No._____

IN THE
SUPREME COURT OF THE UNITED STATES

KEITH HARRIS,
Petitioner,
vs.
UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

The Petitioner, Keith Harris, by counsel, Adam, B. Cogan, Esquire, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit.

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ATTORNEY FOR THE PETITIONER

QUESTIONS PRESENTED

This case presents an important issue concerning the proper application of this Court's holding in Crawford v. United States, 541 U.S. 36 (2004) which held that a defendant has a Sixth Amendment right to confront witnesses whose testimony is used against him at a trial through cross-examination and that this right cannot be overcome by application of an evidentiary rule which otherwise permits the introduction of hearsay evidence.

Keith Harris argued below that the Sixth Amendment and the holding of Crawford was violated when the government introduced the testimony of law enforcement officials that Harris was a participant and the subject of various calls that were intercepted during a wiretap investigation when this identification of Harris was based on information provided to law enforcement by informants that he had no ability to cross examine. Agreeing that Harris' Sixth Amendment rights were violated by the introduction of this evidence, dissenting Judge Ambro of the United States Court of Appeals for the Third Circuit commented that a Sixth Amendment violation clearly occurred here as government agents at trial identified Keith Harris as a participant in the conspiracy and as a party and subject of intercepted telephone conversations based upon information provided "*through informants and local law enforcement*." Addendum A, dissent at 11 (emphasis in Judge Ambro's dissent).

Ignoring the holding of Crawford, the majority of the Court of Appeals, concluded, however, that no Sixth Amendment violation occurred. This petition

thus addresses the specific question: whether the admission of law enforcement testimony that goes to whether a defendant was a participant in a conspiracy based on information provided by informants who did not testify and which the defendant had no ability to cross examine violates the rule of Crawford.

In a related fashion, this case presents a question regarding the extent to which Rule 701 of the Federal Rules of Evidence permits law enforcement witnesses to offer opinion testimony as to the participation of a defendant in a crime, specifically: whether the government's case agents may give lay opinion testimony as to the essential elements of the charged conspiracy and the defendant's membership therein without providing any foundation beyond generally describing the scope of the investigation, i.e., their use of wiretaps, surveillance and witnesses consistent with Rule 701 of the Federal Rules of Evidence?

Finally, this case presents an important issue concerning the trial court's interference in the representation of the defendant during the course of a trial.

During the trial, the trial court ordered trial counsel to refrain from discussing with his client, Keith Harris, when certain government witnesses were going to testify after the government requested that such an order issue, the government advising the court that the witnesses in question were the subject of harassment prior to the trial and insinuating that the Defendant and/or his codefendants were involved in that harassment. Over objection from Keith Harris' counsel that this restriction violated his Sixth Amendment right to counsel, trial

counsel complied with the trial court's order and did not discuss with Harris when the witnesses in question would be testifying over a weekend recess of the trial.

When the trial court reconvened, the government belatedly acknowledged that it had no evidence that either Keith Harris or his codefendants on trial were involved in any pre-trial harassment of the witnesses in question. Despite this Court's explicit statement in Perry v. Leake, 488 U.S. 272 (1989) that a defendant has a right to unrestricted access to his lawyer for advice concerning the availability of witnesses during trial and explicit holding in United States v. Gonzalez-Lopez, 548 U.S. 140 (2006) that the denial of counsel during trial can ever be held harmless, the United States Court of Appeals failed to remedy the trial court's error. This petition thus addresses the continued validity of Perry v. Leake and presents the question: whether the trial court erred in ordering counsel to refrain from discussing with his client when witnesses would be testifying during an extended period of time during the trial based on the unsubstantiated belief that discussion between trial counsel and Keith Harris regarding the availability of witnesses would hinder the witnesses' testimony?

LIST OF PARTIES

Petitioner, Keith Harris, was the defendant in the district court and the appellant in the court of appeals. Respondent, the United States of America, was the plaintiff in the district court and the appellee in the court of appeals.

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Keith Harris respectfully petitions this Court for a writ of certiorari to review the Third Circuit Court of Appeals' judgment in this case.

OPINIONS BELOW

The Opinion and Order of the United States Court of Appeals for the Third Circuit affirming the District Court's judgment of conviction and sentence is unreported and attached hereto as Appendix A. The Order of the United States Court of Appeals for the Third Circuit denying rehearing and rehearing en banc is unreported and attached hereto as Appendix B. The United States District Court for the Western District of Pennsylvania did not issue an opinion.

JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit affirming Keith Harris' conviction and sentence was entered on September 13, 2019. The timely petition for rehearing and rehearing *en banc* was denied on December 10, 2019. The jurisdiction of this Honorable Court is invoked pursuant to Title 28, United States Code, Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The issues raised herein concern the Sixth Amendment to the United States Constitution and Rule 701 of the Federal Rules of Evidence.

The Sixth Amendment to the United Stats Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have

> been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Rule 701 of the Federal Rules of Evidence provides:

> If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is:
>
> **(a)** rationally based on the witness's perception;
>
> **(b)** helpful to clearly understanding the witness's testimony or to determining a fact in issue; and
>
> **(c)** not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

STATEMENT OF THE CASE

Keith Harris was indicted and ultimately convicted in the United States District Court for the Western District of Pennsylvania for conspiracy to distribute in excess of one kilogram of heroin in violation of Title 21 U.S.C. Section 846 as the result of a wiretap investigation into heroin distribution in the Uptown section of Homewood, an area on the outskirts of Pittsburgh, in Allegheny County, Pennsylvania.

Rather than presenting a case at trial predicated on the contents of telephone calls that were intercepted through the wiretap investigation and letting the jury determine what the calls meant, the government instead presented a case premised on the testimony of various law enforcement witnesses who offered extensive lay opinion testimony regarding every aspect of the case including the identification of Keith Harris as a perpetrator in the drug conspiracy and a participant and subject

of various intercepted calls, law enforcement testifying that "Doe", a name heard on certain calls that were intercepted, was, in fact, Keith Harris.

Throughout the trial, Keith Harris objected to this testimony as being offered in violation of his Sixth Amendment rights as explained by the United States Supreme Court in Crawford v. Washington, 541 U.S. 36 (2004) as law enforcement's identification of Keith Harris was "based on hearsay statements by informants and hearsay statements by other law enforcement". Appendix A, dissent, at 11.

Indeed, as Judge Ambro of the Court of Appeals noted,

> At trial, the Government struggled noticeably to draw the link between Keith Harris and Doe. The name Keith was not linked to "Doe" on any of the wiretapped phone calls played for the jury. No informant testified at trial that he or she communicated with Keith using the phone number attributed to him through the nickname Doe. No witness other than law enforcement testified or suggested that any of the calls played at trial actually involved the communications of Keith. No evidence was presented linking the phone number associated with "Doe" to Keith.
>
> In the absence of a link between Keith and "Doe," the Government fell back to its evidentiary panacea: "lay opinion" by law enforcement officials based on their entire investigation. This began with Agent Francis. In a contortion of the English language, the Government asked him to give his "interpretation" of what the word "Doe" meant when used on an audiotape. (JA 242.) Francis said his "interpretation" was that "Doe" is Keith Harris. (JA 243.) He made that so-called interpretation based on his overall investigation. (*See id.*) Similarly, Countryman testified that "Doe *I know from this investigation* is a shortened version of Keith's street name, which is Keydo." (JA 369 (emphasis added).) The problem here is glaring: the identification of Keith as "Doe" was not a semantic decoding of specialized language, as may be permitted under FRE 701, *see Jackson*, 849 F.3d at 553–54. It was the substantive identification of the defendant as the perpetrator of the charged crime based on unspecified evidence never presented to the jury.

Appendix A, dissent, at 12.

Despite this graphic Sixth Amendment violation, the Court of Appeals affirmed Harris' conviction.

The thrust of the government's case at trial was that the relevant conspiracy in the case was "Uptown" and the main question for the jury was "did these four [defendants] actually sign onto it [i.e., Uptown] and take part," Appendix A, dissent at 10.

The government, however, never presented testimony or other evidence explaining how its evidentiary "references to "Uptown," the "U" symbol, or University of Miami clothing, evidence that was key to the government establishing that a conspiracy existed in this case, had a conspiratorial drug-trafficking significance rather than a benign reference to the neighborhood in Pittsburgh, called Uptown, where appellants lived." Appendix A, dissent, at note 2.

As Judge Ambro noted,

> the majority's effort to find record support for recognizing a cohesive organization called the "Uptown Crew" is curious given the briefing before us; in its opposition the Government conceded that its own case agents manufactured the label "Uptown Crew." (See Govt. Opp'n to Hopes Br. At 76, n.29; *see also infra.*) You read that right. On appeal, the Government conceded that its own case agents, including Agent Francis and Detective Caterino, "[a]ffix[ed] the name 'Uptown" to defendants and their alleged associates because it was "helpful conceptually." (*Id.*) In other words, aside from being a useful framing device created by law enforcement, there may be no such thing as the "Uptown Crew." The Government's own case agents created that label as a helpful concept for themselves - as well as the jury - and "affixed it" to the group of individuals they had decided to charge with conspiracy.

Appendix A, dissent, at 9.

From the identification of Keith Harris as a participant in the conspiracy and continuing through various law enforcement witnesses who explained to the jury that the "Uptown" conspiracy existed in the case, the case was tried in complete disregard of the 6th Amendment right of confrontation and Rule 701's limitation on the introduction of lay witness testimony.

In addition, during the government's case at trial, the government convinced the District Court over Keith Harris' objection to order defense counsel to refrain from discussing with Harris when certain witnesses were testifying based on the claim that the witnesses were the objects of intimidation.

Immediately prior to the witness' testimony being received, however, the government conceded that it had no evidence that the defendants on trial were in any way aware of or had taken part in the alleged intimidation.

The restrictions the district court placed on the communications between counsel and the defendant violated Keith Harris' Sixth Amendment rights, the right to counsel never the subject of a harmless error type analysis.

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS DECISION PERMITTING LAW ENFORCEMENT TO TESTIFY AS TO THE IDENTIFY THE DEFENANT AS A PARTICIPANT IN THE CHARGED OFFENSE BASED UPON IMFORMATION PROVICED BY CONFIDENTIAL INFORMANTS DECIDED AN IMPORTANT FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH THIS COURT'S DECISION IN CRAWFORD V. WASHINGTON, 541 U.S. 36 (2004).

Throughout the trial, Keith Harris pointed out that the admission of law enforcement testimony relating to the jury what informants told them about Keith

Harris violated the his Sixth Amendment right to confrontation in violation of the seminal case of Crawford v. Washington, 541 U.S. 36, 51 (2004).

In Crawford, the Supreme Court considered whether the admission of wife's a tape-recorded description of a stabbing her husband was involved in violated the Sixth Amendment confrontation clause where the tape was played at trial but the wife did not testify. Rejecting a previously recognized hearsay exception, the Court found that where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is confrontation.

After surveying the history behind the Confrontation Clause, the Supreme Court arrived at two conclusions: "First, the principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of ex parte examinations as evidence against the accused." Based on this, the Court rejected "the view that the Confrontation Clause applies of its own force only to in-court testimony, and that its application to out-of-court statements introduced at trial depends upon "the law of Evidence for the time being." Second, "that the Framers would not have allowed admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." Id. at 50-54.

The Supreme Court thus concluded in Crawford that "[i]n this case, the State admitted Sylvia's testimonial statement against petitioner, despite the fact that he had no opportunity to cross-examine her. That alone is sufficient to make out a

violation of the Sixth Amendment." In so doing, this Court overruled Ohio v. Roberts, 448 U.S. 56 (1980) which "conditioned the admissibility of all hearsay evidence on whether it falls under a 'firmly rooted hearsay exception' or bears 'particularized guarantees of trustworthiness.'" Id. at 68-69.

The District Court, however, repeatedly overruled Keith Harris's Crawford objections and admitted testimony of law enforcement witnesses that was essentially identical to the testimony that this Court found constitutionally impermissible in Crawford, i.e. testimony that Keith Harris was identified as a participant in inculpatory calls attributed to him and played at trial based on information related to law enforcement by informants including information that Keith Harris went by the name of "Doe" or "Keido", names that were mentioned in several of the calls.

As Judge Ambro of the United States Court of Appeals for the Third Circuit found, what happened here was a Crawford error and "a classic violation of the Sixth Amendment right of confrontation." Appendix A, dissent, at 11.

The majority of the Court of Appeals, however, concluded that no Sixth Amendment violation in this case occurred because law enforcement relied on non-testimonial evidence, that is, evidence drawn from their overall involvement in the wiretaps and surveillance to conclude that Keith Harris was "Doe" and thus a member of the conspiracy. Appendix A at 17.

But as Judge Ambro properly recognized, "Agent Francis told us otherwise at trial: he said the government "identified his phone number through previous calls

during the wiretap **and through informants and local law enforcement**." Appendix A, dissent, at 11 (emphasis in the original).

Based on the foregoing, Judge Ambro went on to conclude that the majority could not "plausibly" conclude the erroneous admission of this evidence harmless beyond a reasonable doubt, the government's identification evidence consisting only of "lay opinion" evidence of law enforcement never submitted to the jury. Appendix A, dissent, at 12.

As the jury was told by law enforcement agents that Keith Harris was a participant in various calls that were attributed to him at trial through information provided by informants whom Harris had no ability to cross examine and as the government failed to prove Keith Harris was a participant in the drug conspiracy in question without the evidence in question, there is no way to reconcile the Court of Appeals' decision with this Court's decision in Crawford.

In lieu of presenting a case that relied on evidence from which the jury could rationally conclude whether or not Keith Harris was a participant in the drug conspiracy based on whether or not he was a participant or subject of the calls that were at the center of the wiretap investigation where Keith Harris had an ability to cross examine that assertion, the government instead introduced law enforcement testimony that it was the Keith Harris's voice on various calls the government pointed to as evidence of Harris's participation in the drug conspiracy based on information that Harris had absolutely no ability to directly confront. This was in

complete violation of the Supreme Court's decision in Crawford v. Washington, 541 U.S. 36, 74 (2004).

The Court of Appeals decision affirming Keith Harris' conviction was in fundamental conflict with the bedrock Sixth Amendment decision in Crawford and its rejection of reliability as a substitute for a defendant's Sixth Amendment right to confrontation.

Through the grant of certiorari in this case, the Court can address Crawford in the context of the presentation of lay law enforcement opinion regarding the identity of participants in a purported crime and the making out of the elements of a criminal offense where the defendant has no opportunity to challenge the underlying claims.

II. THE COURT OF APPEALS DECISION PERMITTING LAW ENFORCEMENT WITNESSES TO PROVIDE LAY OPINION TESTIMONY IDENTIFYING THE ALLEGED PARTICIPANTS IN THE CONSPIRACY AND MAKING OUT OF THE ELEMENTS OF THE OFFENSE IS IN CONFLICT WITH OTHER COURTS OF APPEAL.

In this case, law enforcement agents provided lay opinion testimony on the "essential elements of [the] charged criminal conspiracy," testifying to the existence of an "Uptown heroin organization" and to the defendants' membership therein. Appendix A, dissent, at 6. It is hard to imagine testimony more "usurp[ing] the fact-finding function of the jury." United States v. Garcia, 413 F.3d 201, 210-11 (2d Cir. 2005) as the government concede on appeal that there was no "Uptown heroin crew," and that this was just a "handy label" that the agents employed because it was "helpful conceptually." Appendix A, dissent, at 9.

As Judge Ambro observed in dissent, "[t]he government's own case agents created this label as a helpful concept for themselves – as well as the jury – and 'affixed it' to the group of individuals they had decided to charge with a conspiracy. Appendix A, dissent, at 9.

Rule 701 permits lay opinion testimony only if three foundational requirements are met:

> If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is:
>
> (a) rationally based on the witness's perception;
>
> (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and
>
> (b) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

"[t]he purpose of the foundation requirements of the federal rules governing opinion evidence is to ensure that such testimony does not usurp the fact-finding function of the jury.'" Id. See also, United States v. Slade, 627 F.2d 293, 305 (D.C. Cir. 1980).

As recognized by Judge Ambro, "Federal Rule of Evidence 701 permits the admission of lay opinion testimony that has a proper factual basis and is helpful to the jury[;] [i]t does not give law enforcement witnesses free rein to tell the jury the conclusions of their investigations of a criminal defendant." Appendix A, dissent, at 15. As Judge Ambro stated, "this is a line we must hold firmly." Id.

Several Courts of Appeals have firmly held that line.

In Garcia, the case agent there provided lay opinion testimony based on wiretaps and surveillance regarding the defendant's role in the charged conspiracy. The Second Circuit found that the testimony failed the "personal perception" requirement of Rule 701, because it was not based only on the witness's personal perceptions, but on those of others who conducted the surveillance and monitored the wiretaps. Id. at 211-13. The court also found that the testimony failed the "helpful to the jury" requirement. Id. at 213-14. As the court explained:

> if such broadly based opinion testimony as to culpability were admissible under Rule 701, "there would be no need for the trial jury to review personally any evidence at all." The opinion witness could merely tell the jury what result to reach. This, however, is precisely what the second foundation requirement of Rule 701 is meant to protect against.
> ***
> As we observed in Grinage, when a jury hears that an agent's opinion is based on the total investigation, there is a risk that it may improperly defer to the officer's opinion, thinking his knowledge of pertinent facts more extensive than its own . . . It is, however, the jury's singular responsibility to decide from the evidence admitted at trial whether the government has carried its burden of proof beyond a reasonable doubt.

Id. at 214-15 (internal quotation marks and citations omitted). See also, United States v. Meises, 645 F.3d 5 (1st Cir. 2011) (law enforcement overview testimony about the defendants roles in a drug transaction lacked a foundation of personal knowledge of facts essential to form an admissible opinion, usurped the jury's function and improperly endorsed the government's theory at trial); United States v. Freeman, 730 F.3d 590, (6th Cir. 2013) (no proper evidentiary foundation for law enforcement overview testimony that interpreted recorded conversation based on

agents knowledge from the entire investigation); United States v. Hampton, 718 F.3d 978 (D.C. Cir. 2013)("when a witness has not identified the objective bases for his opinion, the proffered opinion obviously fails completely to meet the requirements of Rule 701, first because there is no way for the court to assess whether it is rationally based on the witness's perceptions, and second because the opinion does not help the jury but only tells it in conclusory fashion what it should find")(internal citations omitted); see also, United States v. Johnson, 617 F.3d 286 (4th Cir. 2010); United States v. Freeman, 498 F.3d 893 (9th Cir. 2007); United States v. Peoples, 250 F.3d 630 (8th Cir. 2001).

Other Circuit Courts of Appeal, however, have found that this type of testimony does not cross the line and is admissible consistent with Rule 701 of the Federal Rules of Evidence. See, United States v. Rollins, 544 F.3d 820 (7th Cir. 2008); United States v. Miranda, 248 F.3d 434 (5th Cir. 2001).

Rule 701 requires lay opinion testimony be helpful to the jury, not just helpful to the government. By upholding the admission of this lay opinion testimony when it failed to meet the personal perception and helpfulness prongs of Rule 701, the Panel majority's opinion runs contrary to Rule 701 and the majority of other Circuits interpreting that Rule and as recognized by Judge Ambro.

Through the grant of certiorari in this case, the Court can resolve the Circuit split over the correct interpretation of Rule 701 of the Federal Rules of Evidence.

III. THE COURT OF APPEALS DECISION PERMITTING THE TRIAL COURT TO PRECLUDE DEFENSE COUNSEL FROM DISCUSSING WITH HIS CLIENT WHEN IMPORTANT WITNESSES WOULD BE TESTIFYING DECIDED AN IMPORTANT FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH THIS COURT'S DECISION IN PERRY V. LEAKE, 488 U.S. 272 (1989).

At the Friday conclusion of the first week of trial testimony, government counsel requested a sidebar without the defendants present and asked that counsel be instructed not to inform their clients that two important witnesses (Brett Harber and Tonya Morton) were going to be testifying on Monday when court reconvened because it would increase the chances that the witnesses would suffer intimidation.

In response to the government's stringent claim of impending danger and strong insinuation that the defendants on trial were linked to that intimidation, the District Court then Ordered:

> With respect to this I find there is sufficient evidence based upon the representations of counsel that both Brent Harber and his mother have been subject to threats; and in the interests of their safety, the Court instructs counsel not to inform their clients of the date of Mr. Harber's and his mother's testimony.

When the Court reconvened on Monday morning, however, the government's premise that the witnesses' testimony might be affected by disclosure to the defendants when the witnesses would be testifying proved to be entirely false, the government conceding that it was not in possession of any evidence that any of the defendants on trial had done anything to intimidate the witnesses from testifying while the case was pending.

It was not until 67 hours after the District Court's Order that the Brett Harber took the stand and more than 90 hours after the Court's Order that Tonya

Morton testified. While Tanya Morton's testimony went largely to a count at which Keith Harris was acquitted, Brett Harber testified extensively about the drug conspiracy at which Keith Harris was found guilty and sentenced to 20 years incarceration.

In Geders v. United States, 425 U.S. 80 (1976), the defendant testified on his own behalf with his direct examination concluding at 4:55 p.m.. When the court recessed for the night and after the jury departed, the prosecutor asked the judge to instruct the defendant not to discuss the case overnight with anyone consistent with the instructions given to every witness whose testimony was interrupted by a recess. The defendant's attorney objected, explaining that he believed he had a right to confer with his client about matters other than the imminent cross-examination, and that he wished to discuss problems relating to the trial with his client. The judge indicated his confidence that counsel would properly confine the discussion, but expressed some doubt that petitioner would be able to do so, saying: "I think he would understand it if I told him just not to talk to you; and I just think it is better that he not talk to you about anything." Id. at 82.

The trial judge then suggested that counsel could have an opportunity immediately after the recess to discuss with his client matters other than cross-examination, such as what witnesses were to be called the next day, and indicated that he would grant a recess the next day so that counsel could consult with the defendant after the defendant's testimony ended. Counsel persisted in his objection, however, although he indicated that he would and did comply with the

court's order. Id.

The Geders Court held that the trial court's order preventing the defendant from consulting with his counsel during a 17 hour overnight recess between his direct and cross examination violated his Sixth Amendment right to counsel:

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

Id. at 91.

In Perry v. Leeke, 488 U.S. 272 (1989), the United States Supreme Court again considered Sixth Amendment claims of interference with the right to effective assistance of counsel in the context of instructions that a defendant and his attorney not confer during a recess that interrupted the defendant's trial testimony, the recess taking place during the trial day and only lasting 15 minutes. While emphasizing the absolute right to consult with counsel, the Perry Court concluded that every trial judge is not compelled to allow the defendant to consult with his lawyer while his testimony is in progress if the judge decides there is good reason not to interrupt the trial for the few minutes. Id. at 285.

The Supreme Court was adamant, however, regarding the limited restrictions a trial court could impose without violating the Sixth Amendment:

> 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**.

Id. at 284. (Emphasis added).

Applying Geders and Perry, courts have consistently given credence to the explicit words of this Court that a trial defendant have "unrestricted access to his lawyer" to discuss such things as "the availability of witnesses" and concluded that a trial court's preventing a defendant from consulting with his attorney about a topic for an extended period of time violates the Sixth Amendment and requires an automatic reversal of the defendant's conviction. United States v. Cavallo, 790 F.3d 1202 (11th Cir. 2015)(reversing conviction even where counsel was permitted to talk to the defendant about his "constitutional rights" but otherwise restricted in talking with the client during two overnight recesses in the midst of the client's testimony); United States v. Sandoval-Mendoza, 472 F.3d 645, 652 (9th Cir. 2006) (reversing conviction where the district court instructed the defendant and his lawyer not to discuss his testimony during any of the recesses during the defendant's testimony, but permitted them to discuss anything else with the district court permitting the defendant and his lawyer to discuss his testimony before redirect); United States v. Johnson, 267 F.3d 376, 379 (5th Cir. 2001) (reversing conviction where the court precluded counsel from discussing case the case with his client during an overnight

recess and a weekend recess while he was testifying); United States v. Santos, 201 F.3d 953 (7th Cir. 2000)(reversing conviction where the direct examination of the defendant was completed late in the afternoon of one of the trial days, her cross-examination was scheduled to take place the next morning and the trial judge told Santos's lawyer that the substance of his client's testimony "should not be the subject of further inquiry with counsel" during the overnight recess, though "this does not mean" counsel could not converse with the client "regarding strategy, the calling of witnesses, and so on"); United States v. Cobb, 905 F.2d 784 (4th Cir. 1990)(order prohibiting counsel from discussing cross examination during weekend recess violated the Sixth Amendment); Sanders v. Lane, 861 F.2d 1033 (7th Cir. 1988)(error to deny access during lunchtime recess); Bova v. Dugger, 858 F.2d 1539 (11th Cir. 1988)(error to deny access during 15 minute recess).

The right to be represented by counsel is among the most fundamental rights, Penson v. Ohio, 488 U.S. 75, 84 (1988), and the Supreme Court has "uniformly 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, 654, (1984)(emphasis added). See also, United States v. Gonzalez-Lopez, 548 U.S. 140 (2006) (the denial of a defendant's right to be represented by his chosen counsel constitutes structural error); Luis v. United States, 578 U.S. ____, (2016)(we have considered the wrongful deprivation of the right to counsel a "structural" error that so "affect[s] the framework within which the trial proceeds" that courts may not even ask whether

the error harmed the defendant).

As no Sixth Amendment error can be considered harmless, the issue is whether the trial court impermissibly interfered with Keith Harris' Sixth Amendment right to counsel when the court ordered counsel not to discuss when Brent Harber and Tonya Morton would be testifying at trial.

The Third Circuit Panel determined that it did not and denied Harris relief concluding that no Sixth Amendment violation occurred as the District Court's restrictions on Keith Harris's access to his lawyer were not a total bar on communication between Keith Harris and his counsel and that the restrictions were otherwise warranted because of the safety concerns the government represented to the Court. Appendix A, majority, at 14.

But in so holding, the Panel ignored that the Supreme Court literally held in Perry that the Sixth Amendment guarantee of "**unrestricted access** to his lawyer" includes the right to discuss the "**availability of other witnesses"** and that Keith Harris's right to have unencumbered discussions with his counsel during trial is so fundamental to our system of justice that it simply could not be restricted as it was here consistent with the Sixth Amendment. Id. at 284.

While the government's allusion to intimidation was cryptic, the government failed to establish that any of the defendants on trial had done anything with respect to Brent Harber or Tonya Morton in the two and half years the case was pending and the District Court erred in entering an order that interfered with the communications between the Defendant and his counsel.

Likewise, the Third Circuit's decision upholding the trial court cannot be permitted to stand consistent with the plain mandate of this Court in Perry and its strict interpretation of the requirements of the Sixth Amendment.

Perry recognized that a defendant has no constitutional right to consult with his lawyer while the defendant is testifying. Perry also recognized, however, that the need for trial counsel to discuss with the client the availability of witnesses, trial tactics and the possibility of negotiating a plea agreement precluded the district court from interfering with the client's access to his lawyer. In so concluding, this Court recognized that the right of a client to discuss with his lawyer the availability of witnesses was of equally paramount concern to discussions about and discussions around the wisdom of negotiating a plea agreement as the availability of witnesses goes directly to what trial tactics will be employed and the wisdom of negotiating a plea agreement.

The violation of the Sixth Amendment that occurred here simply cannot be ignored; Geders and Perry held the right to counsel is so fundamental that a client should never be saddled with an attorney who has to hold something back for an extended period of time in the midst of a trial as such inevitably deteriorates the attorney client relationship, it impossible for counsel to have open and frank discussions with the Client about trial tactics and the possibility of negotiating a plea agreement when the topic of the availability of trial witnesses was specifically off limits from discussion.

The fundamental protections afforded by the Sixth Amendment in this area

were abridged here as the content of the communications between the Defendant and his counsel were simply not a proper concern for the government or the trial court. Keith Harris' Sixth Amendment rights simply should not have been displaced because of concerns about witness intimidation that were never in any way linked to the Defendant on trial or his codefendants.

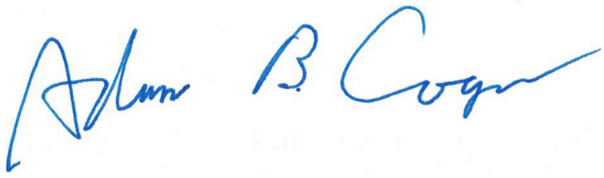
The right of at defendant to consult with counsel is the fundamental premise upon which our system of justice rests and that right to counsel was abridged in this instance.

Through the grant of certiorari in this case, the Court can address the continued validity of Perry in the context of a court's concern over the safety of trial witnesses.

CONCLUSION

WHEREFORE, it is respectfully requested that a Writ of Certiorari be granted.

RESPECTFULLY SUBMITTED,



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