APPENDIX

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APPENDIX A

Court of Criminal Appeals of Texas

David Asa VILLARREAL, Appellant
v.
The STATE of Texas

NO. PD-0048-20
DELIVERED: October 9, 2024

ON APPELLANT'S PETITION FOR DISCRETIONARY REVIEW FROM THE FOURTH COURT OF APPEALS BEXAR COUNTY

OPINION

Richardson, J., delivered the opinion of the Court in which Keller, P.J., and Hervey, Yeary, Newell, and Slaughter JJ., joined.

A jury convicted Appellant, David Asa Villarreal, of murder with a repeat offender enhancement and sentenced him to confinement for sixty years. Appellant argues the trial court erred by limiting his ability to confer with counsel during an overnight recess in violation of his Sixth Amendment right to counsel. Specifically, when a court adjourns for the day with the defendant still on the stand, does a trial judge's *sua sponte* order that defense counsel could confer with defendant on everything except his ongoing testimony violate the defendant's Sixth Amendment right to counsel? Not in this case. We therefore affirm the judgment of the Fourth Court of Appeals.

The United States Supreme Court placed two guideposts on whether a trial court's order preventing a defendant from conferring with counsel when

the defendant is still on the witness stand violates the Federal Constitution's Sixth Amendment right to counsel. A no-conferral order during a 15-minute recess does not violate the Sixth Amendment right to counsel. *Perry v. Leeke*, 488 U.S. 272, 284–85, 109 S.Ct. 594, 102 L.Ed.2d 624 (1989). But a no-conferral order during an overnight recess violates this constitutional right. *Geders v. United States*, 425 U.S. 80, 91, 96 S.Ct. 1330, 47 L.Ed.2d 592 (1976).

This case provides a twist 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.

This is a case of first impression at our Court. Our sister state supreme courts have generally agreed that such a situation does not violate the right to counsel.[1] Yet, federal circuits have reached the oppo-

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[1] *See Beckham v. Com.*, 248 S.W.3d. 547, 554 (Ky. 2008) ("All the trial judge did in the case at hand was attempt to minimize the risk that [defendant] would get 'coaching tips' before the resumption of his cross-examination. Since the trial judge's actions attempted to protect the integrity of the proceedings and did not impermissibly limit all attorney-client contact during the waning minutes of the overnight recess, we hold that the trial court's admonition to counsel did not abridge [defendant's] Sixth Amendment right to counsel."); *State v. Conway*, 108 Ohio St.3d 214, 842 N.E.2d 996, 1021 (2006) ("Although [defendant] 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"); *Bailey v. State*, 422 A.2d 956, 960 (Del. 1980) ("In our view, a testimonial limitation does not constitute a per se Sixth Amendment infringement of a defendant's right of access to counsel"); *People v. Stroner*, 104 Ill.App.3d 1, 59

site conclusion.[2] We side with our sister states and hold that Appellant's Sixth Amendment right to counsel was not violated under these facts.

Ill.Dec. 764, 432 N.E.2d 348, 351 (1982), *aff'd in part, rev'd in part on other grounds by* 96 Ill.2d 204, 70 Ill.Dec. 722, 449 N.E.2d 1326 (1983); *but see People v. Joseph*, 84 N.Y.2d 995, 622 N.Y.S.2d 505, 646 N.E.2d 807, 807 (1994) ("We hold that the trial court denied defendant his right to counsel under ... the Sixth Amendment of the Federal Constitution ... by forbidding him from discussing his trial testimony with his attorney during a weekend recess"); *but see also Petty v. United States*, 317 A.3d 351, 351-52 (D.C. 2024) (per curiam) (vacating conviction because of trial court's order barring discussion of defendant's testimony during an overnight recess).

[2] *See United States v. Sandoval-Mendoza*, 472 F.3d 645, 651 (9th Cir. 2006) ("Indeed 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. Thus, we conclude that trial courts ... may not restrict communications during an overnight recess."); *United States v. Santos,* 201 F.3d 953, 965 (7th Cir. 2000) ("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"); *United States v. Cobb*, 905 F.2d 784, 792 (4th Cir. 1990) ("To remove from [defendant] the ability to discuss with his attorney any aspect of his ongoing testimony effectively eviscerated his ability to discuss and plan trial strategy. 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?"); *Mudd v. United States*, 798 F.2d 1509, 1512 (D.C. Cir. 1986) ("Consultation between lawyers and clients cannot be neatly divided into discussions about 'testimony' and those about 'other' matters. In short,

Background

The day before Appellant began his direct testimony, the trial judge warned the parties that there would be a hard stop at 1:00pm the following day due to the judge's prior administrative commitments.[3] Appellant began his direct testimony just before noon.[4] About an hour later, while direct testimony was still ongoing, the judge recessed the tri-

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there is no question that even a limited order such as the one here conflicts with sixth amendment rights."); *Id.* at 1515 (Scalia, J., concurring) (agreeing that the trial 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."); *but see United States v. Triumph Cap. Grp., Inc.*, 487 F.3d 124, 137 (2nd. Cir. 2007) ("We emphasize, yet again, the narrowness of our holding. The imposition of the court order on Andrews' right to effective assistance of counsel was trivial because, *inter alia*, (1) the order restricted only the discussion of testimony and did not cut off all communication; (2) defense counsel, while still in the courthouse and less than thirty minutes after it was put in place, was informed the ban might be lifted; (3) counsel admits that he could have contacted the defendant at that time to make arrangements to speak later that evening, but made no attempt to do so; (4) the defendant was still available by cell phone at the time defense counsel learned that restriction on communication was going to be lifted; (5) the restriction on communications was lifted at 8 pm, three hours after it was initiated; (6) the defendant was given as much time as necessary to consult with his attorney prior to beginning testimony the next day and acknowledged that he had had sufficient time; and (7) there was no bad faith on the part of the government or the court. We do not hold that any one of these factors alone would have lead to the restriction being constitutional. Indeed, had any of these factors *not* been present, our conclusion might well have been different.").

[3] 4 RR 252–53.

[4] 5 RR 103.

al.[5] After dismissing the jury, the following dialogue occurred:

> 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.

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[5] 5 RR 136.

[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 –
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> [DEFENSE COUNSEL #1]: Sure.
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> THE COURT: -- for that. And so I'm just using that as an analogy.
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> [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.
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> THE COURT: Objection noted. All right. Folks, then we will see you-all again tomorrow.[6]

The trial judge reconvened the trial approximately 24 hours later. There is nothing in the record that suggests that Appellant conferred or had an opportunity to confer with counsel the morning before the trial restarted. Nor is there anything in the record that shows the judge inquiring if Appellant and his

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[6] 5 RR 137–139 (emphasis added).

counsel were indeed able to confer on matters outside his testimony during the 24-hour recess. Later that day, while Appellant was being cross-examined, the court took a seven-minute recess. The judge stated "And, Mr. Villarreal, you're still on the stand so the same admonishments I gave your attorney yesterday still apply."[7] There were no objections.

Appellant was found guilty, and a divided court of appeals affirmed his conviction. We granted Appellant's petition for discretionary review.

Standard of Review

The court below also differed on whether to apply an abuse of discretion standard or a *de novo* standard in reviewing whether the trial court's limited no-conferral order violated Appellant's Sixth Amendment right to counsel. We need not decide at this time what the appropriate standard of review is for appellate courts in evaluating this type of issue in the future.[8] Because this application-of-law-to-fact

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[7] 6 RR 40.

[8] Texas appellate courts have applied an abuse of discretion standard while evaluating Sixth Amendment violation claims involving limitations on conferring with counsel. *Burks v. State*, 227 S.W.3d 138, 144 (Tex. App.—Houston [1st Dist.] 2006) ("The abuse-of-discretion standard controls when we review a contention that a trial-court ruling deprived a criminal defendant of counsel during a *portion* of the trial") (emphasis in original); *see Schuldreich v. State*, 899 S.W.2d 253, 255 (Tex. App.—Houston [14th Dist.] 1995) ("The trial court may (although that's not the case here), in its discretion, require an accused to not confer with his defense counsel"). However, this view is not unanimously followed throughout the country. *See United States v. Triumph Cap. Grp., Inc.*, 487 F.3d 124, 131 (2nd Cir. 2007) (applying a *de novo* review on whether a defendant's Sixth Amendment rights were violated by an order restricting

question is a "clearly defined issue[ ] of first impression," we apply a *de novo* review. *Henderson v. State*, 962 S.W.2d 544, 551 (Tex. Crim. App. 1997) (citing *Austin v. State*, 934 S.W.2d 672, 674-675 (Tex. Crim. App. 1996)).

Discussion

Our federal constitution guarantees "in all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defen[s]e." U.S. Const. amend. VI. "Designed to remedy any imbalance in our adversary system, the Sixth Amendment promises that an accused is entitled to defense counsel in all criminal prosecutions." *Hidalgo v. State*, 983 S.W.2d 746, 752 (Tex. Crim. App. 1999). This constitutional right encompasses all critical stages of the criminal proceeding. *Gilley v. State*, 418 S.W.3d 114, 120 (Tex. Crim. App. 2014).

The Supreme Court in *Geders* and *Perry* planted the guideposts on what restrictions on communications between a defendant and his counsel are constitutionally tolerable. A blanket prohibition on conferring with counsel during an overnight recess (17-hours) when the defendant is testifying on the stand is unconstitutional. *Geders*, 425 U.S. at 91, 96 S.Ct. 1330. But a trial court may restrict communication

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discussions about ongoing testimony during an overnight recess).

Additionally, this Court has utilized an abuse of discretion standard in reviewing other Sixth Amendment rights. *Irby v. State,* 327 S.W.3d 138, 145 (Tex. Crim. App. 2010) (a trial court order forbidding cross examination on the witness' juvenile record); *Webb v. State*, 766 S.W.2d 236 (Tex. Crim. App. 1989) (a trial court excluding testimony from a witness who violated the sequestration rule).

between a defendant and counsel during a short recess (15-minutes) where presumably the only topic that would be discussed is the ongoing testimony. *Perry*, 488 U.S. at 284–285, 109 S.Ct. 594.

At first glance, the length of the recess appears to be the determining variable between *Geders* and *Perry*.[9] However, the type of communication being restricted is the true controlling factor.[10] The Supreme Court has made clear that "when a defendant becomes a witness, he has no constitutional right to consult with his lawyer while he is testifying." *Perry*, 488 U.S. at 281, 109 S.Ct. 594. 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." *Id.* at 284, 109 S.Ct. 594. Thus, the ultimate inquiry becomes whether the restrictive conferral order would "meaningfully interfere with constitutionally protected communication." *United States v. Triumph Cap. Grp., Inc.*, 487 F.3d 124, 131 (2nd. Cir. 2007).

Neither *Geders* nor *Perry* addressed the scenario at hand—restricting only discussions of a defendant's ongoing testimony during an overnight recess. Reviewing these cases reveals the two interests at play are preserving the defendant's right to assis-

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[9] *People v. Joseph*, 84 N.Y.2d 995, 622 N.Y.S.2d 505, 646 N.E.2d 807, 809 (1994) ("It is clear that the critical factor in determining whether a violation of the right to counsel occurred here is the length of time dividing the defendant's access to counsel contemplated by the trial court's ruling").

[10] *United States v. Padilla*, 203 F.3d 156, 160 (2nd. Cir. 2000) ("the difference between *Perry* and *Geders* is not the quantity of communication restrained but its constitutional quality").

tance of counsel and ensuring the truth-seeking function of a trial. But the Supreme Court has placed a thumb on the scale in favor of preserving the assistance of counsel when it conflicts with the risk of "improper coaching." *Geders*, 425 U.S. at 91, 96 S.Ct. 1330.

Right to Assistance of Counsel

The first interest is the defendant's right to assistance of counsel. This is fundamental and essential to a fair trial within our adversarial system of justice. *Gideon v. Wainwright*, 372 U.S. 335, 343, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). A defendant "requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence." *Id.* at 345, 83 S.Ct. 792 (quoting Justice Sutherland's words describing a defendant's need for counsel, *Powell v. Alabama*, 287 U.S. 45, 68–69, 53 S.Ct. 55, 77 L.Ed. 158 (1932)).

Occupying the witness stand as a defendant cannot bar the total assistance of counsel during an overnight recess because trial preparation does not suddenly cease when the recess is called, and trial preparation does not resume only when the judge says proceed the following day. Trial preparation is a continuous affair. When the government is attempting to take one's liberty, it may not sever the relationship between defendant and his counsel overnight, only to reconnect it the next day. "Such recesses are often times of intensive work, with tactical decisions to be made and strategies to be reviewed." *Geders*, 425 U.S. at 88, 96 S.Ct. 1330. We

recognize "the defendant's right to unrestricted access to his lawyer for advice on a variety of trial-related matters that is controlling in the context of a long recess." *Perry*, 488 U.S. at 284, 109 S.Ct. 594.

The type of "trial-related matters" that the Supreme Court expressly mentioned counsel must be able to confer with his client about include: "information made relevant by the days testimony;" avenues of "inquiry along lines not fully explored earlier;" "the significance of the day's events;" "the availability of other witnesses;" "trial tactics;" and "the possibility of negotiating a plea bargain." *Geders*, 425 U.S. at 88, 96 S.Ct. 1330; *Perry*, 488 U.S. at 283, 109 S.Ct. 594. What this non-exhaustive list shows is that a defendant must be able to confer with counsel about the derivative effects of the ongoing testimony. "Consideration" of the testimony must be allowed in order to foster the constitutionally protected communications between counsel and defendant.

The Truth-Seeking Function of the Trial

The second interest is ensuring trial courts achieve the truth-seeking function within our adversarial system. "[I]t is simply an empirical predicate of our system of adversary rather than inquisitorial justice that cross-examination of a witness who is uncounseled between direct examination and cross-examination is more likely to lead to the discovery of truth than is cross-examination of a witness who is given time to pause and consult with his attorney." *Perry*, 488 U.S. at 282, 109 S.Ct. 594. Thus the "trial-related matters" that counsel may confer about overnight with his client does not include counsel discussing a defendant's ongoing testimony. It is why

a defendant "has no constitutional right to consult with his lawyer while he is testifying." *Id.* at 281, 109 S.Ct. 594.

Put another way, counsel may not manage his client's testimony. He may not coach the testimony to course-correct a disastrous direct examination to brace against the impact of the upcoming cross-examination. "Once the defendant places himself at the very heart of the trial process, it only comports with basic fairness that the story presented on direct is measured for its accuracy and completeness by uninfluenced testimony on cross-examination." *Id.* at 283, 109 S.Ct. 594.

Discussing or conferring about the ongoing testimony is distinct from taking "consideration" of the ongoing testimony. The former disrupts the truth-seeking function of trial; the latter allows counsel to constitutionally advise his client during the overnight recess.

To illustrate, suppose a defendant is being unpersuasive and inconsistent on the stand. An overnight recess is called before the examination is completed. Counsel telling the defendant what to say and how to say it in response to his and the prosecutors upcoming questions the following day is properly prohibited. However, counsel advising the defendant to take the plea deal after the earlier poor performance is constitutionally protected.

A narrow trial order on prohibiting coaching passes constitutional muster. However, an insufficiently limited order might preempt counsel and defendant's conversations about other matters, thereby depriving the defendant of legal representation at a critical stage.

Application

Applying these principles to the instant situation, we conclude that the trial judge's order did not intrude upon constitutionally protected communications between Appellant and counsel during the overnight recess. The following factors drive our narrow holding.

First, the language used by the judge complied with *Perry*. He cabined his admonishments to conferring about the ongoing testimony. From the start, the judge framed the issue as discussing the ongoing testimony. Addressing Appellant, the judge stated, "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."

Addressing Appellant's two attorneys, the judge explained that counsel were not to "confer with [Appellant] while he was on the stand about his testimony." He continued, "I don't want you discussing what you couldn't discuss with him if he was on the stand in front of the Jury .... His testimony." The judge further clarified, "But ask yourselves before you talk to him about something, is this something that -- manage his testimony in front of the jury?"

We interpret this as a limited order. The order only restricted discussions of Appellant's ongoing testimony and nothing else. Constitutionally protected communications were not targeted. The judge's explanation about *managing* the testimony in front of the jury supports the conclusion that the judge was focused on preserving the truth-seeking function of trial by preventing coaching—something a trial court may prevent. The judge did not say anything to pre-

vent *consideration* of the ongoing effects of the testimony. "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." That language 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). The sentencing example used by the judge to describe what type of communications were permissible was similar to the of ability to negotiate a plea, a topic of conversation expressly allowed by *Perry*.

Second, counsel affirmed that he understood the trial court's order. He responded "Sure, it does," when asked by the judge if what he said made sense. Just before counsel lodged a Sixth Amendment objection, lead counsel once again stated that he understood the trial court's judgment. This supports the conclusion that counsel were still able to have constitutionally permissible communications with Appellant that afternoon, evening, and the following morning, before the trial resumed with Appellant on the stand.

However, Appellant's second counsel was mistaken when stating that he was not "going to talk to him about the facts that he testified about." That is an incorrect interpretation of *Geders* and *Perry*. Counsel must be allowed to discuss the derivative effects of the testimony. Again, for example, if the ongoing testimony revealed information about a new witness, counsel must be able to ask the defendant informational questions to effectively assist their client. But, after this improper statement, the judge continued explaining what is and what is not al-

lowed. And the first chair repeatedly affirmed that he understood the court's order.

Third, there is nothing in the record that suggests Appellant and his counsel were unable to confer on constitutionally permissible matters during the overnight recess.

Fourth, the following day, when a brief recess occurred while Appellant was being cross-examined, the judge stated, "you're still on the stand so the same admonishments I gave your attorney yesterday still apply." Appellant's counsel did not object. This suggests that counsel understood that the judge's order only prohibited conferring about ongoing testimony.

Fifth, the absence of a motion for a new trial that documented any potential communication hindrances between counsel and Appellant is another data point against the conclusion that constitutional communications were desired but were prohibited.

Sixth, the context of the recess militates in favor of the order being constitutional. It was the judge himself, with his prior scheduled engagement, that caused the recess to occur during the middle of the defendant's testimony. And it was the judge himself that initiated the limited-conferral order. The State was not involved in this situation. There was no prodding by the prosecution to restrict Appellant's communications with counsel.

Certainly, it would be best to allow a defendant to complete his direct and cross-examination within the same day to avoid this issue. But that is not always possible. The judge threaded the needle with the right to counsel and the need to protect the integrity

of the trial. Under these facts, there was no Sixth Amendment right to counsel violation.

Conclusion

We hold the trial judge's *sua sponte* restriction on counsel discussing Appellant's ongoing testimony during an overnight recess did not violate his Sixth Amendment right to counsel. We affirm the judgment of the court of appeals.

Yeary, J., filed a concurring opinion.

Keel, J., filed a concurring opinion in which McClure J., joined.

Walker, J., filed a dissenting opinion.

Yeary, J., filed a concurring opinion.

I join the Court's opinion. Doing the best it can with what the United States Supreme Court has given it to work with, the Court concludes that the trial court's limitation on defense counsel's ability to confer with his testifying client during an overnight recess was constitutionally acceptable. It finds this limitation justified because, while the trial court prohibited counsel from conferring with Appellant directly about the *substance* of his *testimony*, it did not otherwise "intrude upon the constitutionally protected communications between Appellant and counsel" during that interregnum. Majority Opinion at ——. This compromise seems the only acceptable choice given the Supreme Court's precedents. *See Geders v. United States*, 425 U.S. 80, 91, 96 S.Ct. 1330, 47 L.Ed.2d 592 (1976) (explaining that an order prohibiting an attorney from conferring with his client during an overnight recess violates the consti-

tutional right to counsel); *and compare Perry v. Leeke*, 488 U.S. 272, 284–85, 109 S.Ct. 594, 102 L.Ed.2d 624 (1989) (explaining that an order prohibiting an attorney from conferring with his client during a 15-minute recess does not violate the Sixth Amendment right to counsel).

That does not mean it is an ideal choice. 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. Majority Opinion at ——, ——. I do not envy the defense lawyer who risks being held in contempt while trying to navigate this murky distinction. 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? Majority Opinion at ——. Perhaps it will not prove problematic in many if not most cases. Indeed, Appellant makes no showing in this case that his attorney found the trial court's instruction in this case difficult to comply with or inhibitive of his ability to counsel his client as needed—*at all*. Thus, there exists in this case at least an argument that Appellant has also failed to demonstrate prejudice.

This case nonetheless presents what must be a common and likely intractable problem, it seems to me. The Supreme Court's precedents seem to force an examination of the length of time of the recess to

know the answer to whether a defendant's right to counsel is violated. But the relationship between an attorney and his client cannot boil down only to how much time has ticked away on a clock. Either the Sixth Amendment requires a right of conferral in this circumstance, or it does not, and the answer cannot depend on some right to confer that kicks in somewhere between a fifteen minutes and an overnight recess. If it did, that would just be silly. Moreover, there is no textual basis in the language of the federal constitution on which to hang a temporal trigger for the right that is at stake.

Here, the Court's opinion strikes a balance found arguably outside, rather than in-between, the Supreme Court's precedents. It approves a non-conferral order that leaves it to a defendant's counsel to know the difference between discussing his client's testimony with him as opposed to discussing other distinguishable aspects of representation. It does strike me as almost impossible for a trial court to know how to articulate a clear enough instruction, or for counsel to fathom the scope of whatever necessarily indistinct guidance he is given. But I am convinced that the trial court did an adequate job here given the existing Supreme Court precedents on the topic.

As it stands, 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." *Jacobellis v. Ohio*, 378 U.S. 184, 197, 84 S.Ct. 1676, 12 L.Ed.2d 793 (1964) (Stewart, J., concurring). I believe at some point, if not here, it will behoove the Supreme Court to revisit this area of the law and draw a

bright line rule. For evidence of why, just look at the varied opinions cited in footnotes 1 and 2 of the Court's opinion. Majority Opinion at ——— – ——— nn. ———, ———. This is no way to navigate a right as important as the constitutional right to counsel.

Either the Sixth Amendment requires that a defendant be allowed to consult with his attorney during breaks of any duration, and about any topic, during his testimony; or else basic fairness requires that any consultation with counsel, about any topic, should be categorically banned throughout the course of his testimony, however long that may go on. After all, the defendant having opted to testify in his own behalf, "the rules that generally apply to other witnesses—rules that serve the truth-seeking function of the trial—are generally applicable to him as well." *Perry*, 488 U.S. at 282, 109 S.Ct. 594.

Until such time as the Supreme Court should clarify matters, I join this Court's opinion in muddling through.

Keel, J., filed a concurring opinion in which McClure, J., joined.

A defendant has no right to consult with his attorney while he is testifying, and a trial court may forbid such discussion during a short break taken during the defendant's testimony. *Perry v. Leeke*, 488 U.S. 272, 284, 109 S.Ct. 594, 102 L.Ed.2d 624 (1989). But 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.*; *Geders v. U.S.*, 425 U.S. 80, 91,

96 S.Ct. 1330, 47 L.Ed.2d 592 (1976). We face the latter scenario in this case. The majority, however, misreads *Perry*, and that misreading may lead trial courts into constitutional error, so I do not join the Court's opinion.

I. *Geders* and *Perry*

"[A]n order preventing [a defendant] from consulting his counsel 'about anything' during a 17-hour overnight recess between direct- and cross-examination impinged" on his Sixth Amendment right to counsel. *Geders*, 425 U.S. at 91, 96 S.Ct. 1330. Overnight recesses "are often times of intensive work, with tactical decisions to be made and strategies to be reviewed." *Id.* at 88, 96 S.Ct. 1330. "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.*

Normal consultation overnight includes discussions about various trial-related topics, including those made relevant by the defendant's testimony. *Id.*; *Perry*, 488 U.S. at 284, 109 S.Ct. 594. The defendant has a right to "unrestricted access to his lawyer for advice" on these matters during an overnight recess. *Perry*, 488 U.S. at 284, 109 S.Ct. 594. That unrestricted access includes the right to discuss the defendant's ongoing testimony: "The fact that such discussions will inevitably include some consideration of the defendant's ongoing testimony does not compromise that basic right." *Id.*

The majority misreads the latter sentence to mean that, although attorneys may give "some consideration" to the defendant's testimony, they may be forbidden from overnight discussion of that testi-

mony with him. But the sentence says the overnight discussions will include consideration of the defendant's testimony; it does not mention the attorneys' consideration. The most natural reading of the passage is that effective assistance of counsel may require overnight discussions of the defendant's ongoing testimony, and the Sixth Amendment guarantees access to such discussion.

The majority also misreads *Perry* by downplaying the temporally based nature of its holding and rationale. *Perry* noted that "the Federal Constitution does not compel every trial judge to allow the defendant to consult with his lawyer while his testimony is in progress if the judge decides that there is a good reason to interrupt the trial *for a few minutes*." *Id.* at 284-85, 109 S.Ct. 594 (emphasis added). It said that "when a defendant becomes a witness, he has no right to consult with his lawyer *while* he is testifying" and "no right to have the testimony *interrupted* in order to give him the benefit of his counsel's advice." *Id.* at 282, 109 S.Ct. 594 (emphasis added). It pointed out, "The interruption in *Geders* was of a different character"—i.e., it was "a long recess." *Id.* at 284, 109 S.Ct. 594. And in that context, the defendant's "right to unrestricted access to his lawyer for advice on a variety of trial related matters" is "controlling." *Id.* Fear of unethical coaching was immaterial to the *Perry* decision. *Id.* at 280-81, 109 S.Ct. 594. All that mattered was the length of the recess. *See id.* at 284, 109 S.Ct. 594. Short recess—no right. Overnight recess—unrestricted right.

The majority's failure to recognize these simple, clear rules may encourage trial courts to enter orders that force attorneys to choose between effective

and candid consultation about the case on trial, on the one hand, and censored consultation, on the other. In the majority's example, the attorney in an overnight recess who wants to advise his badly testifying client to change course and plead guilty could not detail how and why his testimony was so faulty that his advice had changed. The attorney would have to choose between giving his advice effectively by explaining its rationale—and violating the court's order—or giving the advice without explanation and forcing his client into an uninformed choice. The conflict would undermine the Sixth Amendment right to assistance of counsel.

The majority's justifications for its holding are peculiar. It claims, for example, that the order complied with *Perry*, but it did not. The majority points to the order's *sua sponte* origin and one attorney's claim that he understood it, but those circumstances would not redeem an unconstitutional order. And the majority says that the record does not show any harm—an irrelevant consideration in assessing error and an inversion of the constitutional harm standard, to boot.

The majority claims that other state supreme courts "generally agree" with its conclusion and cites three cases for that contention. While the majority places a "*see e.g.*" before that list—implying there are other cases that support its holding—I find no other examples. And one of the cases is inapplicable because it involved a break of only a few minutes. *Beckham v. Commonwealth*, 248 S.W.3d 547, 553 (Ky. 2008). As far as I can tell, one case decided since *Perry* agrees with the majority—*State v. Conway*, 108 Ohio St.3d 214, 842 N.E.2d 996, 1021 (2006)—

and two disagree—*Petty v. US*, 2024 D.C. App. LEXIS 228 (D.C. 2024) (per curiam); *People v. Joseph*, 84 N.Y.2d 995, 622 N.Y.S.2d 505, 646 N.E.2d 807 (1994). Accordingly, state courts that have confronted the issue since *Perry* do not "generally agree" with the majority's conclusion.

Meanwhile, the majority downplays the true consensus—that of federal circuit courts against such an order. It says that those courts "mostly" disagree with the majority's approach, but it seems they all do. The majority cites one federal case that upheld such an order, but the order was rescinded after three hours, and the trial court granted the defendant extra time to consult with his lawyer before beginning the next day's testimony. *U.S. v. Triumph Cap. Group, Inc.*, 487 F.3d 124, 137 (2nd. Cir. 2007). That court agreed that a restriction on communication during a long recess may be unconstitutional "even if the restriction bars discussion only of the defendant's testimony." *Id.*

II. Conclusion

The trial court erred to enter the order. I agree with the State, however, that the error was not structural. Unlike the *Geders* order, this one did not forbid all consultation overnight, and its prohibition against conferring about one topic during one overnight recess near the end of guilt-phase testimony did not pervade the entire proceeding. *See Satterwhite v. Texas*, 486 U.S. 249, 256, 108 S.Ct. 1792, 100 L.Ed.2d 284 (1988). I also agree that the error was harmless beyond a reasonable doubt. *See* Tex. R. App. P. 44.2(a). The only contested issue in this murder trial was self-defense; Appellant testified on

that issue before the overnight recess; his version of events was weak; any effort to change his testimony overnight would have further damaged his credibility; and the State's case against him was overwhelming and included Appellant's damning, spontaneous expressions of regret and claims that the victim "didn't deserve it" and was "innocent." As the State sums it up, the victim's murder was "the inevitable conclusion to a days-long, meth-induced rampage, spurred on by [Appellant's] bizarre paranoid delusions[.]" Depriving him of the ability to discuss his testimony over one night near the end of this trial was error but harmless beyond a reasonable doubt. I concur in the Court's judgment.

Walker, J., filed a dissenting opinion.

The Sixth Amendment of the United States Constitution guarantees all defendants, including Appellant David Asa Villarreal, the right to assistance of counsel during trial. This right would be gutted if a judge can ban a defendant from talking to his lawyer overnight during the course of the trial, and so the Supreme Court rightly held that this kind of order is unconstitutional. *Geders v. United States*, 425 U.S. 80, 91, 96 S.Ct. 1330, 47 L.Ed.2d 592 (1976). However, a split-Supreme Court thought it would be permissible for a judge to keep a defendant from talking to his defense lawyer during a fifteen-minute break. *Perry v. Leeke*, 488 U.S. 272, 283–84, 109 S.Ct. 594, 102 L.Ed.2d 624 (1989).

Today, this Court decides that the trial court's order prohibiting Appellant and his defense counsel

from discussing the case during a twenty-four hour,[1] overnight recess did not violate his right to counsel, because the recess occurred during the middle of Appellant's testimony and the trial judge referred to Appellant's testimony. I disagree. *Perry*, which upheld a discussion ban, repeatedly emphasized the shortness of the recess, which made it reasonable to presume that only the defendant's in progress testimony would be discussed during that short break. *Perry*'s holding was also limited—it merely held that the Sixth Amendment does not require a trial court to allow consultation regarding a defendant's ongoing testimony during an interruption in the trial "for a few minutes." Not only was the twenty-four hour

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[1] The trial court called for a recess at 1:00 pm, and it asked the jury to be back at 1:00 pm the next day:

> THE COURT: Ladies and gentlemen, as you know, I discussed earlier we are going to have to stop today. It's not how I really wanted to run the trial, but some other issues are coming up.
>
> For tomorrow – we will come back tomorrow. But since we are leaving here almost at 1:00, why don't we start again tomorrow at 1 o'clock. So what I'm going to ask you to do is get here a little bit before 1 o'clock, assemble into the jury room. And as soon as we can, at 1 o'clock, we'll get the doors opened and get you in here, and we'll just proceed where we left off from today.

After the jury left, the trial court made the same request of the parties before adjourning:

> THE COURT: ... All right. Folks, then we will see you-all again tomorrow.
>
> ...
>
> Just try to be here a little bit before 1 o'clock. I'd like to start right on the dot at 1 o'clock.
>
> ...
>
> Court's in recess.
>
> (Proceedings recessed at 12:58 p.m.)

prohibition in this case far longer than the fifteen-minute break in *Perry*, but the trial court's order was not as clean-cut as the Court makes it out to be. While the trial court pointed to the topic of Appellant's testimony, it required counsel to treat Appellant as actively sitting and testifying on the witness stand. Counsel was virtually required to avoid discussing anything with Appellant for twenty-four hours, a time period of such a different character that discussions would necessarily encompass more than just the ongoing testimony.

A twenty-four hour ban on discussion falls squarely within *Geders* and violated Appellant's Sixth Amendment right to counsel. The complete deprivation of counsel during the twenty-four hour overnight recess is structural error, requiring reversal regardless of whether there is a showing of harmlessness. Respectfully, I dissent to the Court's decision to affirm the judgment of the court of appeals.

I — *Geders* and *Perry*

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defense." U.S. CONST. amend. VI. A defendant's right to assistance 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, 96 S.Ct. 1330. The right to assistance of counsel means "that there can be no restrictions upon the function of counsel in defending a criminal prosecution in accord with the traditions of the adversary factfinding process that has been constitutionalized in the Sixth and Four-

teenth Amendments." *Herring v. New York*, 422 U.S. 853, 857–58, 95 S.Ct. 2550, 45 L.Ed.2d 593 (1975).

In *Geders*, the Supreme Court held that "an order preventing petitioner from consulting his counsel 'about anything' during a seventeen-hour overnight recess between his direct-and cross-examination impinged upon his right to the assistance of counsel guaranteed by the Sixth Amendment." *Geders*, 425 U.S. at 91, 96 S.Ct. 1330. While a trial court has "broad power to sequester witnesses before, during, and after their testimony" in order to prevent improper attempts to influence their testimony, that power is curtailed when the witness is the defendant. *Id.* at 87–88, 96 S.Ct. 1330.

> A sequestration order affects a defendant in quite a different way from the way it affects a nonparty witness who presumably has no stake in the outcome of the trial. A nonparty witness ordinarily has little, other than his own testimony, to discuss with trial counsel; a defendant in a criminal case must often consult with his attorney during the trial. Moreover, "the rule" accomplishes less when it is applied to the defendant rather than a nonparty witness, because the defendant as a matter of right can be and usually is present for all testimony and has the opportunity to discuss his testimony with his attorney up to the time he takes the witness stand.

Id. at 88, 96 S.Ct. 1330. Furthermore, the duration of the order, covering an overnight recess, itself had constitutional dimension:

> The recess at issue was only one of many called during a trial that continued over 10 calendar

> days. But it was an overnight recess, 17 hours long. It 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.

Id. After discussing "a variety of ways to further the purpose served by sequestration without placing a sustained barrier to communication between a defendant and his lawyer,"[2] the Supreme Court concluded that:

> 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 re-

---

[2] The Supreme Court suggested that the prosecutor could cross-examine the defendant about any "coaching" that may have occurred during the recess, or the trial court could simply wait to call the recess until after the defendant finished testifying. *Geders*, 425 U.S. at 89–91, 96 S.Ct. 1330.

> solved in favor of the right to the assistance and guidance of counsel.

Id. at 91, 96 S.Ct. 1330 (citing *Brooks v. Tennessee*, 406 U.S. 605, 92 S.Ct. 1891, 32 L.Ed.2d 358 (1972)).

While the order preventing consultation during the seventeen-hour recess in *Geders* was unconstitutional, the Supreme Court upheld an order barring a defendant from consulting with his attorney during a fifteen-minute afternoon break in *Perry*, 488 U.S. at 284–85, 109 S.Ct. 594. The Supreme Court acknowledged that "the line between the facts of *Geders* and the facts of [*Perry*] is a thin one." *Id.* at 280, 109 S.Ct. 594. However, a defendant does not have "a constitutional right to discuss ... testimony while it is in process," and the only thing that Perry and his counsel could possibly discuss during the fifteen-minute break was that testimony. *Id.* at 284, 109 S.Ct. 594. The Supreme Court emphasized the reality between a seventeen-hour overnight recess and a fifteen-minute break during testimony:

> The interruption in *Geders* was of a different character because the normal consultation between attorney and client that occurs during an overnight recess would encompass matters that go beyond the content of the defendant's own testimony—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. It is the defendant's right to unrestricted access to his lawyer for advice on a variety of trial-related matters that is controlling in the context of a *long recess*. The fact that such discussions will inevitably in-

> clude some consideration of the defendant's ongoing testimony does not compromise that basic right. But in a *short recess* in which it is appropriate to presume that nothing but the testimony will be discussed, the testifying defendant does not have a constitutional right to advice.

Id. (emphasis added) (citation omitted).

As Judge Keel deftly explains in her concurring opinion, all that matters is the length of the recess. (Keel, J., concurring opinion at ——) ("Short recess—no right. Overnight recess—unrestricted right."). Indeed, *Perry* made it clear in its final holding:

> We merely hold that the Federal Constitution does not compel every trial judge to allow the defendant to consult with his lawyer while his testimony is in progress if the judge decides that there is a good reason to interrupt the trial for a few minutes.

Id. at 284–85, 109 S.Ct. 594. The 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. Where 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. *See Perry*, 488 U.S. at 284, 109 S.Ct. 594 ("The fact that such discussions will inevitably include some consideration of the defendant's ongoing testimony does not compromise that basic right."); *Geders*, 425 U.S. at 91, 96 S.Ct. 1330 ("the conflict must, under the Sixth Amendment, be re-

solved in favor of the right to the assistance and guidance of counsel.").

II — The Order in This Case

In this case, the trial court's order was not a prohibition on conferring for fifteen-minutes. This was far longer than even the seventeen-hour recess in *Geders*. The overnight recess here, and its attendant conferral ban, lasted for twenty-four hours. While *Geders* and a strict reading of *Perry* would say this length of time is unconstitutional, the Court finds no violation because the trial court's order, as the Court reads it, only prevented discussion of Appellant's ongoing testimony.

But the trial court's order was not so limited. In calling the recess, after the jury left the courtroom, the trial court said:

> 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 Fifth Amendment [sic] right to talk to your attorney.
>
> So I'm really going to put the burden on Mr. Scharff to tell you the truth. Mr. Scharff and Mr. Brown, 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 Mr. Scharff and Mr. Brown 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.

MR. SCHARFF: 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.*

MR. SCHARFF: 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?

MR. SCHARFF: Sure, it does.

MR. BROWN: 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.
>
> MR. SCHARFF: 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 –
>
> MR. SCHARFF: Sure.
>
> THE COURT: – for that. And so I'm just using that as an analogy.
>
> MR. SCHARFF: 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.*
>
> MR. SCHARFF: 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.

(emphasis added). Clearly, the trial court pointed to the topic of Appellant's ongoing testimony. But the trial court did not simply tell counsel to avoid discussing only the testimony. The trial court repeated-

ly directed counsel to treat Appellant as if he were sitting on the witness stand, testifying in front of the jury, and the trial court told counsel they could not talk to Appellant at all if he is on the witness stand in front of the jury. The trial court's order required counsel "to pretend that Mr. Villarreal is on the stand. You couldn't confer with him during that time." And when counsel tried to ask if it was the court's order that counsel cannot confer with Appellant, instead of giving a straightforward answer of "You can confer with your client, but not about his testimony," the trial court told counsel that "I don't want you discussing what you couldn't discuss with him if he was on the stand in front of the Jury." The trial court further instructed counsel "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."

The trial court's order here effectually put Appellant in a position where he had no right to confer with counsel. *See Perry*, 488 U.S. at 281, 109 S.Ct. 594 (a defendant "has no constitutional right to consult with his lawyer while he is testifying.").

And even if the trial court's order only told counsel to pretend Appellant was on the stand, without adding that they could not talk to him while up there, how could trial counsel confer with their client if he was actively sitting on the witness stand during trial, in full view of the jury? Counsel could not discuss overall trial strategy with Appellant while he was sitting on the witness stand in front of the jury. Counsel could not discuss evidence that had been admitted, or witnesses that they might want to call,

while the jury was watching. Counsel could not discuss plea negotiations with him, nor could counsel discuss how the trial court's rulings were helping or hurting the case, and counsel especially could not discuss the jury in full view of the jury itself.

The trial court's order that counsel treat Appellant as if he were actively sitting on the witness stand barred counsel from discussing anything with Appellant. The trial court's overnight prohibition was essentially the same as the unconstitutional order in *Geders*.

III — No Harm Analysis Required

Certain errors that affect the framework within which the trial proceeded, rather than simply errors in the trial process itself, are deemed "structural errors" and require reversal regardless of whether the error was harmless. "All structural errors must be founded on a violation of a federal constitutional right, but not all violations of federal constitutional rights amount to structural errors." *Schmutz v. State*, 440 S.W.3d 29, 35 (Tex. Crim. App. 2014). In fact, "[m]ost constitutional errors are not 'structural.'" *Mendez v. State*, 138 S.W.3d 334, 340 (Tex. Crim. App. 2004). "For federal constitutional error that is not structural, the applicable harm analysis requires the appellate court to reverse unless it determines beyond a reasonable doubt that the error did not contribute to the defendant's conviction or punishment." *Lake v. State*, 532 S.W.3d 408, 411 (Tex. Crim. App. 2017) (citing Tex. R. App. P. 44.2(a)). The list of structural errors is short, and:

> In *Johnson v. United States*, the Supreme Court set forth its most recent list of structural

> errors: *the total deprivation of counsel at trial*, lack of an impartial trial judge, the unlawful exclusion of members of the defendant's race from a grand jury, the denial of the right to self-representation at trial, the denial of the right to a public trial, and an instruction that erroneously lowers the burden of proof for conviction below the "beyond a reasonable doubt" standard.

Johnson v. State, 169 S.W.3d 223, 235 (Tex. Crim. App. 2005) (discussing *Johnson v. United States*, 520 U.S. 461, 468–69, 117 S.Ct. 1544, 137 L.Ed.2d 718 (1997)) (emphasis added).

"The total deprivation of counsel at trial" need not be limited to situations in which a defendant has no lawyer at all; *Geders* shows that a deprivation of counsel may be temporary. In *Perry*, the Supreme Court explained that "actual or constructive denial of the assistance of counsel *altogether* is not subject to ... prejudice analysis." *Perry*, 488 U.S. at 280, 109 S.Ct. 594 (emphasis added). Consequently, the Supreme Court explained that it simply reversed on finding the violation in *Geders*:

> In [*Geders*], we simply reversed the defendant's conviction without pausing to consider the extent of the actual prejudice, if any, that resulted from the defendant's denial of access to his lawyer during the overnight recess. That reversal was consistent with the view we have often expressed concerning the fundamental importance of the criminal defendant's constitutional right to be represented by counsel.

Id. at 279, 109 S.Ct. 594. And in *Cronic*, the Supreme Court cited *Geders* as an example of where it

had "found constitutional error without any showing of prejudice when counsel was either totally absent, or prevented from assisting the accused during a critical stage of the proceeding." *United States v. Cronic*, 466 U.S. 648, 659 n.25, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984); *see also Johnson*, 169 S.W.3d at 231 (likening the "denial of counsel at a critical stage" to "the deprivation of a trial and the deprivation of an appeal" and reasoning both errors "would clearly be reversible without a showing of harm"). As far as the Supreme Court has been concerned, *Geders* error is structural error immune to harm analysis.

Indeed, as the D.C. Circuit Court of Appeals explained, if harm analysis were required, "it would be anomalous if defendant was also forced to relinquish the right to have his discussions with his lawyer kept confidential" because "[t]he only way that a defendant could show prejudice would be to present evidence of what he and counsel discussed, what they were prevented from discussing, and how the order altered the preparation of his defense." *See Mudd v. United States*, 798 F.2d 1509, 1513 (D.C. Cir. 1986). Piercing the attorney-client relationship, in order to show harm to that right, is too much.

I would hold that the error in this case is a structural one.

IV — Conclusion

The court of appeals and this Court draw the wrong lesson from *Perry*. *Perry* took pains to emphasize the difference between a fifteen-minute break and an overnight recess during the defendant's testimony. The Supreme Court made it clear that a tri-

al court could not prohibit discussions overnight, even though those discussions would inevitably include the defendant's ongoing testimony. The Supreme Court in *Perry* did not hold that trial courts can carve out that topic from overnight discussions.

Furthermore, the Court also misinterprets the trial court's order to be narrower than it truly was. The trial court did not specifically limit consultation about Appellant's testimony; the trial court required counsel to treat Appellant as if he were currently testifying on the witness stand. The trial court's order effectually prohibited Appellant and his defense attorney from conferring for twenty-four hours, violating Appellant's right to counsel guaranteed by the Sixth Amendment under *Geders*. And a violation of the Sixth Amendment right to counsel under *Geders* is structural error immune to harm analysis.

The court of appeals's judgment should be reversed. Because this Court chooses to affirm, I respectfully dissent.

APPENDIX B

Court of Appeals of Texas, San Antonio.

David Asa VILLARREAL, Appellant
v.
The STATE of Texas, Appellee

No. 04-18-00484-CR

Delivered and Filed: December 27, 2019
Discretionary Review Granted June 17, 2020

APPELLANT ATTORNEY, Edward F. Shaughnessy, III, Attorney at Law, 206 E. Locust Street, San Antonio, TX 78212.

APPELLEE ATTORNEY, Andrew Warthen, Assistant Criminal District Attorney, 101 W. Nueva St., San Antonio, TX 78205.

Sitting: Sandee Bryan Marion, Chief Justice, Rebeca C. Martinez, Justice, Luz Elena D. Chapa, Justice

OPINION

Opinion by: Sandee Bryan Marion, Chief Justice

A jury convicted appellant David Asa Villarreal ("Villarreal") of murder with a repeat offender enhancement and sentenced him to confinement for sixty years. In two issues on appeal, Villarreal argues the trial court erred by admitting hearsay testimony and by limiting his ability to confer with counsel during an overnight recess in violation of his Sixth Amendment right to counsel. We affirm the trial court's judgment.

Admission of Evidence

In his first issue, Villarreal argues the trial court erred by admitting, over his hearsay objection, testimony regarding the contents of a text message sent on the night of the murder by the victim to Veronica Hernandez, a mutual friend of Villarreal and the victim. During Hernandez's direct examination, the following exchange occurred:

> Q. [by the prosecutor] So when [Villarreal and the victim] got back, what happened after that?
>
> A. [by Hernandez] [The victim] sent me a text and he said—
>
> [DEFENSE COUNSEL]: Objection, hearsay, Your Honor. And lack of foundation, especially when it comes to cell phones and spoofing and phone numbers and who actually sent from what phone. I don't think the proper foundation has been laid for her to know exactly who sent what message.
>
> THE COURT: It's overruled. Go ahead.
>
> Q. [by the prosecutor] Being that you hung out with [the victim] a lot, were you familiar with his phone number?
>
> A. [by Hernandez] Yes, ma'am.
>
> Q. Did you have it programmed in your telephone[?]
>
> A. Yes, ma'am.
>
> Q. Did you text [the victim] a lot?
>
> A. I did.
>
> ...
>
> Q. Okay. And it was common for you guys to have conversations over text messages?

A. Yes, ma'am.

Q. Okay. So that night, did you end up spending the night?

A. No, ma'am.

Q. Why not?

A. He told me—[the victim] told me that [Villarreal] wanted to work things out, and he was trying to make peace with [Villarreal]. That was—

Q. Were they having problems in their relationship?

A. I guess so.

[DEFENSE COUNSEL]: Objection then to the speculation.

THE COURT: Overruled. Go ahead.

As a prerequisite to presenting a complaint for appellate review, the record must show the complaint was made to the trial court by timely objection. Tex. R. App. P. 33.1(a)(1). Where the complaint raised on appeal does not comport with the trial objection, nothing is preserved for our review. *Clark v. State*, 365 S.W.3d 333, 339 (Tex. Crim. App. 2012); *Huerta v. State*, 933 S.W.2d 648, 650 (Tex. App.—San Antonio 1996, no pet.). "In addition, a party must object each time the inadmissible evidence is offered or obtain a running objection." *Valle v. State*, 109 S.W.3d 500, 509 (Tex. Crim. App. 2003). "An error in the admission of evidence is cured where the same evidence comes in elsewhere without objection." *Id.*

Here, although the trial court overruled Villarreal's initial hearsay objection, Hernandez did not

immediately testify regarding the contents of the victim's text message. Rather, after answering several additional questions regarding her familiarity with the victim's telephone number and the frequency of her communications with the victim, Hernandez eventually relayed the contents of the victim's text message in response to a different question. Villarreal objected to Hernandez's response to the latter question on the basis of speculation but not hearsay. Accordingly, because Villarreal failed to obtain a ruling on a running objection or to re-urge his objection to the testimony on the basis of hearsay, his hearsay complaint is not preserved. Villarreal's first issue is overruled.

Sixth Amendment

In his second issue, Villarreal argues the trial court erred by limiting his ability to confer with his counsel during an overnight recess in violation of his Sixth Amendment right to counsel. Specifically, Villarreal complains of the following exchange between the trial court and Villarreal's counsel, which took place during Villarreal's direct examination and prior to an overnight recess:

> 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 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 Fifth Amendment [*sic*] right to talk to your attorney.

So I'm really going to put the burden on [trial counsel] to tell you the truth.... I'm going to ask that both of you [trial counsel] 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 [trial counsel] 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 he needs to confer.

[TRIAL 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.

[TRIAL 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?
>
> [TRIAL COUNSEL 1]: Sure, it does.
>
> [TRIAL 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....
>
> [TRIAL 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.

The Sixth Amendment guarantees criminal defendants the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In reviewing a complaint that the trial court deprived a defendant of counsel during a portion of the trial, we apply an abuse of discretion standard. *Burks v. State*, 227 S.W.3d 138, 144 (Tex. App.—Houston [1st Dist.] 2006, pet. ref'd) (citing *Perry v. Leeke*, 488 U.S. 272, 282, 109 S.Ct. 594, 102 L.Ed.2d 624 (1989); *Geders v. United States*, 425 U.S. 80, 86–91, 96 S.Ct. 1330, 47 L.Ed.2d 592 (1976)).

Although the trial court has "broad power to sequester witnesses before, during, and after their testimony," the Supreme Court has held this discretion is significantly limited by the Sixth Amendment when applied to a testifying defendant. *Geders*, 425

U.S. at 87–88, 96 S.Ct. 1330. In *Geders*, the Supreme Court held the trial court abused its discretion by prohibiting the defendant from consulting his counsel "about anything" during an overnight recess between the defendant's direct and cross-examinations. *Id.* at 88, 91, 96 S.Ct. 1330.

However, not every restriction on a defendant's ability to communicate with his counsel violates his Sixth Amendment right to counsel. In *Perry*, the Supreme Court held it was not an abuse of discretion to prohibit a defendant from conferring with his counsel during a fifteen-minute recess between the defendant's direct and cross-examinations. 488 U.S. at 284–85, 109 S.Ct. 594. The Court reasoned that because a defendant "has no constitutional right to consult with his lawyer while he is testifying," the trial judge must have the power to "maintain the status quo during a brief recess in which there is a virtual certainty that any conversation between the witness and the lawyer would relate to the ongoing testimony." *Id.* at 281, 283–84, 109 S.Ct. 594. Noting the "thin" line between the facts at issue in *Perry* and those at issue in *Geders*, the *Perry* Court distinguished the fifteen-minute recess from the overnight recess in *Geders*, explaining:

> The interruption in *Geders* was of a different character because the normal consultation between attorney and client that occurs during an overnight recess would encompass matters that go beyond the content of the defendant's own testimony—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.... The fact that such discussions will inevitably include some consideration of the defendant's ongoing testimony does not compromise that basic right.

Id. at 284, 109 S.Ct. 594.

The Supreme Court, therefore, has recognized the trial court may prevent a testifying defendant from discussing his ongoing testimony with his counsel but may not prohibit the defendant and his counsel from discussing matters "that go beyond the content of the defendant's own testimony," such as trial strategy. *See id.* In this case, the trial court tried to thread the needle by advising Villarreal that he could talk to his attorneys during the overnight recess but instructing Villarreal's attorneys not to discuss "what you couldn't discuss with [Villarreal] if he was on the stand in front of the jury.... His testimony." The trial court asked counsel if his instructions "make sense to you," and Villarreal's two attorneys responded, respectively: "Sure, it does" and "We aren't going to talk to him about the facts that he testified about." Although one of Villarreal's attorneys lodged a Sixth Amendment objection "just for in the future," he reiterated: "I understand the Court's judgment."

In 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. While the issue appears to be one of first impression in Texas, courts in other states and the federal circuit courts of appeals have addressed it and reached opposing conclusions.

Several 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. *E.g., Beckham v. Commonwealth*, 248 S.W.3d 547, 553–54 (Ky. 2008); *State v. Conway*, 108 Ohio St.3d 214, 842 N.E.2d 996, 1021 (2006); *Webb v. State*, 663 A.2d 452, 459–60 (Del. 1995) (holding trial court properly instructed testifying defendant "not to discuss [his] testimony with anyone" but erred by failing to make it "unmistakably clear" that the defendant and his counsel could discuss "other matters"). In contrast, several federal circuit courts of appeals have held any restriction on communication with counsel during an overnight recess is impermissible. *E.g., United States v. Triumph Capital Grp., Inc.*, 487 F.3d 124, 132–33 (2d Cir. 2007); *United States v. Sandoval-Mendoza*, 472 F.3d 645, 651 (9th Cir. 2006); *United States v. Santos*, 201 F.3d 953, 965 (7th Cir. 2000); *United States v. Cobb*, 905 F.2d 784, 792 (4th Cir. 1990).

In the absence of any guidance from the court of criminal appeals or any of our sister courts in Texas, and based on the Supreme Court's decisions in *Geders* and *Perry*, we hold the trial court had discretion to limit Villarreal's right to confer with his attorneys during an overnight recess to topics other than his ongoing testimony. Both *Geders* and *Perry* acknowledge that "when a defendant becomes a witness, he has no constitutional right to consult with his lawyer while he is testifying." *Perry*, 488 U.S. at 281, 109 S.Ct. 594; *see also Geders*, 425 U.S. at 88, 96 S.Ct. 1330. Although *Geders* instructs that the

trial court had no discretion to prohibit Villarreal and his attorneys from discussing "anything," 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. Villarreal's attorneys repeatedly confirmed they understood the trial court's order. Accordingly, in this matter of first impression in Texas, we conclude the trial court did not abuse its discretion in limiting Villarreal's right to confer with his counsel during an overnight recess to matters other than his ongoing trial testimony. Villarreal's second issue is overruled.

Conclusion

Having overruled both of Villarreal's issues, we affirm the trial court's judgment.

DISSENTING OPINION

Dissenting Opinion by: Rebeca C. Martinez, Justice

I believe the majority applies the wrong standard of review to Villarreal's Sixth Amendment assistance of counsel claim. Because I believe the trial court's order effectively denied Villarreal his Sixth Amendment right to assistance of counsel by prohibiting him from conferring with his attorney during an overnight recess, I respectfully dissent.[1]

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[1] Because I find Villarreal's second issue dispositive, I do not address Villarreal's first issue. *See* Tex. R. App. P. 47.1.

RIGHT TO ASSISTANCE OF COUNSEL

Standard of Review and Applicable Law

Villarreal's Sixth Amendment assistance of counsel claim should properly be reviewed under a *de novo* standard of review. "In approaching a Sixth Amendment right-to-counsel question, as with many other constitutional issues, ... [a]n appellate court should afford 'almost total deference' to a trial court's determination of the historical facts and to its determination of mixed questions of law and fact that turn on an evaluation of credibility and demeanor. Mixed questions of law and fact that do not turn on credibility and demeanor are to be reviewed *de novo*." *See Manns v. State*, 122 S.W.3d 171, 178 (Tex. Crim. App. 2003) (internal footnotes and citations omitted). The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defense." U.S. Const. amend. VI. The Supreme Court has long recognized that a defendant's right to assistance 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 v. United States*, 425 U.S. 80, 88, 96 S.Ct. 1330, 47 L.Ed.2d 592 (1976). Thus, the Supreme Court has interpreted the right to assistance of counsel "to mean that there can be no restrictions upon the function of counsel in defending a criminal prosecution in accord with the traditions of the adversary factfinding process that has been constitutionalized in the Sixth and Fourteenth Amendments." *Herring v. New York*, 422 U.S. 853, 857–58, 95 S.Ct. 2550, 45 L.Ed.2d 593 (1975).

Claims that a defendant's Sixth Amendment right to assistance of counsel were violated by a trial court order restricting communication between the defendant and his attorney are governed by two seminal Supreme Court cases, *Geders v. United States*, 425 U.S. 80, 96 S.Ct. 1330, 47 L.Ed.2d 592 (1976), and *Perry v. Leeke*, 488 U.S. 272, 109 S.Ct. 594, 102 L.Ed.2d 624 (1989). In *Geders*, the Supreme Court held that "an order preventing petitioner from consulting his counsel 'about anything' during a 17-hour overnight recess between his direct-and cross-examination impinged upon his right to the assistance of counsel guaranteed by the Sixth Amendment." *Geders*, 425 U.S. at 91, 96 S.Ct. 1330. The Court reasoned that a trial court's "broad power" in limiting witnesses' communications before, during, and after their testimony in order to lessen the possibility of witness tampering is curtailed when the witness is the defendant because "[a] sequestration order affects a defendant in quite a different way from the way it affects a nonparty witness who presumably has no stake in the outcome of the trial." *Id.* at 87–88, 96 S.Ct. 1330. The Court explained that an overnight recess is often a crucial time for both the defendant and his counsel:

> It 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 over-

> night recess during trial gives the defendant a chance to discuss the significance of the day's events.

Id. at 88, 96 S.Ct. 1330. The Court noted that a trial court could employ other means to guard against improper witness influence, such as allowing the examination to conclude. The Court concluded:

> 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, 96 S.Ct. 1330 (citing *Brooks v. Tennessee*, 406 U.S. 605, 92 S.Ct. 1891, 32 L.Ed.2d 358 (1972)).

Thirteen years later, the Supreme Court explained its *Geders* precedent and further defined the contours of a defendant's Sixth Amendment right to assistance of counsel in *Perry v. Leeke*, 488 U.S. 272, 109 S.Ct. 594, 102 L.Ed.2d 624 (1989). In *Perry*, the Court held that an order barring a defendant from consulting with his attorney during a 15-minute afternoon break did *not* violate the defendant's Sixth Amendment right to assistance of counsel. *Id.* at 284–85, 109 S.Ct. 594. While the Court acknowledged that "the line between the facts of *Geders* and the facts of [*Perry*] is a thin one," the Court explained,

> The interruption in *Geders* was of a different character because the normal consultation be-

> tween attorney and client that occurs during an overnight recess would encompass matters that go beyond the content of the defendant's own testimony—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. It is the defendant's right to unrestricted access to his lawyer for advice on a variety of trial-related matters that is controlling in the context of a long recess. The fact that such discussions will *inevitably include some consideration of the defendant's ongoing testimony* does not compromise that basic right. But in a short recess in which it is appropriate to presume that nothing but the testimony will be discussed, the testifying defendant does not have a constitutional right to advice.

Id. at 284, 109 S.Ct. 594 (emphasis added) (citation omitted).

Sixth Amendment Discussion

Villarreal's trial commenced on June 19, 2018, when the State began its case-in-chief. On the third day of trial, the State offered three witnesses before resting. Defense counsel moved for a directed verdict, which the trial court denied.

Defense counsel then began the presentation of defendant's case-in-chief, and Villarreal took the stand to testify in his own defense. Villarreal's testimony consisted of his relationship with Estrada and the events leading up to Estrada's murder, including the verbal and physical altercation between

Villarreal and Estrada that allegedly precipitated the murder. As Villarreal was testifying to his actions immediately following the stabbing of Estrada, the trial court called a recess at 1:00 p.m. The recess would last until the following day at 1:00 p.m., at which time Villarreal's direct examination would continue. The majority's opinion considers the exchange between the trial court and Villarreal's counsel and interprets the instruction to counsel as a permissible exercise of "discretion to limit Villarreal's right to confer with his attorneys during an overnight recess to topics other than his ongoing testimony." The majority essentially agrees with the State's argument that the trial court's order struck a proper balance between the two competing concerns emphasized in both *Geders* and *Perry*: preserving the integrity of the defendant's testimony and protecting the defendant's Sixth Amendment right to assistance of counsel. Respectfully, this view lacks an objective perspective of the state of the case and the instruction's effect upon counsel and the accused.

As the record reflects, the trial court repeatedly ordered defense counsel to treat Villarreal as if he was still on the witness stand during the overnight recess. Defense counsel was not to discuss "what you couldn't discuss with him if he was on the stand in front of the [j]ury" and "to decide, if he asks you any questions ..., [ask yourself] 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." As the majority emphasizes, a defendant has no constitutional right to consult with his lawyer while he is testifying. As instructed, Villarreal's defense counsel were to treat Villarreal as if he was still on the wit-

ness stand in front of the jury, thus unable to consult with him at all during the overnight recess. When asked to confirm that counsel could not confer with their client, the trial court, supposing they may reach the sentencing phase the next day, permitted Villarreal's counsel to discuss "possible sentencing issues" with him during the overnight recess but immediately repeated his instruction, "I don't want you discussing what you couldn't discuss with him if he was on the stand in front of the jury." Understanding the trial court's instruction as a muzzle, counsel properly urged an objection under the Sixth Amendment. Considering the trial court's order in its entirety, Villarreal was deprived of counsel who could consult with him "about anything" or, at a minimum, about trial matters coming before the sentencing phase that did not concern "sentencing issues." *Geders*, 425 U.S. at 91, 96 S.Ct. 1330 ("holding an order preventing [appellant] from consulting [with] his counsel 'about anything' during a [24]-hour overnight recess" is unconstitutional and "impinge[s] upon [the appellant's] right to the assistance of counsel guaranteed by the Sixth Amendment").

This division, however, is impermissible during a 24-hour overnight recess, as *Perry* and *Geders* explained. *See id.* at 284, 109 S.Ct. 594. Here, where the witness is the defendant testifying *after* the State has rested and the 24-hour overnight recess is the last before the defense rests, the majority acknowledges but ignores what the Supreme Court in *Perry* recognized—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 281, 284, 109 S.Ct. 594 (emphasis added). "It is the defendant's right to *unrestricted access* to his lawyer for advice on a variety of trial-related matters that is *controlling in the context of a long recess*," regardless of "the fact that such discussions will *inevitably include some consideration of the defendant's ongoing testimony*." *See id.* at 284, 109 S.Ct. 594 (emphasis added). *Perry*'s reasoning was buttressed in *Geders* by specific examples of appropriate subjects of discussion that touch upon a defendant's testimony, including "obtain[ing] ... information made relevant by the day's testimony," such as the names and availability of other witnesses who may be able to corroborate the defendant's testimony or discussing the possibility of negotiating a plea bargain after a defendant's potentially damaging testimony. *Geders*, 425 U.S. at 88, 96 S.Ct. 1330; *see Perry*, 488 U.S. at 284, 109 S.Ct. 594. Consultation between a defense attorney and his client "cannot be neatly divided into discussions about 'testimony' and those about 'other' matters." *Mudd v. United States*, 798 F.2d 1509, 1512 (D.C. Cir. 1986). Unguided, the majority interprets the trial court's instructions as an attempt "to thread the needle" that permissibly left Villarreal free to consult with his attorneys on any matter not related to his ongoing testimony.

Here, 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. *See Perry*, 488 U.S. at 284, 109 S.Ct. 594. 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. *See United States v. Triumph Capital Grp., Inc.*, 487 F.3d 124, 133 (2d Cir. 2007) ("[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"). 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." *See Mudd*, 798 F.2d at 1512; *see also United States v. Santos*, 201 F.3d 953, 965 (7th Cir. 2000) (holding that prohibiting the defendant from discussing his ongoing testimony with his attorney during a substantial recess "would as a practical matter preclude the assistance of counsel across a range of legitimate legal and tactical questions").

Further, the trial court's order was not just a simple instruction prohibiting Villarreal from discussing his testimony with his attorney; rather, it was an ambiguous order where Villarreal's defense counsel, prior to advising Villarreal on his defensive strategy,

was left to question whether the matter to be discussed was "something that is going to be considered to be conferring with [Villarreal] on the witness stand while the jury is there or not." *Cf. Commonwealth v. Werner*, 206 Pa.Super. 498, 214 A.2d 276, 278 (1965) ("It is not the function of the trial judge to decide what a defendant's defense should be, nor when or how that defense should be planned, nor how much consultation between a defendant and his retained counsel is necessary to adequately cope with changing trial situations. That is the function of counsel."). Even if Villarreal's defense counsel understood the trial court's order as an attempt to sever discussions between Villarreal's testimony and other permissible vaguely-defined matters, such as "possible sentencing issues," "an order such as [this] one ... 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," particularly in light of the trial court's cautionary statement to Villarreal's counsel that "lawyers are under different rules than the defendants are." *See Mudd*, 798 F.2d at 1512. Defense counsel may have avoided further developing and exploring Villarreal's theory of self-defense with him during the overnight recess out of fear of violating the trial court's order were they to inevitably broach Villarreal's ongoing testimony. *See Geders*, 425 U.S. at 88, 96 S.Ct. 1330. The trial court's order may have had a similar "chilling effect" in preventing defense counsel from discussing with Villarreal the "possibility of negotiating a plea bargain" if they had been dissatisfied with Villarreal's testimony on direct. *See Perry*, 488 U.S. at 284, 109 S.Ct. 594; *Mudd*, 798 F.2d at 1512. Further, defense counsel may have

cautiously avoided reevaluating trial tactics and strategies with Villarreal because it would require some consideration of Villarreal's ongoing testimony. *See Perry*, 488 U.S. at 284, 109 S.Ct. 594; *United States v. Cobb*, 905 F.2d 784, 792 (4th Cir. 1990) ("To remove from [the defendant] the ability to discuss with his attorney any aspect of his ongoing testimony effectively eviscerate[s] his ability to discuss and plan trial strategy. 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?").

Notably, in this case, Villarreal's testimony was interrupted on direct examination after the State had rested, and the trial court's instructions were made *sua sponte*. Unlike in *Geders*, the government did not request an instruction pertaining to communications with the witness during the 24-hour long recess, and the prosecutor expressed no desire to cross-examine Villarreal without the intervention of counsel due to a risk of improper 'coaching.' The trial court was not asked to resolve any conflict between Villarreal's right to counsel and the prosecutor's desire to cross-examine an uninfluenced witness on cross-examination. *See Geders*, 425 U.S. at 82, 96 S.Ct. 1330. The concerns expressed in both *Geders* and *Perry* are not present here; the instruction is thus even less justified than the order deemed impermissible in *Geders*. *See Geders*, 425 U.S. at 91, 96 S.Ct. 1330 (holding the "prosecutor's desire to cross-examine the defendant without the intervention of counsel" to prevent "the risk of improper 'coaching' " must yield to the "defendant's right to consult with his attorney during a long overnight recess in the

trial"). Even assuming a perceived risk by the trial court, "the conflict must, under the Sixth Amendment, be resolved in favor of the right to the assistance and guidance of counsel." *See Geders*, 425 U.S. at 91, 96 S.Ct. 1330). This conclusion is consistent with decisions by all of the federal circuit courts that have considered the issue—the Second Circuit, the Ninth Circuit, the Seventh Circuit, the Fourth Circuit, and the District of Columbia Circuit. *See Triumph*, 487 F.3d at 132 ("[A]ll 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."); *United States v. Sandoval-Mendoza*, 472 F.3d 645, 651 (9th Cir. 2006); *Santos*, 201 F.3d at 965; *Cobb*, 905 F.2d at 792; *Mudd*, 798 F.2d at 1510.

For these reasons, I believe 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.

Alternatively, Abuse of Discretion Review

Alternatively, I would also conclude that the trial court abused its discretion by prohibiting Villarreal from conferring with his attorney during the overnight recess, particularly where the trial court acts *sua sponte* and without the State indicating a desire to cross-examine an uninfluenced witness because of a perceived risk of 'coaching' by defense counsel. A trial court abuses its discretion by acting without reference to guiding rules and principles or by acting arbitrarily or unreasonably. *Burks v. State*, 227

S.W.3d 138, 145 (Tex. App.—Houston [1st Dist.] 2006, pet. ref'd) (citing *Lyles v. State*, 850 S.W.2d 497, 502 (Tex. Crim. App. 1993)). As the record reflects, the trial court did not merely prohibit Villarreal from discussing his testimony with his attorney, but repeatedly ordered defense counsel to treat Villarreal as if he was still on the witness stand during the overnight recess. Because a testifying defendant does not have a constitutional right to advice from counsel while on the stand, the trial court's instructions effectively divested Villarreal of his right to unrestricted consultation with counsel during the long overnight recess. The trial court essentially equated the long, overnight recess with a short, few-minute break. The trial court was thus acting without reference to the guiding constitutional principles set out in *Geders* and *Perry* by denying Villarreal of his "right to unrestricted access to his lawyer for advice" and abused its discretion by depriving Villarreal of his Sixth Amendment right to assistance of counsel during the overnight recess. *See Geders*, 425 U.S. at 91, 96 S.Ct. 1330; *Perry*, 488 U.S. at 284, 109 S.Ct. 594.

Even assuming, as the majority does, that the trial court "tried to thread the needle" by prohibiting only communications concerning Villarreal's ongoing testimony, the trial court did not have the discretion to impose even this tailored limitation on Villarreal and his counsel because their discussions during the 24-hour long overnight recess would "inevitably include some consideration of the defendant's ongoing testimony." *See Perry*, 488 U.S. at 284, 109 S.Ct. 594. While it is entirely "appropriate to presume that nothing but the testimony will be discussed" in a

short recess, an overnight recess is "of a different character" and is not subject to the same presumption. *Id.* Instead, "[i]t is the defendant's right to *unrestricted* access to his lawyer ... that is controlling in the context of a long recess." *Id.* (emphasis added). Because this was a recess spanning 24-hours, much longer than the 17-hour overnight recess in *Geders*, the trial court had no discretion to take away Villarreal's right to "unrestricted access" to his lawyer even if such discussions would involve ongoing testimony, particularly where his own testimony amounts to his whole defense. *See id.*; *cf. Werner*, 214 A.2d at 278 ("The right to the assistance of ... counsel is not a right which exists only from 9 a.m. to 4 p.m. and only in the courtroom and only concerning certain aspects of the case. The defendant had the right to discuss the entire case, including his own testimony, with his attorney.... Discussion of this testimony might have been very important in determining the future course of his defense.").

For these reasons, I would also find, in the alternative, that the trial court acted without reference to the constitutional principles set out in *Geders* and *Perry*, and thus abused its discretion by prohibiting counsel to provide unrestricted counsel to Villarreal during the overnight recess.

Harm Discussion

Having found error under an abuse of discretion standard, I must next consider whether the error is "structural" and thus reversible without a showing of harm, or whether the error must be subjected to a harm analysis because it is not "structural." *See Johnson v. State*, 169 S.W.3d 223, 235–36 (Tex.

Crim. App. 2005). A structural error is a "defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself." *Johnson v. United States*, 520 U.S. 461, 468, 117 S.Ct. 1544, 137 L.Ed.2d 718 (1997) (quoting *Arizona v. Fulminante*, 499 U.S. 279, 310, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991)). Structural errors "give rise to automatic reversal, with no harm analysis whatsoever." *Johnson*, 169 S.W.3d at 232. We may "not review and analyze a claim of error as structural error unless the United States Supreme Court has defined the error as structural...." *Burks*, 227 S.W.3d at 144 (citing *Gray v State*, 159 S.W.3d 95, 97 (Tex. Crim. App. 2005)).

> In *Johnson v. United States*, the Supreme Court set forth its most recent list of structural errors: the total deprivation of counsel at trial, lack of an impartial trial judge, the unlawful exclusion of members of the defendant's race from a grand jury, the denial of the right to self-representation at trial, the denial of the right to a public trial, and an instruction that erroneously lowers the burden of proof for conviction below the "beyond a reasonable doubt" standard.

Johnson, 169 S.W.3d at 235 (quoting *Johnson*, 520 U.S. at 468–69, 117 S.Ct. 1544).

"All structural errors must be founded on a violation of a federal constitutional right, but not all violations of federal constitutional rights amount to structural errors." *Schmutz v. State*, 440 S.W.3d 29, 35 (Tex. Crim. App. 2014). In fact, "[m]ost constitutional errors are not 'structural.' " *Mendez v. State*, 138 S.W.3d 334, 340 (Tex. Crim. App. 2004). "For

federal constitutional error that is not structural, the applicable harm analysis requires the appellate court to reverse unless it determines beyond a reasonable doubt that the error did not contribute to the defendant's conviction or punishment." *Lake v. State*, 532 S.W.3d 408, 411 (Tex. Crim. App. 2017) (citing Tex. R. App. P. 44.2(a)).

Here, the State contends that Villarreal did not suffer structural error, that is, he did not suffer a total deprivation of counsel, and thus a harm analysis is required. I disagree. The Supreme Court likened a *Geders* violation to the "actual or constructive denial of the assistance of counsel *altogether*" and:

> simply reversed the defendant's conviction without pausing to consider the extent of the actual prejudice, if any, that resulted from the defendant's denial of access to his lawyer during the overnight recess. That reversal was consistent with the view we have often expressed concerning the fundamental importance of the criminal defendant's constitutional right to be represented by counsel.

Perry, 488 U.S. at 279–80, 109 S.Ct. 594 (emphasis added) (citation omitted). Moreover, in *United States v. Cronic*, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984), the Supreme Court cited *Geders* as an example of where it had "found constitutional error without any showing of prejudice when counsel was either totally absent, or prevented from assisting the accused during a critical stage of the proceeding." *Id.* at 659 n.25, 104 S.Ct. 2039; *see also Johnson*, 169 S.W.3d at 231 (likening the "denial of counsel at a critical stage" to "the deprivation of a trial and the deprivation of an appeal" and reasoning both errors

"would clearly be reversible without a showing of harm").

Additionally, having already found that Villarreal was denied his Sixth Amendment right to assistance of counsel, "it would be anomalous if defendant was also forced to relinquish the right to have his discussions with his lawyer kept confidential" because "[t]he only way that a defendant could show prejudice [in this context] would be to present evidence of what he and counsel discussed, what they were prevented from discussing, and how the order altered the preparation of his defense" and would thus improperly infringe upon the defendant's attorney-client privilege. *See Mudd*, 798 F.2d at 1513.

Here, the trial court's order, much like the order in *Geders*, prevented Villarreal from consulting with his lawyer during a 24-hour overnight recess. As the Supreme Court held in *Geders*, an order that prohibits the appellant from consulting with his counsel during a 24-hour overnight recess is unconstitutional and "impinge[s] upon [the appellant's] right to the assistance of counsel guaranteed by the Sixth Amendment." *See Geders*, 425 U.S. at 91, 96 S.Ct. 1330. Moreover, the trial court's order effectively denied Villarreal the constitutional right to discuss trial-related matters with his attorney and it prohibited Villarreal and his counsel from further developing Villarreal's defense during the overnight recess; thus, Villarreal was denied the "guiding hand of counsel at every step in the proceedings against him." *See id.* at 88–89, 96 S.Ct. 1330 (quoting *Powell v. Alabama*, 287 U.S. 45, 68–69, 53 S.Ct. 55, 77 L.Ed. 158 (1932)). Because the trial court's order, like the order held impermissible in *Geders*, con-

structively denied Villarreal "assistance of counsel altogether," the error is "structural" and thus reversible without a showing of harm or prejudice. *See Perry*, 488 U.S. at 280, 109 S.Ct. 594.

Alternatively, if the trial court's error were subjected to a harm analysis, I cannot say "beyond a reasonable doubt that the error did not contribute to the conviction or punishment." *See* Tex. R. App. P. 44.2(a). Thus, in the alternative, reversal is also required under Rule 44.2(a). Under Texas Rule of Appellate Procedure 44.2(a), a non-structural federal constitutional error must be reversed "unless the court determines beyond a reasonable doubt that the error did not contribute to [Villarreal's] conviction or punishment." *Id.* Under this standard, the State has the burden to prove the error is harmless beyond a reasonable doubt. *Davis v. State*, 195 S.W.3d 311, 316–17 (Tex. App.—Houston [14th Dist.] 2006, no pet.); *see Chapman v. California*, 386 U.S. 18, 26, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967) (finding, under the "harmless-constitutional-error" test, that the State did not demonstrate to the Court, beyond a reasonable doubt, that the error did not contribute to petitioner's conviction). "Unless the error could not possibly have contributed to the conviction or punishment, we must reverse." *Davis*, 195 S.W.3d at 316–17 (citing *Wall v. State*, 184 S.W.3d 730, 746 (Tex. Crim. App. 2006)). A reviewing court may consider "the source and nature of the error, the extent to which the State emphasized it, its probable collateral implications, [and] the weight the jury would probably give it," though these factors are neither exhaustive or dispositive. *Id.* (citing *Harris v. State*, 790 S.W.2d 568, 587 (Tex. Crim. App. 1989)). "If, af-

ter such analysis, the harm of the error simply cannot be assessed, then 'the error will not be proven harmless beyond a reasonable doubt,' and reversal is required." *Morris v State*, 554 S.W.3d 98, 124 (Tex. App.—El Paso 2018, pet. ref'd) (quoting *Lake*, 532 S.W.3d at 411).

Here, the State argues "if depriving a defendant of his ability to discuss his testimony with counsel during a short break is not even error ..., then it is hard to see how the restriction is not 'obviously' harmless under the circumstances." However, an overnight recess is of an entirely "different character" and while it is "appropriate to presume that nothing but the testimony will be discussed" in a short recess, in the context of a long recess, "[i]t is the defendant's right to unrestricted access to his lawyer for advice ... that is controlling," even if "such discussions will inevitably include some consideration of the defendant's ongoing testimony." *See Perry*, 488 U.S. at 284, 109 S.Ct. 594. Moreover, "[t]he only way that a defendant could show prejudice [in this context] would be to present evidence of what he and counsel discussed, what they were prevented from discussing, and how the order altered the preparation of his defense," which are private discussions reasonably protected by the attorney-client privilege. *See Mudd*, 798 F.2d at 1513. Further, given the ambiguous nature of the trial court's order to Villarreal,[2] we cannot say beyond a reasonable doubt that Villarreal understood he could still, in fact, communicate with

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[2] For example, the trial court first directed its order to Villarreal: "And so I'd like to tell you [Villarreal] that you can't confer with your attorney but [at] the same time you have a [Sixth] Amendment right to talk to your attorney."

his attorneys, nor can we determine whether Villarreal refrained from consulting with his attorneys for fear of violating the trial court's order. *Cf. Geders*, 425 U.S. at 88–89, 96 S.Ct. 1330 ("The right to be heard would be, in many cases, of little avail if [the defendant] did not comprehend the right to be heard by counsel.... [A defendant] is unfamiliar with the rules of evidence.... He lacks both the skill and knowledge adequately to prepare his defense, even though he [may] have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him." (quoting *Powell*, 287 U.S. at 68–69, 53 S.Ct. 55)). Certainly, counsel expressed such a concern. Accordingly, I would conclude, in the alternative, that if the trial court's error were subjected to a harm analysis, I cannot say beyond a reasonable doubt that the error did not contribute to the conviction or punishment.

For the reasons stated above, I respectfully dissent.