorney during a weekend recess was not significantly less invasive of sixth amendment rights than the order prohibiting all contact between a defendant and his attorney during an overnight recess in *Geders*.").

These six circuits are joined by the high courts of New Jersey, New York, and the District of Columbia, which have likewise held that a trial court may not bar a defendant and his counsel from discussing the defendant's testimony during an overnight recess.

In *State v. Fusco*, 461 A.2d 1169, 1174 (N.J. 1983), the New Jersey Supreme Court held that "an order prohibiting a defendant during an overnight recess from discussing his own testimony with his attorney is a violation of the defendant's right to the assistance of counsel as guaranteed by the federal and state constitutions." The court rejected the state's contention "that *Geders* is distinguishable from this case because the trial court's order here prohibited defendant from discussing only his testimony and did not, as in *Geders,* prevent him from discussing anything with his attorney. We are unconvinced by this argument and find the *Geders* analysis equally applicable to this case." *Id.* at 1173. As the court explained,

> A defendant's own testimony can be a critical part of his defense. It is defendant's opportuni-

> ty to tell his story in his own words. It is a chance for defendant to display his own demeanor and testimonial qualities to the finder of fact who will ultimately determine the credibility of his defense. To allow a defendant the opportunity to confer with counsel during an overnight recess about everything but his own testimony is to deny the defendant the right to discuss the very thing he wants most to discuss with counsel. Further, defendant's right to discuss his testimony with counsel is most crucial when defendant is in the midst of, or about to begin, testimony on cross-examination. A lay defendant, unfamiliar with the techniques of a skillful cross-examiner, may become confused under the pressure of the prosecutor's questions and be unable to testify fully and well.

Id. at 1173-74.

In *People v. Joseph*, 646 N.E.2d 807, 807 (N.Y. 1994), the New York Court of Appeals held that "the trial court denied defendant his right to counsel under both the Sixth Amendment of the Federal Constitution and article I, § 6 of the New York State Constitution by forbidding him from discussing his trial testimony with his attorney during a weekend recess." The court, quoting *Geders*, explained that during an overnight recess, "'[t]he lawyer may need to obtain from his client information made relevant by the day's testimony, or he may need to pursue inquiry along lines not fully explored earlier. At the very least, the overnight recess during trial gives the defendant a chance to discuss with counsel the significance of the day's events.'" *Id.* at 808 (quoting *Geders*, 425 U.S. at 88). *See also People v. Umali*,

888 N.E.2d 1046, 1050 (N.Y. 2008) ("It is well settled that a court cannot prohibit defense counsel from speaking to a defendant about his trial testimony during a recess unless the break is one of very short duration.").

The District of Columbia Court of Appeals reached the same holding in *Martin v. United States*, 991 A.2d 791 (D.C. Ct. App. 2010). The court explained that "the defendant does have a constitutionally protected right to discuss a 'variety of trial-related matters' during a substantial recess that 'will *inevitably* include some consideration of the defendant's ongoing testimony.'" *Id.* at 794 (quoting *Perry*, 488 U.S. at 284). *See also Petty v. United States*, 317 A.3d 351, 352 (D.C. Ct. App. 2024) (per curiam) (reversing where the trial court prohibited the defendant from conferring with his attorney about his testimony during an overnight recess).

These nine courts have all addressed the same fact pattern that is present in our case, in which a defendant is prohibited from discussing his testimony with his attorney during an overnight recess. Had our case arisen in any of these jurisdictions, Mr. Villarreal's conviction would have been reversed.

B. Four lower courts hold that the Sixth Amendment does not guarantee this right.

In the decision below, the Texas Court of Criminal Appeals joined the Delaware, Kentucky, and Ohio Supreme Courts on the other side of the split.

In *Bailey v. State*, 422 A.2d 956 (Del. 1980), the Delaware Supreme Court distinguished a blanket ban on a defendant's consultation with counsel from

a ban on discussion of the defendant's testimony. "In our view, a testimonial limitation does not constitute a per se Sixth Amendment infringement of a defendant's right of access to counsel," the court reasoned. *Id.* at 960. The court concluded that "the Trial Judge's testimonial limitation ruling was not erroneous under *Geders* because the *Geders* holding does not apply to the present facts." *Id.* at 961. *See also Webb v. State*, 663 A.2d 452, 459 (Del. 1995) ("the Superior Court's initial admonition to Webb that he was 'not to discuss [his] testimony with anyone' because he was '[s]till subject to [his] oath[ ] and the cross-examination will start tomorrow' would have been proper as within the trial court's discretion"); *id.* at 460 ("If it is unavoidable that an evening recess interrupt the defendant's cross-examination, trial judges should be especially vigilant in giving unmistakably clear and limited instructions that the defendant-witness may not discuss his or her testimony with counsel, but that instruction should not permit any inference that the defendant and counsel may not discuss other matters.").

In *Beckham v. Commonwealth*, 248 S.W.3d 547 (Ky. 2008), the Kentucky Supreme Court agreed that a trial court may prohibit the defendant from discussing his testimony with counsel during an overnight recess. "*Geders* involved a trial court's complete denial of a defendant's right to consult with his attorneys during an overnight recess," the court explained. *Id.* at 553. "By contrast, the case at hand involves a trial court's permitting the defendant to have contact with his attorneys during an overnight recess while limiting that contact by telling the attorneys to not discuss their client's ongoing testimo-

ny." *Id.* The Kentucky Supreme Court concluded that "[s]ince the trial judge's actions attempted to protect the integrity of the proceedings and did not impermissibly limit all attorney-client contact," the court's order did not abridge the Sixth Amendment right to counsel. *Id.* at 554.

The Ohio Supreme Court reached the same holding in *State v. Conway*, 842 N.E.2d 996 (Ohio 2006). The court reasoned that "*Geders* concerned a complete deprivation of access to counsel. This matter is not analogous to *Geders* because the trial court did not restrict Conway's access to his lawyers during the overnight recess." *Id.* at 1021. "Although Conway was prohibited from discussing his uncompleted testimony with counsel, the trial court did not order him not to meet or consult with counsel about other matters during the overnight recess." *Id.*

Below, the Texas Court of Criminal Appeals cited these decisions and concluded: "We side with our sister states and hold that Appellant's Sixth Amendment right to counsel was not violated." App. 4a.

Both courts below acknowledged the existence of this split. *Id.* at 3a-4a, 48a-49a. So did then-Judge Sotomayor, who noted for the Second Circuit that "[c]ourts have … disagreed with respect to whether an overnight restriction on communications that only bars discussion of a defendant's testimony will satisfy the demands of the Sixth Amendment under *Geders* and *Perry*." *Serrano v. Fischer*, 412 F.3d 292, 300 (2d Cir. 2005).

The lower courts are thus divided 9-4. A conflict of this magnitude will never be resolved without this Court's intervention.

II. The decision below is wrong.

Certiorari is also warranted because the court below erred in holding that the Sixth Amendment permits a trial court to prohibit the defendant from discussing his testimony with counsel during an overnight recess.

A. The decision below is contrary to this Court's precedents.

To begin with, the decision below is inconsistent with this Court's precedents. In *Geders*, the Court explained that the importance of consultation with counsel is at its peak during an overnight recess, when the defendant must confer with counsel about a wide range of matters, including the defendant's testimony. As the Court noted,

> [i]t is common practice during such recesses for an accused and counsel to discuss the events of the day's trial. Such recesses are often times of intensive work, with tactical decisions to be made and strategies to be reviewed. *The lawyer may need to obtain from his client information made relevant by the day's testimony*, or he may need to pursue inquiry along lines not fully explored earlier. At the very least, the overnight recess during trial gives the defendant a chance to discuss with counsel the significance of the day's events. Our cases recognize that the role of counsel is important precisely because ordinarily a defendant is ill-equipped to understand and deal with the trial process without a lawyer's guidance.

Geders, 425 U.S. at 88 (emphasis added).

The Court acknowledged that during an overnight recess, an unethical lawyer might try to "coach" the defendant—that is, he might try to tell the defendant what to say on the stand—but the Court explained that an order prohibiting discussion between the defendant and his counsel is hardly necessary to deter coaching.

> There are other ways to deal with the problem of possible improper influence on testimony or "coaching" of a witness short of putting a barrier between client and counsel for so long a period as 17 hours. The opposing counsel in the adversary system is not without weapons to cope with "coached" witnesses. A prosecutor may cross-examine a defendant as to the extent of any "coaching" during a recess, subject, of course, to the control of the court. Skillful cross-examination could develop a record which the prosecutor in closing argument might well exploit by raising questions as to the defendant's credibility, if it developed that defense counsel had in fact coached the witness as to how to respond on the remaining direct examination and on cross-examination.

Id. at 89-90.

The Court added that coaching can also be prevented simply by scheduling the defendant's testimony to begin early enough in the day that it can be completed before nightfall.

> [T]he trial judge, if he doubts that defense counsel will observe the ethical limits on guiding witnesses, may direct that the examination of the witness continue without interruption until completed. If the judge considers the risk

> high he may arrange the sequence of testimony so that direct- and cross-examination of a witness will be completed without interruption.

Id. at 90 (footnote omitted).

The Court accordingly concluded that the importance of the right to confer with counsel during an overnight recess outweighed the risk that an unethical attorney might try to coach the defendant.

> There are a variety of ways to further the purpose served by sequestration without placing a sustained barrier to communication between a defendant and his lawyer. To the extent that conflict remains between the defendant's right to consult with his attorney during a long overnight recess in the trial, and the prosecutor's desire to cross-examine the defendant without the intervention of counsel, with the risk of improper "coaching," the conflict must, under the Sixth Amendment, be resolved in favor of the right to the assistance and guidance of counsel

Id. at 91.

The Court reaffirmed these observations in *Perry*. Although the Court held that a trial court may prohibit consultation between the defendant and his attorney during a 15-minute recess in the middle of the day, *Perry*, 488 U.S. at 281-82, the Court was careful to distinguish a brief daytime recess from a much longer overnight recess. In an overnight recess, the Court explained, there are a wide range of "matters that the defendant does have a constitutional right to discuss with his lawyer, such as the availability of other witnesses, trial tactics, or even the possibility of negotiating a plea bargain." *Id.* at

284. The Court made clear that "[t]he fact that *such discussions will inevitably include some consideration of the defendant's ongoing testimony* does not compromise that basic right." *Id.* (emphasis added).

After explaining that the defendant has a right to discuss his ongoing testimony with counsel during an overnight recess, the Court noted that during a brief daytime recess "the judge may permit consultation between counsel and defendant during such a recess, but forbid discussion of ongoing testimony." *Id.* at 284 n.8. The Court could not have stated the distinction any more clearly. During a brief daytime recess, the trial court may instruct the defendant not to discuss his testimony with counsel, but during an overnight recess, the defendant must be allowed to discuss his testimony with counsel.

Below, the Court of Criminal Appeals misread *Geders* and *Perry*. The court quoted this Court's admonition in *Perry* that "'when a defendant becomes a witness, he has no constitutional right to consult with his lawyer while he is testifying.'" App. 11a (quoting *Perry*, 488 U.S. at 281). But the Court of Criminal Appeals overlooked the fact that this passage refers only to a short daytime recess such as the one in *Perry*, not to an overnight recess such as the one in *Geders* and in our case. And the Court of Criminal Appeals ignored the portions of *Geders* and *Perry* quoted above, in which the Court clarified that a defendant *does* have a constitutional right to consult with his lawyer during an overnight recess in the middle of his testimony.

B. The decision below is unworkable.

The rule adopted by the court below is also unworkable in practice. When a defendant confers with his attorney, the defendant's testimony permeates every aspect of counsel's advice. There is no way to separate discussions of testimony from discussions of trial strategy. Prohibiting counsel from discussing the defendant's testimony during an overnight recess is tantamount to preventing counsel from doing his or her job.

This was the view of Justice Marshall, who of course had considerable experience as a trial lawyer, including in criminal cases. Justice Marshall doubted "that it is possible to distinguish discussions regarding trial strategy from discussions regarding testimony." *Perry*, 488 U.S. at 295 n.8 (Marshall, J., dissenting). He gave an example in which

> counsel's direct examination of the defendant inadvertently elicits damaging information that can be effectively neutralized on redirect only if the defendant has the opportunity to explain his direct testimony to counsel. If a recess were called, the ensuing attorney-defendant discussion would seem to be as much about trial strategy as about upcoming testimony. Without a chance to speak with the defendant, counsel will be hampered in knowing whether redirect is even advisable.

Id.

There are many similar circumstances in which, during an overnight recess, counsel will have a legitimate reason to discuss the defendant's testimony. Counsel may need to caution the defendant not to

mention excluded evidence. *Santos*, 201 F.3d at 965. Counsel may need to explain to the defendant that his testimony has been so damaging that it would be wise to change his plea. *Sandoval-Mendoza*, 472 F.3d at 651. As Judge Calabresi observed for the Second Circuit, "a defendant's constitutional right to consult with his attorney on a variety of trial-related issues during a long break, such as an overnight recess, is inextricably intertwined with the ability to discuss his ongoing testimony." *Triumph Capital Grp.*, 487 F.3d at 133.

The rule adopted by the court below would also be extraordinarily difficult to administer. It requires trial courts (and appellate courts reviewing convictions) to make metaphysical distinctions between discussions about the defendant's testimony and discussions about general trial strategy. For example, if the defendant's testimony makes defense counsel realize that it will be important to call an additional witness, may defense counsel discuss this with the defendant? If the defendant's testimony causes defense counsel to reevaluate the desirability of a plea agreement, may defense counsel so advise the defendant? All sorts of questions like these will arise, questions that will depend on what exactly it means for the defendant and his attorney to discuss his testimony. The rule adopted by most of the lower courts is far easier to administer, because it does not require courts to make these fine distinctions.

The rule adopted by the court below also threatens the "sanctity of the attorney-client relationship," *Patterson v. Illinois*, 487 U.S. 285, 290 n.3 (1988). The only way the trial court could enforce it would be to interrogate the defendant and his counsel each

morning about what they discussed the previous evening, which would destroy the confidentiality of these discussions. The rule adopted by most of the lower courts, which does not require courts to poke their noses into these discussions, gives appropriate respect to the confidential relationship between a defendant and his counsel.

The only conceivable reason to forbid the defendant from discussing his testimony with counsel is to prevent coaching. As the Court explained in *Geders*, however, there are less intrusive ways to prevent coaching, including cross-examination by the prosecutor and intelligent scheduling by the trial court. Here, for example, the trial court began Mr. Villarreal's testimony at noon, despite knowing that he would call an overnight recess an hour later. A little foresight would have prevented the problem from arising in the first place. As the Court held in *Geders*, a worry about coaching is not a good enough reason to prevent a defendant from conferring with his counsel during an overnight recess.

III. This is an important issue, and this case is an excellent vehicle for resolving it.

This issue is important. The right to counsel is fundamental, especially in the middle of a criminal trial. *See Cuyler v. Sullivan*, 446 U.S. 335, 343 (1980). Overnight recesses "are often times of intensive work, with tactical decisions to be made and strategies to be reviewed. The lawyer may need to obtain from his client information made relevant by the day's testimony, or he may need to pursue inquiry along lines not fully explored earlier." *Geders*,

425 U.S. at 88. Yet trial courts in several states are barring defendants from discussing their testimony with their attorneys during overnight recesses, because they erroneously believe that this Court approved of such orders in *Perry*. It is long past time that the Court corrected this mistake.

This case is an ideal vehicle for resolving the conflict among the lower courts. The case is on direct appeal, so the Court's review is *de novo*, and there are no procedural hoops to jump through before reaching the question presented. There are no other issues left in the case. The Court's answer to the question presented will determine the outcome of the case. No future case could possibly be a better vehicle than this one.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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