No. 24-557

IN THE
Supreme Court of the United States

DAVID ASA VILLARREAL,
Petitioner,

v.

TEXAS,
Respondent.

On Writ of Certiorari to the Court of Criminal Appeals of Texas

BRIEF OF NATIONAL ASSOCIATION OF CRIMINAL DEFENSE ATTORNEYS AS AMICUS CURIAE ON BEHALF OF PETITIONER

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QUESTION PRESENTED

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

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INTEREST OF AMICUS CURIAE

The National Association of Criminal Defense Lawyers (NACDL) is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. NACDL was founded in 1958 and has a nationwide membership of many thousands of direct members and up to 40,000 attorneys in affiliate organizations. NACDL is dedicated to advancing the proper, efficient, and fair administration of justice. NACDL files many amicus briefs each year in this Court and other federal and state courts, seeking to assist in cases presenting issues important to criminal defendants, criminal defense lawyers, and the criminal system.[1]

NACDL also has a particular interest in this case, as it directly affects the ability of criminal defense lawyers to advise their clients at trial, to make informed strategic decisions about the defense, and to protect privileged attorney-client communications.

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[1] Pursuant to this Court's Rule 37.6, counsel for amicus curiae state that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than amicus and its counsel made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

A trial court's order prohibiting an accused and his counsel from "discussing" the accused's testimony during an overnight recess is equivalent to a *Geders* violation and requires automatic reversal.

First, any meaningful overnight consultation between an accused and his lawyer during the accused's testimony will include discussion of that testimony. Indeed, this Court in *Geders v. United States*, 425 U.S. 80 (1976), and *Perry v. Leeke*, 488 U.S. 272 (1989), explicitly acknowledged that an overnight recess in testimony will inevitably involve discussion of that testimony. The defendant's testimony is relevant to a host of critical trial issues, such as whether to plead guilty, whether to pursue additional investigation, decisions about the rest of the defense case, and how to litigate jury instructions and handle upcoming closing arguments. Accordingly, several lower courts have recognized prohibitions on discussing testimony during an overnight recess as a *Geders* violation. *See, e.g.*, *Mudd v. United States*, 798 F.2d 1509, 1515 (D.C. Cir. 1986)); *id.* (Scalia, J., concurring) ("I therefore join in the majority's holdings that a prohibition on attorney-defendant discussion during substantial recesses, even if limited to discussion of testimony, violates the sixth amendment and that . . . it constitutes *per se* reversible error.").

Moreover, even if a prohibition narrowly targeted at "discussion of testimony" were theoretically both possible and compatible with *Geders*, such a prohibition is impossible in practice and therefore the equivalent of the order in *Geders* itself. No lawyer in the throes of trial can do his constitutional duty if burdened with distinguishing between discussions of "testimony" and "non-testimonial matters" for purposes of complying

with such an order. Of course, lawyers are already expected to avoid brazen attempts to improperly influence a witness, which are banned by ethical rules. But nearly every conversation a lawyer might have in an overnight recess during the defendant's testimony might arguably relate, even if indirectly, to that testimony. If preoccupied by trying to comply with such a confusing mandate, at the risk of his bar card, a lawyer will be chilled from having the type of robust discussions with his client needed to satisfy the Sixth Amendment.

To the extent a trial court wishes to further control counsel's ability to "coach" a defendant, it can – and must – do so without violating the Sixth Amendment. The trial court is always free to limit breaks in a defendant's testimony to shorter periods; to ensure that cross-examination follows immediately after direct; and to allow the prosecution latitude to cross-examine the defendant with any evidence of coaching.

In turn, a *Geders* violation interfering with attorney-client communications during a significant break in the defendant's testimony is structural error. This Court said as much implicitly in *Geders*, and explicitly in *Perry*. But even if this Court had never spoken on the matter, no other approach would be possible. The inability to meaningfully strategize with one's attorney about key issues on the eve of what may be the last and most important day of trial has a prejudicial effect that is exceedingly hard to quantify. It affects numerous aspects of the trial, and potentially even whether the trial will continue at all. And a prejudice analysis in this context would involve invasive appellate probing of privileged attorney-client communications. Tellingly, the few times this Court or lower courts have applied harmless error analysis to a claim of denial of counsel at a critical stage have been (1) where the

court found no error to begin with because the stage was not "critical"; (2) where a would-be *Geders* error involved a short break with an immediate subsequent chance for consultation; or (3) where the error related exclusively to one identifiable piece of evidence at trial. Here, as in *Geders* itself, the error is not capable of being cabined in such a way; rather, it went to the heart of counsel's ability to assist the accused at trial.

ARGUMENT

I. AN ORDER PROHIBITING COUNSEL FROM DISCUSSING A DEFENDANT'S TESTIMONY DURING A SIGNIFICANT BREAK IN TRIAL IS FUNDAMENTALLY INCOMPATIBLE WITH THE SIXTH AMENDMENT RIGHT TO COUNSEL.

The trial court's order in this case is incompatible with the Sixth Amendment in two respects. First, counsel cannot meaningfully advise a criminal defendant about the case during a significant break in trial without being able to discuss the defendant's testimony. Second, because of the inherent difficulty in distinguishing between matters related and unrelated to the defendant's testimony, such an order – even if its purportedly narrow focus on testimony were somehow justified in the abstract – is unworkable and has an impermissible chilling effect on attorney-client communications during a critical stage in trial.

A. Counsel cannot meaningfully assist a criminal defendant without being able to discuss the defendant's testimony during an overnight recess in that testimony.

This Court in *Geders v. United States*, 425 U.S. 80 (1976), recognized that a defendant must be able to speak with counsel about the case during an overnight recess, even about matters related to the defendant's testimony. While the unconstitutional order in *Geders* broadly prohibited all attorney-client communications during the recess, this Court noted that those communications will often involve discussing the testimony itself. For example, a 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." 425 U.S. at 88. The Court also mentioned the "important ethical distinction between *discussing testimony* and seeking improperly to influence it," 425 U.S. at 90 n.3 (emphasis added), indicating that the former is entirely proper.

In *Perry v. Leeke*, 488 U.S. 272 (1989), this Court again acknowledged the inevitability that attorney-client communications during a significant break in a defendant's testimony will involve discussing a client's testimony. The Court reaffirmed an accused's "right to unrestricted access to his lawyer for advice on a variety of trial-related matters" during an overnight recess in his testimony even while noting that these "discussions will inevitably include some consideration of the defendant's ongoing testimony." *Id.* at 284. In contrast, as the *Perry* Court eventually held, a mere fifteen-minute break in testimony is not a critical time for counsel and client to discuss the case as a whole or how the defendant's testimony affects it. *Id.* at 285.

Beyond the examples given in *Geders* and *Perry*, there are a host of other ways in which a criminal defendant's ability to meaningfully discuss the case in general with his lawyer during an overnight recess in his testimony will require some direct or indirect discussion of that testimony, including:

- Facilitating compliance with court orders by reminding the defendant not to discuss excluded or otherwise inadmissible evidence;
- Discussing strategy related to requesting jury instructions made newly relevant by the defendant's testimony and likely to be given shortly after the defendant's testimony;
- Warning the defendant about potential questions that could raise self-incrimination concerns;
- Considering whether to seek a mistrial based on something that happened in the courtroom related to the testimony (e.g. an elicited remark, a jury note related to the testimony);
- Discussing what to argue or emphasize during closing argument, based on the content and strength of the defendant's testimony;
- Contemplating the need to subpoena new witnesses or obtain physical or documentary evidence based on new leads from a defendant's direct or cross-examination;
- Evaluating the strength or weakness of the testimony in the context of deciding whether to plead guilty before the end of trial;
- Assessing whether the defendant's testimony established a strong alibi defense and, thus, whether to abandon plans to call an alternative alibi witness whose credibility might be attacked;

- Correcting what would otherwise be inaccurate testimony (whether inadvertent or otherwise) so the attorney does not suborn false testimony;

- Determining the pros and cons of raising competence, if the defendant's testimony newly suggests he may not be competent to proceed with the rest of trial;

- Offering basic information about what will happen the next day in terms of the completion of direct examination and the nature and purpose of cross- and redirect-examination;

- Discussing the client's concerns about whether his testimony will subject him to being targeted or killed and what to do about it;

- Explaining legal concepts that arose during testimony, such as a hearsay objection, if the client asks;

- Informing the defendant, based on new investigation, that an alleged felony on his record is actually a misdemeanor that cannot be used to impeach him; or

- Deciding whether the defendant's testimony went sufficiently well before the jury that the defense should decline to call other witnesses who might be discredited.

None of these critically important topics would be permissible attorney-client communications under the trial court's order in this case.

Not surprisingly, then, several lower courts have recognized that limitations on discussing testimony violate *Geders*. *See, e.g.*, *United States v. Sandoval–Mendoza*, 472 F.3d 645, 651 (9th Cir. 2006) ("[I]t 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 . . . without discussing the testimony itself."); *United States v. Santos,* 201 F.3d 953, 965 (7th Cir. 2000) (noting that a prohibition on discussion of testimony "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 [an accused] the ability to discuss with his attorney any aspect of his ongoing testimony [would] effectively eviscerate[] his ability to discuss and plan trial strategy."); *Mudd*, 798 F.2d at 1512 ("The only logical implication [of *Geders*] is that the Court also meant to forbid prohibitions on attorney/defendant discussions of the defendant's testimony during a substantial recess, not just blanket prohibitions during such a recess."); *id.* at 1515 (Scalia., J., concurring) (agreeing with Court's holding on this point); *Petty v. United States*, 317 A.3d 351, 352-53 (D.C. 2024) (holding that prohibition on an attorney-defendant discussion of testimony during overnight recess required reversal); *id.* at 356 (quoting *Martin v. United States*, 991 A.2d 791, 795 (D.C. 2010)) (noting that the "majority of the federal circuits agree that 'under *Perry* and *Geders*' a trial 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'").

Nor will the prosecution be prejudiced by allowing unfettered communications between the accused and his counsel during an overnight recess in the accused's testimony. While it is always possible that an attorney will attempt to "coach" or improperly influence a defendant during a recess in testimony, the ethical rules themselves already prohibit such witness coaching,

without the need for a court order that broadly prohibits discussions of testimony between an attorney and client. *See Geders*, 425 U.S. at 90 n.3 (citing ethical rules barring an attorney's improper influencing of a client's testimony).

Moreover, because the possibility of coaching witnesses exists from the very beginning of trial, there is little additional truth-enhancing value in an overbroad prohibition on discussing testimony during a particular overnight recess. *See Geders*, 425 U.S. at 88 (noting that a rule prohibiting discussion of testimony "accomplishes less when it is applied to the defendant," given that he "has the opportunity to discuss his testimony with his attorney up to the time he takes the witness stand."). *Cf. Perry*, 488 U.S. at 282 (noting that the "poise and sense of strategy" that a witness regains after being able to take a break and consult with their attorney would happen during an overnight recess whether or not the attorney "coached" the witness).

Instead of hampering attorney-client communications during one of the most critical moments in trial, trial courts should instead use "other ways to deal with the problem" of client coaching. *Geders*, 425 U.S. at 89. First, the prosecution "may cross-examine a defendant as to the extent of any 'coaching' during a recess," and "exploit" any inculpatory answers "in closing argument." *Id.* at 89-90. This remedy is similar to that approved by the Court to account for the defendant's ability to sit through other witnesses' testimony before testifying himself. *See Brooks v. Tennessee*, 406 U.S. 605, 613 (1972) (holding that the rule on sequestering witnesses cannot be enforced against a criminal defendant); *Portuondo v. Agard*, 529 U.S. 61, 75 (2000) (holding that the prosecution may comment on the defendant's ability to avoid sequestration). Second, the trial judge, "if he doubts that defense counsel will observe

the ethical limits on guiding witnesses, may direct that the examination of the witness continue without interruption until completed." *Id.* at 90. Third, the trial judge is always free to "arrange the sequence of testimony so that direct- and cross-examination of a witness will be completed without interruption." *Id.*

Ultimately, of course, "to the extent that conflict remains between" the right to consult one's attorney and the prosecution's interest in minimizing "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 (citing *Brooks*, 406 U.S. 605). But in any event, the resolution of any perceived concerns about improper influence cannot be to prohibit an accused from discussing his testimony with his attorney during an overnight break in that testimony.

B. Any attempt to distinguish discussions of testimony from discussions of the case in general, in an order ostensibly prohibiting only the former, is inherently unworkable.

Even if the Sixth Amendment were theoretically compatible with an order prohibiting only discussions of a client's testimony and not discussions about the case more broadly, any attempt to tailor a prohibition to apply only to the former and not the latter is unworkable in practice. Because of the inherent difficulty in determining which communications will be deemed "testimony" related, a lawyer cannot zealously advocate for the accused if preoccupied with navigating such a confusing prohibition.

Faced with potential sanctions for violating an order like the one here, an attorney may well be discouraged

from having critical conversations with the accused where the testimonial/non-testimonial line is unclear. For example, nearly all the examples listed above of communications involving "discussion of testimony" could also be deemed discussions of trial strategy. But if they are both, do they violate the order? More precisely, will a given trial judge decide that they violate the order? While even an appellate court in the light of day might have difficulty determining whether some attorney-client communications are related to the defendant's testimony, an attorney in the throes of trial would have even more difficulty deciding what does and does not comply with an order like the one here.

To further visualize how difficult it would be for a defendant and his counsel to navigate such an order, one could imagine the following types of back-and-forth during an overnight recess:

Defendant: "I'm really nervous and afraid. Testifying is terrifying. Do you think I'm going to be okay?"

Attorney: "I'm sorry; I'm not sure if we can discuss that."

Defendant: "How much longer will my testimony last?"

Attorney: "I'm sorry; I'm not sure if we can discuss that."

Defendant: "Well, can you at least remind me what a cross-examination and redirect examination are, and what I can expect?"

Attorney: "I'm sorry; I'm not sure if we can discuss that."

Defendant: "Do you think my testimony today might lead me to be targeted or even killed? Can I seek protection?"

Attorney: "I'm sorry; I'm not sure if we can discuss that."

Defendant: "What did the prosecutor mean by 'hearsay' when he objected to me telling the jury what I told the police that night?"

Attorney: "I'm sorry; I'm not sure if we can discuss that."

Defendant: "That supposed felony conviction you said they might bring up – have you figured out whether it's actually a misdemeanor?"

Attorney: "I'm sorry; I'm not sure if we can discuss that."

Defendant: "Do you think the jury will believe my testimony over the informant? If not, do you think we need to put on more of a defense case tomorrow?"

Attorney: "I'm sorry; I'm not sure if we can discuss that."

Defendant: "Can you track down that other alibi witness I mentioned today? His address is –"

Attorney: "I'm sorry; I'm not sure if we can discuss that."

Similarly, one could imagine a defense attorney under the cloud of such an order having to hesitate before comforting a weeping client who is worried the jury will not believe his truthful testimony; before explaining to a juvenile client that his mother will be able to watch the rest of his testimony in the morning, to calm him down; or before preparing the client to hear the judge give the standard jury instruction on a defendant's testimony. There are as many other examples as there are criminally accused clients, each of whom have different needs, issues, and questions.

By forcing both counsel and the accused to second-guess their every utterance during what may be one of the most important conversations in the client's entire life, such an order jeopardizes counsel's basic ability to do his constitutional duty. Awkwardly hamstrung in this fashion, counsel cannot meaningfully assist a criminal defendant with his defense.

This Court recognized this reality in *Geders* itself. From the beginning, the trial court in *Geders* "expressed some doubt" that Geders' attorney "would be able to" confine his discussion to matters other than the imminent cross-examination. 425 U.S. at 82. This Court nonetheless determined that the attorney required unfettered access to the accused during the overnight recess and that any concerns about coaching be resolved in favor of access to counsel. *Id.* at 91. If the *Geders* Court had deemed a more narrowly tailored prohibition on discussing testimony to be workable and appropriate, it could have easily suggested that as an obvious solution. Instead, the Court appears to have understood that the only tenable option is to allow unfettered attorney-client communication and deal with "coaching" concerns through the tools of the adversarial system.[2]

Courts construing *Geders* have also acknowledged the difficulty in determining whether discussions are related to testimony, and the chilling effect this uncertainty could have on lawyers trying to be effective advocates. *See, e.g., Santos*, 201 F.3d 953, 966 (7th Cir.

[2] In contrast, as the *Perry* Court noted, there is a "virtual certainty" that any attorney-client communication in a brief fifteen-minute recess during a client's testimony will relate only to the client's testimony, rather than the case as a whole. 488 U.S. at 283. Thus, the prohibition in *Perry* did not present the same unworkable dilemma as the one here.

2000) (describing a similar order as "confusing marching orders"); *Petty*, 317 A.3d at 353 (striking down a similar prohibition on discussing testimony during an overnight recess and noting that counsel said he was "chilled as to what [he] could discuss" with his client under the order); *Martin,* 991 A.2d at 794 n.13 (citing cases explaining why "[c]onsultations between lawyers and clients cannot be neatly divided into discussions about 'testimony' and those about 'other' matters" (internal quotation marks omitted)); *Perry*, 488 U.S. at 295 n.8 (Marshall, J., dissenting) (noting that if "direct examination of the defendant inadvertently elicits damaging information that can effectively be neutralized on redirect only if the defendant has the opportunity to explain his direct testimony to counsel," counsel might wonder whether "the ensuing attorney-defendant discussion" is "about trial strategy" or "about upcoming testimony"); *id.* (predicting "a chilling effect on cautious attorneys, who might avoid giving advice on nontestimonial matters for fear of violating [an order barring discussion of testimony]") (quoting *Mudd*, 798 F.2d at 1512).

II. A *GEDERS* VIOLATION DURING A SIGNIFICANT BREAK IN THE DEFENDANT'S TESTIMONY IS STRUCTURAL ERROR.

This Court, and most lower courts to have addressed the issue, have repeatedly stated that *Geders* violations during an overnight recess require an automatic retrial. Indeed, no other approach would make sense, given the inherently diffuse and indeterminate effects of such a violation, as well as the privileged nature of attorney-client communications. Moreover, unlike trial errors caused by counsel's mistakes, a prosecutor's overreach, or a trial court's attempt to resolve difficult novel legal issues as best it can, a *Geders* error

like the one here involve an affirmative step by a judge to interfere with attorney-client communications and is entirely within the trial court's control to avoid. In this sense, *Geders* errors are analogous to faulty reasonable doubt instructions, which – not coincidentally – are also structural errors.

This Court has divided constitutional errors into two classes: (1) "trial errors" that happen "during presentation of the case to the jury" and whose effect can "be quantitatively assessed" under the harmlessness standard of *Chapman v. California*, 386 U.S. 18 (1967); and (2) "structural defects," which "defy analysis" under *Chapman* because they involve "consequences that are necessarily unquantifiable and indeterminate." *United States v. Gonzalez-Lopez*, 548 U.S. 140, 149-50 (2006) (quoting *Sullivan v. Louisiana*, 508 U.S. 275, 282 (1993)). Trial errors thus involve constitutional violations that at most affect a particular witness, piece of evidence, or element. *See, e.g.*, *Arizona v. Fulminante*, 499 U.S. 279, 295 (1991) (subjecting erroneous admission of coerced confession to *Chapman* test); *Neder v. United States*, 527 U.S. 1, 7-9 (1999) (applying *Chapman* to a failure to instruct on a single element supported by overwhelming evidence of guilt). In contrast, this Court has treated as structural those errors affecting multiple aspects of the case: the denial of the right to counsel, self-representation, or public trial, as well as denial of the jury right through a faulty reasonable doubt instruction. *Gonzalez-Lopez*, 548 U.S. at 150 (citations omitted).

Like other structural errors, a *Geders* violation during an overnight recess in a defendant's testimony is not specific to a particular witness, piece of evidence, or element. Rather, a prohibition on attorney-client discussions of a defendant's testimony during that testimony potentially affects not only the presentation of

the defendant's testimony but a host of other aspects of trial. As explained in Part I, these aspects include the decision whether to plead guilty, given how the testimony came out; the need for protection from retaliation; whether to request a mistrial; discussions of strategy related to jury instructions and closing argument; the decision whether to subpoena additional documents or objects or call additional defense witnesses; and the raising of competence as an issue.

In turn, the prejudicial effect of denying the accused a chance to discuss these matters with his lawyer at a critical point in trial is too hard to quantify. As this Court explained in holding that denial of retained counsel of one's choice is structural error:

> Different attorneys will pursue different strategies with regard to investigation and discovery, development of the theory of defense, selection of the jury, presentation of the witnesses, and style of witness examination and jury argument. And the choice of attorney will affect whether and on what terms the defendant cooperates with the prosecution, plea bargains, or decides instead to go to trial. In light of these myriad aspects of representation, the erroneous denial of counsel bears directly on the "framework within which the trial proceeds," *Fulminante*, *supra*, at 310—or indeed on whether it proceeds at all.

Gonzalez-Lopez, 548 U.S. at 150. In the same respect, a prohibition on discussing issues that go to the heart of the defense strategy at a key point in trial also implicates "myriad aspects of representation." Indeed, being able to discuss a defendant's testimony can be critical to deciding whether to plead guilty, i.e., "whether [the trial] proceeds at all." *Id.* Thus, applying

Chapman "in such a context would be a speculative inquiry into what might have occurred in an alternate universe." *Id.*

Accordingly, this Court in both *Geders* and *Perry* treated a *Geders* violation involving an overnight recess during a defendant's testimony as requiring automatic reversal. The *Geders* Court reversed based solely on the finding of a right-to-counsel violation, without any inquiry into prejudice, 425 U.S. at 91, even though the government's brief urged the Court to affirm on this alternative ground. *See* Brief for United States at 12-24, *Geders v. United States* (1976) (No. 74-5968). Nor did the *Geders* majority take issue with or otherwise comment on Justices Marshall's characterization in his concurrence that "the Court holds" that a defendant establishing a *Geders* violation "need not make a preliminary showing of prejudice." *Id.* at 92 (Marshall, J., concurring).

This Court in *Perry* went even further, explicitly rejecting a prejudice analysis for the type of error in *Geders*. It first noted that the *Geders* Court's automatic reversal was both proper and "consistent with" the Court's right-to-counsel precedents. 488 U.S. at 279. It next explained the difference between actual ineffectiveness claims, which are subject to prejudice analysis, and actual or constructive denials of counsel at critical stages of the proceedings, which are not. *Id.* at 280 (noting that a *Geders* violation is the latter, not the former). The *Perry* Court ultimately concluded that it "c[ould not] accept the rationale" of the lower court that a *Geders* violation can be harmless beyond a reasonable doubt under *Chapman*. *Id.*

Beyond the *Geders* context, this Court has repeatedly reaffirmed that no prejudice showing is necessary when a Sixth Amendment violation stems from denial

of counsel at a critical stage. "We have spared the defendant the need of showing probable effect upon the outcome, and have simply presumed such effect, where assistance of counsel has been denied . . . during a critical stage of the proceeding." *Mickens v. Taylor*, 535 U.S. 162, 166 (2002) (holding, in contrast to the rule in critical-stage cases, that a petitioner must show prejudice to merit a new trial on ineffective-assistance-of-counsel grounds based on a conflict of interest of which the trial court was unaware). *See also United States v. Cronic*, 466 U.S. 648, 659 n.25 (1984) (citing *Geders* for the proposition that this Court has "uniformly found constitutional error without any showing of prejudice when counsel was ... prevented from assisting the accused during a critical stage of the proceeding"); *id.* at 659 (explaining that "[t]he presumption that counsel's assistance is essential requires us to conclude that a trial is unfair if the accused is denied counsel at a critical stage of his trial"); *White v. Maryland*, 373 U.S. 59 (1963) (holding that admission at trial of guilty plea made at preliminary hearing without counsel required a new trial, and noting "we do not stop to determine whether prejudice resulted"); *Hamilton v. Alabama*, 368 U.S. 52, 55 (1961) (holding that where counsel is denied at arraignment in a capital case, "the degree of prejudice can never be known" because "only the presence of counsel could have enabled this accused to know all the defenses available to him and to plead intelligently"); *Cf. Gonzalez-Lopez*, 548 U.S. at 150 (distinguishing denial-of-counsel claims from ineffectiveness claims on grounds that the "requirement of showing prejudice in ineffectiveness claims stems from the very definition of the right").

Nonetheless, there appear to be a small handful of cases in which this Court has indicated that *Chapman* applies to a particular claim of denial of counsel during

a critical stage. But none is analogous to a case like this one, involving interference with attorney-client discussions during an overnight recess or involving a defendant's testimony. And all but one of these cases involve errors that undisputedly affected only a single piece of evidence offered at trial.

In the first of these cases, *United States v. Wade*, 388 U.S. 218 (1967), the petitioner argued he was unconstitutionally denied counsel at a post-arraignment lineup identification procedure and that elicitation of a subsequent in-court identification was the "fruit" of that error. *Id.* at 235, 244.[3] Thus, the crux of Wade's claim was that a particular piece of evidence – the in-court identification – was erroneously admitted. While this Court agreed with petitioner that a lineup should be considered a "critical stage," *id.* at 237, it remanded for the trial court to determine whether the in-court identification had an "independent source" (and was thus not a fruit) and whether its admission was harmless under *Chapman*. *Id.* at 242-43. *See also Gilbert v. California*, 388 U.S. 263, (1967) (remanding for determination of harmlessness of *Wade* error); *Moore v. Illinois*, 434 U.S. 220, 232 (1977) (same). But the error in *Wade* was qualitatively different from a *Geders* error in that it involved counsel's absence at a stage relevant only to rebutting a single item of evidence. Thus, the ultimate issue in *Wade* – the erroneous admission of an item of evidence that is a fruit of a right-to-counsel violation – lends itself to *Chapman* review in a way that a *Geders* error does not.

In the second of these cases, *Coleman v. Alabama*, 399 U.S. 1 (1970), the Court held that a preliminary

[3] The lineup identification was not introduced by the government at trial and was only elicited by defense counsel on cross-examination. *Wade*, 388 U.S. at 220.

hearing was a "critical stage" for right-to-counsel purposes but remanded for a determination of whether denial of counsel was harmless under *Chapman*. *Id.* at 10-11. The parties in *Coleman* did not cite *Chapman* or otherwise brief or mention at oral argument the issue of harmlessness,[4] other than a conclusory statement without citation in the state's brief that the absence of counsel did not "substantially affect the rights of accused on trial."[5] The Court's reasons for invoking *Chapman* are therefore obscure, especially in light of the Court's later insistence that a defendant is "spared" the "need of showing probable effect upon the outcome" if "counsel has been denied . . . during a critical stage of the proceeding." *Mickens*, 535 U.S. 166.

In the third case, *Milton v. Wainwright*, 407 U.S. 371 (1972), this Court held that admission of a confession obtained in violation of *Massiah v. United States*, 377 U.S. 201 (1964) (holding that a post-arraignment interrogation of a defendant by government agents was a "critical stage" at which the right to counsel applied) was harmless beyond a reasonable doubt under *Chapman*. Again, the denial of counsel related only to one identifiable piece of evidence, allowing the harm analysis to focus on the effect of that piece of evidence (the confession).

And in *Satterwhite v. Texas*, 486 U.S. 249 (1988), this Court declined to presume prejudice where a defendant was unconstitutionally denied counsel during a pretrial psychiatric evaluation by a state expert. *Id.*

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[4] *See* Brief for Petitioner, *Coleman v. Alabama* (1970), (No. 68-72), 1969 WL 119859 (May 20, 1969); Oral Argument, *Coleman v. Alabama*, Nov. 18, 1969, *available at* https://www.oyez.org/cases/1969/72.

[5] Brief for Respondent at 6, *Coleman v. Alabama*, 399 U.S. 1 (1970) (No. 68-72).

at 257-58. This Court relied on the fact that the error was "limited to the admission into evidence of [the expert's] testimony" and noted that "[w]e have permitted harmless error analysis . . . where the evil caused by a Sixth Amendment violation is limited to the erroneous admission of particular evidence at trial." *Id.* Again, such an error is qualitatively different from a *Geders* error disallowing key conversations about multiple aspects of trial.

The majority of lower courts also appear to agree that a *Geders* violation interfering with attorney-defendant communications during an overnight recess is structural error requiring automatic reversal. *See, e.g.*, *United States v. Torrez*, 997 F.3d 624, 627 (5th Cir. 2021) (describing *Geders* error, when objected to, as "presumptively prejudicial," and reversing in this case for plain error); *United States v. Triumph Cap. Grp., Inc.*, 487 F.3d 124, 131 (2d Cir. 2007) (explaining that it is "well settled that, in the *Geders* context, a violation of a defendant's Sixth Amendment right to counsel ... constitutes a structural defect which defies harmless error analysis and requires automatic reversal" (internal quotation marks omitted)); *United States v. Johnson*, 267 F.3d 376, 379 (5th Cir. 2001) (explaining that, in *Perry*, the Supreme Court "held that a showing of prejudice is not an essential component of establishing a violation of the *Geders* rule" and expressing support for that view as "the constitutional right to counsel warrants the most zealous protection"); *Moore v. Purkett*, 275 F.3d 685, 689 (8th Cir. 2001) (explaining that a *Geders* violation is "reversible without a showing of prejudice"); *United States v. Miguel*, 111 F.3d 666, 673 (9th Cir. 1997) (noting that, where a *Geders* violation occurs, the violation constitutes "a denial of the assistance of counsel 'altogether'

so as to require reversal with no showing of prejudice"); *Mudd*, 798 F.2d at 1513 (adopting a per se rule that "reversal is required" following a *Geders* violation as the approach that "best vindicates the right to the effective assistance of counsel"); *id.* at 1515 (Scalia, J., concurring) (agreeing with majority on this point); *Clark v. State*, 301 A.3d 241, 257, 271 (2023) (explaining that *Geders* violations require automatic reversal even when raised in post-conviction proceedings and reviewed for plain error); *Martin*, 991 A.2d at 793 (citing *Geders*, 425 U.S. at 91, and *Perry*, 488 U.S. at 278-80) ("[A]n order prohibiting a defendant from conferring with his counsel during an overnight (or other significant) interruption of his testimony is a denial of the defendant's Sixth Amendment right to counsel that requires reversal without any showing of prejudice."); *Jackson v. United States*, 422 A.2d 1202, 1203 (D.C. 1979) (en banc) (holding that an order directing a defendant not to discuss his testimony during a lunchtime recess was reversible error without regard to prejudice because "the degree of prejudice suffered by the accused, and the impact on jury deliberations often cannot be assessed on the record"). *Cf. United States v. Russell*, 205 F.3d 768, 769-70 (5th Cir. 2000) (absence of counsel for two days was structural error); *French v. Jones*, 332 F.3d 430, 438 (6th Cir. 2003) (presuming prejudice from denial of counsel during response to jury note, given the "uncertainty of the prejudice" from the absence); *Commonwealth v. Johnson*, 828 A.2d 1009, 1015 (Pa. 2003) (presuming prejudice from "temporary" denial of counsel "during reiterative jury instructions").

Even those courts declining to treat an alleged denial of counsel at a critical stage as structural have typically done so only after they decline to find error to begin with, because either the stage is not "critical" or

a break was too short to be deemed analogous to *Geders*. *See, e.g.*, *United States v. Nelson*, 884 F.3d 1103, 1107, 1108 (11th Cir. 2018) (noting that an order prohibiting discussion of testimony may be structural error, and that the Eleventh Circuit had earlier come "pretty close" to explicitly saying so, but that the order here was at the defense's own request);[6] *United States v Roy*, 855 F.3d 1133 1147-48, 1150 (11th Cir. 2017) (declining to apply structural error rule because the seven-minute break involved a "momentary absence" of counsel trivial enough not to be a "critical stage"); *Rose v. State*, 304 P.3d 387, 394 (Mont. 2013) (declining to find *Geders* error where order required counsel to leave jail by 10:30 and counsel could have come at 5:30 but chose not to come until 9:30); *Wallace v. State*, 851 So.2d 216, 220 (2003) (declining to find limit on consultation during lunch break to be error, but acknowledging that it would otherwise presume prejudice from the error); *Moore v. Commonwealth*, 771 S.W.2d 34, 40-41 (Ky. 1988) (declining to presume prejudice or even find error where order related to a "brief" lunch recess during defendant's testimony), *ab-*

[6] The *Nelson* Court noted that the United States appeared to concede that a prohibition on discussing testimony during an overnight break is structural error if objected to:

> Does it violate the Sixth Amendment to prevent a criminal defendant from discussing his testimony, but not other topics, during a single overnight recess? Although no existing precedent resolves that precise question, even the Government seems to concede that the answer, at least as a general matter, is probably yes. See Br. of Appellee at 52 ("[T]he district court's limitation here impermissibly constrained Skillern's ability to consult with his attorney during the first overnight recess.").

884 F.3d at 1106.

rogated on other grounds by McGuire v. Commonwealth, 885 S.W.2d 931 (Ky. 1994).[7] As the California Supreme Court explained, a defendant's inability to consult his lawyer about his testimony is different in kind even from other *Geders*-type errors:

> The harm from preventing an accused from speaking with his or her attorney about his or her own testimony extends further than that attending court-imposed limitations on communications about a nondefendant witness, and is also more difficult to quantify. . . [T]o remove from the accused "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?"

People v. Hernandez, 273 P.3d 1113, 1121-22 (Cal. 2012) (declining to presume prejudice where limit on discussions related only to a cooperator's declaration). *Cf. State v. Smith*, 375 So.3d 654, 668-69 (La. App. 2023) (declining to find error or presume prejudice from limits on consultation with counsel during short recess, but noting this "is different from" "instances where the defendants were not allowed to consult with their attorneys *during their testimonies*").

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[7] One exception appears to be *Sanders v. Lane*, 861 F.2d 1033 (7th Cir. 1988), in which the court deemed the absence of counsel in a "brief routine recess during the trial day" a Sixth Amendment violation but nonetheless harmless under *Chapman*. *Id.* at 1035, 1040. The court noted that nearly all other courts took a *per se* approach, *id.* at 1039 (citing cases), but cited this Court's then-recent opinion in *Satterwhite* (subjecting *Massiah* error to *Chapman*) in concluding that the deprivation during a mere "lunch recess" was analogous to the easily cabined error in *Satterwhite*. *Sanders*, 861 F.2d at 1040.

Treating *Geders* violations as structural errors also avoids awkwardly requiring judicial probing of otherwise privileged attorney-client communications to determine the effect of the violation. *Cf. Mudd*, 798 F.2d at 1513 (noting that a harm analysis in a *Geders* situation "would create an unacceptable risk of infringing on the attorney-client privilege"). A reviewing court would presumably have to ask of the defendant, for example, "what he and counsel discussed, what they were prevented from discussing, and how the order altered the preparation of his defense." *See id*. "Presumably the government would then be free to question defendant and counsel about the discussion that *did* take place, to see if defendant nevertheless received adequate assistance." *Id.*

Moreover, determining prejudice when it comes to prohibitions on discussing a defendant's testimony during an overnight recess is uniquely difficult, given the centrality of that evidence and everything it affects. In any criminal trial where a defendant testifies, the defense risks inadvertently shifting the burden in the minds of the jurors. Instead of asking whether the prosecution has proved its case beyond a reasonable doubt, the jurors might simply compare the competing narratives of prosecution and defense, determining which is most persuasive. As a result, the defendant's choice to testify leads to a host of strategic dilemmas that must be resolved on the fly, related to whether additional corroborating witnesses are worth the attendant risks, whether to pursue further investigation, whether to plead guilty, whether to seek a mistrial, which jury instructions to request or modify, and what to say in closing arguments.

Given this Court's precedents treating *Geders* errors as structural, the growing consensus of lower courts on the matter, and the ill-advised nature of a prejudice

inquiry in the context of attorney-client discussions of a criminal defendant's testimony, this Court should reaffirm that *Geders* violations are structural errors. To change course now would impose an impossible burden on reviewing courts and denigrate the one procedural right – the right to assistance of counsel – through which "all other rights of the accused are protected." *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963).

CONCLUSION

For the foregoing reasons, the judgment of the court of criminal appeals should be reversed.

Respectfully submitted,

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