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 FOR 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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BRIEF FOR PETITIONER

Petitioner David Asa Villarreal respectfully requests that this Court reverse the judgment of the Court of Criminal Appeals of Texas.

OPINIONS BELOW

The opinion of the Court of Criminal Appeals of Texas is published at 707 S.W.3d 138. Pet. App 2a-40a. The opinion of the Court of Appeals of Texas is published at 596 S.W.3d 338. Pet. App. 41a-69a.

JURISDICTION

The judgment of the Court of Criminal Appeals was entered on October 9, 2024. The certiorari petition was filed on November 13, 2024. This Court granted certiorari on April 7, 2025. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

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

STATEMENT

During an overnight recess, the defendant has a Sixth Amendment "right to unrestricted access to his lawyer for advice on a variety of trial-related matters." *Perry v. Leeke*, 488 U.S. 272, 284 (1989). This right is clear and categorical, and it applies even if the overnight recess occurs while the defendant is still on the stand. "The fact that such discussions will inevitably include some consideration of the defendant's ongoing testimony does not compromise

that basic right." *Id.* In short, the Sixth Amendment protects the defendant's right to discuss all aspects of his defense (including legitimate discussions of his testimony) during an overnight recess.

In this case, however, the trial court was so worried that counsel might "coach" the defendant—that counsel might impermissibly tell the defendant what to say on the stand—that it prohibited counsel from discussing the defendant's testimony during an overnight recess. The Texas Court of Criminal Appeals affirmed by somehow distinguishing between discussions of *trial strategy*, which it said were protected by the Sixth Amendment, and discussions of *testimony*, which it said were not.

The Texas courts erred. It is simply not possible to separate discussions of testimony from discussions of strategy, because the defendant's testimony permeates every aspect of the defense. A defendant's testimony inevitably covers the most crucial parts of the case. It overlaps with other evidence, other witness statements, other strategic calls, and every other decision the defense will have to make the following day. If counsel is forbidden from discussing the defendant's testimony, counsel will be hamstrung in discussing key events that took place earlier that day and crucial decisions for the rest of the trial. The decision below effectively prohibits substantive advice essential for the assistance that the Sixth Amendment guarantees.

A trial court can certainly prohibit coaching, but the court may not also bar the defendant from discussing his testimony with counsel. Because the courts below abridged this fundamental right, the judgment below should be reversed.

1. David Villarreal was on trial for the murder of Aaron Estrada. Villarreal was the only defense witness at the guilt phase. His defense was that Estrada attacked him and that he stabbed Estrada in self-defense while Estrada was trying to choke him to death. Trial Transcript 5:127-28.

Villarreal began testifying shortly before noon. Pet. App. 5a. After about an hour, in the middle of Villarreal's direct testimony, the trial court declared a recess and dismissed the jury for the day, because the court had a previously scheduled administrative commitment. *Id.*

The court instructed Villarreal and his attorneys that during the ensuing 24-hour recess, they should not discuss Villarreal's testimony:

> THE COURT: Mr. Villarreal, we're in an unusual situation. **You are right in the middle of testimony. Normally your lawyer couldn't come up and confer with you about your testimony in the middle of the trial and in the middle of having the jury hear your testimony. And so I'd like to tell you that you can't confer with your attorney but the same time you have a [Sixth] Amendment right to talk to your attorney.**
>
> So I'm really going to put the burden on [Defense Counsel #1] to tell you the truth. [Defense Counsel #1] and [Defense Counsel #2], too, as well. **I'm going to ask that both of you pretend that Mr. Villarreal is on the stand. You couldn't confer with him during that time.**
>
> Now, Mr. Villarreal, if -- puts us in an odd situation. **But I believe if you need to talk**

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

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

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

[DEFENSE COUNSEL #1]: Okay.

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

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

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

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

[DEFENSE COUNSEL #1]: Certainly.

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

[DEFENSE COUNSEL #1]: Sure.

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

[DEFENSE COUNSEL #1]: Sure.

THE COURT: **And you're going to have to decide, if he asks you any questions and such, is this something that is going to be considered to be conferring with him on the witness stand while the jury is there or not**.

[DEFENSE COUNSEL #1]: Okay. All right. I understand the Court's judgment and just -- just for in the future, I'm just going to make an objection under the Sixth Amendment that the

> Court's order infringes on our right to confer with our client without his defense.
>
> THE COURT: Objection noted. All right. Folks, then we will see you-all again tomorrow.

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

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

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

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

The Court of Appeals noted that in Villarreal's case, "the trial court tried to thread the needle" between *Geders* and *Perry* by allowing Villarreal to speak with his counsel during the overnight recess, but not about any matters that they would not be allowed to discuss while Villarreal was still on the stand. *Id.* at 48a. The Court of Appeals observed that

"[i]n the years since the *Perry* decision, the Supreme Court has not squarely addressed the precise question here—*i.e.*, whether the trial court abuses its discretion by permitting the defendant to consult his counsel during an overnight recess about any topic except his ongoing testimony." *Id.*

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

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

On the other side, "several federal circuit courts of appeals have held any restriction on communication with counsel during an overnight recess is impermissible." Pet. App. 49a (citing *United States v. Triumph Cap. Grp., Inc.*, 487 F.3d 124 (2d Cir. 2007); *United States v. Sandoval-Mendoza*, 472 F.3d 645 (9th Cir. 2006); *United States v. Santos*, 201 F.3d 953 (7th Cir. 2000); and *United States v. Cobb*, 905 F.2d 784 (4th Cir. 1990)).

The Court of Appeals sided with the former group of decisions. "Although *Geders* instructs that the trial court had no discretion to prohibit Villarreal and his attorneys from discussing 'anything,'" the Court

of Appeals reasoned, "it did not do so. Rather, the trial court expressly recognized Villarreal's constitutional right to confer with his counsel and put the onus on counsel to ensure any discussions avoided the topic of Villarreal's testimony." Pet. App. 49a-50a.

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

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

Justice Martinez pointed out that Villarreal's case was a good example of the impossibility of partitioning a lawyer's advice to the defendant into two categories, one involving testimony and the other encompassing everything else. "Here," she noted, "the overnight recess occurred after the State had rested and during Villarreal's direct-examination while Villarreal was testifying to the alleged altercation that precipitated the stabbing of the victim. Discussions between Villarreal and his counsel, as *Perry* recognized, would thus inevitably include some consideration of Villarreal's testimony." *Id.* at 57a-58a (inter-

nal quotation marks omitted). She observed that "the trial court's order prevented Villarreal from conferring with counsel about defensive matters that were inextricably intertwined with his previous testimony on direct." *Id.* at 58a. Justice Martinez therefore concluded that "the trial court's order prohibiting Villarreal from conferring with his attorney during an overnight recess deprived him of his Sixth Amendment right to assistance of counsel." *Id.* at 61a.

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

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

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

Like the Court of Appeals, the Court of Criminal Appeals recognized the conflict among the lower courts on this question. The court observed that "[o]ur sister state supreme courts have generally agreed that such a situation does not violate the right to counsel." *Id.* at 3a & n.1 (citing *Beckham v.*

Commonwealth, 248 S.W.3d 547 (Ky. 2008); *State v. Conway*, 842 N.E.2d 996 (Ohio 2006); and *Bailey v. State*, 422 A.2d 956 (Del. 1980), but noting that two state high courts have reached the opposite holding—*People v. Joseph*, 646 N.E.2d 807 (N.Y. 1994), and *Petty v. United States*, 317 A.3d 351 (D.C. Ct App. 2024)). The court acknowledged that "federal circuits have reached the opposite conclusion"—that is, they found a Sixth Amendment violation in these circumstances. Pet. App. 3a-4a & n.2 (citing *United States v. Sandoval-Mendoza*, 472 F.3d 645 (9th Cir. 2006); *United States v. Santos,* 201 F.3d 953 (7th Cir. 2000); *United States v. Cobb*, 905 F.2d 784 (4th Cir. 1990); and *Mudd v. United States*, 798 F.2d 1509 (D.C. Cir. 1986)).

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

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

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

b. Judge Yeary concurred. *Id.* at 18a-21a. He accepted that the majority opinion had done "the best it can with what the United States Supreme Court has given it to work with." *Id.* at 18a. "This does not mean it is an ideal choice," he continued. *Id.* at 19a. He worried that "[t]he 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." *Id.* (brackets and internal quotation marks omitted). He predicted that this line would prove unworkable in practice: "I do not envy the defense lawyer who risks being held in contempt while trying to navigate this murky distinction." *Id.* "How is the most ethically compliant lawyer supposed to determine how to communicate with his client about information made relevant by the day's testimony or the significance of the day's events or trial tactics or the advisability mid-trial of negotiating a plea bargain without some reference, however fleeting or indirect, to the substance or tenor of his client's as-yet-unfinished appearance on the

witness stand?" *Id.* (brackets and internal quotation marks omitted).

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

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

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

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

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

During an overnight recess, Judge Walker continued, any discussion of trial strategy between a defendant and counsel would "'inevitably include some consideration of the defendant's ongoing testimony.'" *Id.* (quoting *Perry*, 488 U.S. at 284). He concluded that "[t]he trial court's overnight prohibition was essentially the same as the unconstitutional order in *Geders*." Pet. App. 37a.

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

SUMMARY OF ARGUMENT

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

A. The Sixth Amendment guarantees "the defendant's right to unrestricted access to his lawyer for advice" during an overnight recess. *Perry v. Leeke*, 488 U.S. 272, 284 (1989). "The fact that such discussions will inevitably include some consideration of the defendant's ongoing testimony does not compromise that basic right." *Id.* Full and free consultation is essential if counsel is to properly advise the defendant on the day's events and prepare for the next day's proceedings. Counsel may not "coach" the defendant by telling him what to say in his testimony, but "[t]here are other ways to deal with the problem of possible improper influence on testimony or 'coaching' of a witness short of putting a barrier between client and counsel." *Geders v. United States*,

425 U.S. 80, 89 (1976). These other methods include the prosecutor's cross-examination of the defendant as to the extent of any coaching, as well as the trial court's ability to schedule the defendant's testimony so that it may be completed in a single day. *Id* at 89-90.

B. Below, the Texas Court of Criminal Appeals tried to distinguish between discussions of *testimony*, which it said the trial court could prohibit, and discussions of *trial strategy*, which it said the trial court could not prohibit. This supposed line is unworkable and truncates legitimate advice protected by the Sixth Amendment.

1. The defendant's testimony is inseparable from the defense's trial strategy, so prohibiting discussion of testimony will prevent defendants from receiving the assistance that the Sixth Amendment guarantees.

a. The rule adopted below will make it impossible for defendants to receive the advice they need to make informed decisions on matters critical to the defense or even whether to enter a plea. Counsel will also be barred from advising defendants on essential issues concerning their testimony, such as the importance of not mentioning excluded evidence and the need to avoid perjury.

b. There are many common situations in which the defendant says something in his testimony that makes counsel realize the importance of taking a future action, such as calling an additional witness or obtaining additional evidence. In these situations, counsel needs to discuss the defendant's testimony with him if counsel is to provide effective representation.

c. All competent lawyers prepare their witnesses to testify by going over the questions and answers ahead of time, but the rule adopted below will prevent defendants from receiving this assistance, because such preparation must often take place during overnight recesses.

d. The rule adopted below will be impossible to administer. Because so much of counsel's constitutionally protected advice concerns the same subjects as the defendant's testimony, banning discussion of testimony is nearly tantamount to banning consultation altogether. Trial courts (and appellate courts reviewing convictions) will have to make metaphysical distinctions between discussions of the defendant's testimony and discussions of trial strategy. For instance, if the defendant's testimony makes counsel conclude that it would be advisable to accept a plea offer, may counsel explain this to the defendant? If the defendant has testified falsely or mistakenly, may counsel urge him to correct his error? With each overnight recess, courts will have to draw an undrawable line between permissible and impermissible discussions.

2. The impossibility of distinguishing between permitted and prohibited discussions will chill the advocacy of defense attorneys, who risk being held in contempt for crossing an indiscernible line. Counsel's advice will inevitably be limited by the fear of saying the wrong thing. This chill comes at the direct expense of the defendant's Sixth Amendment right to the assistance of counsel.

3. The rule adopted below cannot be enforced without destroying the attorney-client privilege. The only way the trial court could enforce it would be to

ask the defendant and counsel, "what did you talk about last night?" But these discussions are privileged. If defendants realize that their overnight consultations with counsel will be revealed to the court the following morning, they will not confide fully in counsel, and counsel will not be able to provide useful advice.

For these reasons, the minority rule adopted below is unworkable in practice. There is a better model proven by experience. The rule in most courts, which allows the defendant and counsel to discuss the defendant's testimony, is easy to administer. Trial courts do not have to draw metaphysical distinctions between discussions that are allowed and those that are prohibited. Defense lawyers are not chilled by the prospect of being held in contempt. The attorney-client privilege remains intact. Lawyers can provide full advice on fundamental issues and defendants can make informed decisions with the guidance that the Sixth Amendment protects.

C. The rule adopted below is not necessary to prevent "coaching," which can be deterred by effective cross-examination and prudent scheduling. Experience in the lower courts again provides proof. Most courts have long held that defendants have a right to discuss their testimony with counsel during an overnight recess, but there has not been an outbreak of improper coaching in any of these jurisdictions.

D. The Court should decline Texas's invitation to overrule *Geders*.

1. *Geders* was correctly decided. Chief Justice Burger's opinion for a unanimous Court correctly recognized that the assistance of counsel is essential during an overnight recess. Texas's argument finds

no basis in the text or original meaning of the Sixth Amendment, which guarantees "the assistance of counsel" without excluding assistance on particular topics or at particular times of day.

2. Even if *Geders* were somehow dubious, the traditional factors the Court considers in determining whether to overrule a decision all point in favor of stare decisis. The reasoning of *Geders* is sound. *Geders* has proven workable. *Geders* has not distorted any legal doctrines. And overruling *Geders* would revolutionize trial practice. There is no need to replace a longstanding, workable constitutional doctrine with a novel regime demanding artificial lines that no ordinary lawyer or judge can discern in practice.

ARGUMENT

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

The decision below is wrong. It is contrary to *Geders v. United States*, 425 U.S. 80 (1976), and *Perry v. Leeke*, 488 U.S. 272 (1989), which confirmed that a defendant has a right to confer with counsel about his testimony during an overnight recess.

The rule adopted below is also unworkable in practice. It will be impossible to administer, because there is no way to distinguish discussions of testimony, which the decision below prohibited, from discussions of trial strategy, which the decision below allowed. The ambiguity of this distinction will chill the advocacy of defense attorneys, who risk being

held in contempt for crossing an indiscernible line. The decision below also destroys the attorney-client privilege, because the only way a trial court could enforce it would be to pry into privileged conversations between defendants and their lawyers.

Nor is this odd rule necessary to prevent "coaching." A trial court can prohibit coaching without also preventing defendants from getting the assistance the Sixth Amendment guarantees.

Finally, Texas errs in suggesting that the Court should overrule *Geders*. *Geders* was correctly decided, and even if Texas's doubts had any substance, the state cannot satisfy any of the traditional criteria justifying a departure from stare decisis.

A. The Court's precedents require "unrestricted access" to counsel during an overnight recess, even where "such discussions will inevitably include some consideration of the defendant's ongoing testimony."

The Court has twice addressed the scope of the right to counsel during trial recesses. In *Geders v. United States*, 425 U.S. 80 (1976), the Court unanimously held that a defendant has a right to consult his attorney during an overnight recess. In *Perry v. Leeke*, 488 U.S. 272 (1989), the Court held that a defendant has no such right to consult his attorney during a 15-minute daytime recess—while stressing that *Geders* controls outside that setting. Both cases indicate that a defendant's right to the assistance of counsel includes the right to discuss his testimony with counsel during an overnight recess.

Geders and *Perry* together establish four propositions.

First, during an overnight recess, the defendant has a right to confer with counsel about matters essential to the defense. While the trial court may bar *nonparty* witnesses from discussing their testimony with anyone during an overnight recess, the trial court may not apply a like prohibition to the defendant, who has a Sixth Amendment right to the assistance of counsel that nonparty witnesses lack. *Geders*, 425 U.S. at 88. During an overnight recess, the defendant and counsel need to discuss "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." *Perry*, 488 U.S. at 284. "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.

These overnight discussions between the defendant and counsel necessarily encompass a review of "the events of the day's trial." *Geders*, 425 U.S. at 88. For example, "[t]he lawyer may need to obtain from his client information made relevant by the day's testimony." *Id.* Likewise, counsel "may need to pursue inquiry along lines not fully explored earlier." *Id.* "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.*

Second, the defendant's own testimony is one of the matters essential to the defense, so the defendant has a right to discuss it with counsel during an overnight recess. As the Court explained, "[i]t 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." *Perry*, 488 U.S. at 284 (emphasis added). During these overnight consultations, "the role of counsel is important precisely because ordinarily a defendant is ill-equipped to understand and deal with the trial process without a lawyer's guidance." *Geders*, 425 U.S. at 88.

As if anticipating Texas's argument in this case, the Court made clear that "[t]he fact that *such discussions will inevitably include some consideration of the defendant's ongoing testimony* does not compromise that basic right." *Perry*, 488 U.S. at 284 (emphasis added).

Third, during an overnight recess, if there is a conflict between the government's interest in preventing "coaching" (which is not protected by the Sixth Amendment) and the defendant's right to legitimate assistance from counsel (which *is* protected by the Sixth Amendment), "the conflict must … be resolved in favor" of preserving the defendant's right to the assistance of counsel. *Geders*, 425 U.S. at 91.

In *Geders*, the Court acknowledged that during an overnight recess, an unethical lawyer might try to "coach" the defendant—that is, he might try to tell the defendant what to say on the stand—but the Court explained that restricting the assistance of counsel is hardly necessary to deter coaching:

> There are other ways to deal with the problem of possible improper influence on testimony or "coaching" of a witness short of putting a barrier between client and counsel for so long a period as 17 hours. The opposing counsel in the adversary system is not without weapons to cope

> with "coached" witnesses. A prosecutor may cross-examine a defendant as to the extent of any "coaching" during a recess, subject, of course, to the control of the court. Skillful cross-examination could develop a record which the prosecutor in closing argument might well exploit by raising questions as to the defendant's credibility, if it developed that defense counsel had in fact coached the witness as to how to respond on the remaining direct examination and on cross-examination.

Id. at 89-90.

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

> [T]he trial judge, if he doubts that defense counsel will observe the ethical limits on guiding witnesses, may direct that the examination of the witness continue without interruption until completed. If the judge considers the risk high he may arrange the sequence of testimony so that direct- and cross-examination of a witness will be completed without interruption.

Id. at 90 (footnote omitted).

The Court accordingly held that the importance of the defendant's right to confer with counsel during an overnight recess outweighs the risk that an unethical attorney might try to coach the defendant. There is no justification for "placing a sustained barrier to communication between a defendant and his lawyer." *Id.* at 91. And if any concerns remain, the Sixth Amendment ultimately wins out:

> 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.

Fourth, during a brief daytime recess, the trial court may limit or even completely prohibit consultation between the defendant and counsel—but only in that limited setting. And only for a limited reason: Just as defendants have no right to insist upon a time-out while testifying, courts have the power to preserve the status quo should a temporary break be necessary. And just as defendants do not have a right to discuss each question with counsel before answering, courts can prevent consultation if trial is "interrupt[ed] … for a few minutes." *Perry*, 488 U.S. at 284-85.

There is accordingly a sharp distinction between overnight recesses, when the defendant has a right to confer with counsel, and brief daytime recesses, when he does not: "[J]ust as a trial judge has the unquestioned power to refuse to declare a recess at the close of direct testimony—or at any other point in the examination of a witness—we think the judge must also have the power to maintain the status quo during a brief recess." *Id.* at 283. In that limited setting alone, a different constitutional rule applies: The defendant does not have a right to discuss his testimony with counsel. *Id.* at 284.

The Court could not have stated the distinction any more clearly. During a brief daytime recess, the trial court may instruct the defendant not to discuss his testimony with counsel. But during an overnight recess, the defendant must be allowed "unrestricted access" to full advice. *Id.*; *Geders*, 425 U.S. at 88.

The bright line the Court drew in *Geders* and *Perry* between overnight recesses and daytime recesses has been in place for 36 years. It has proven to be a stable and administrable line. Daytime recesses are typically quite short. Overnight recesses, such as the 24-hour recess in this case, are much longer. The lower courts have had no trouble distinguishing between the two.

This sharp distinction between overnight recesses and daytime recesses also makes sense as a matter of courtroom logistics. During a short daytime recess in the middle of the defendant's testimony, the defendant frequently remains on the witness stand rather than returning to his seat next to counsel. This is especially likely if the defendant is in custody and is therefore guarded during the trial by law enforcement, who often prefer to minimize the defendant's movements. When the defendant remains on the stand during a recess, it would normally be impractical for counsel to confer privately with him. By contrast, there are no such logistical obstacles to attorney-client consultation during an overnight recess.

Below, the Court of Criminal Appeals relied on this Court's admonition in *Perry* that "'when a defendant becomes a witness, he has no constitutional right to consult with his lawyer while he is testifying.'" Pet. App. 11a (quoting *Perry*, 488 U.S. at 281). But the Court of Criminal Appeals overlooked that

this passage refers only to a short daytime recess such as the one in *Perry*, not to an overnight recess like the ones in *Geders* and in our case. The Court of Criminal Appeals also failed to recognize that in this passage, the Court was explaining why the defendant is not entitled to call for a time-out in the middle of his testimony to confer with counsel. As the very next sentence made clear, "neither [the defendant] nor his lawyer has a right to have the testimony interrupted in order to give him the benefit of counsel's advice." *Perry*, 488 U.S. at 281. This passage from *Perry* is about brief daytime recesses requested by the defendant, not overnight recesses called by the trial court.

B. The line the court below attempted to draw, between discussions of testimony and discussions of trial strategy, is contrary to the Sixth Amendment and unworkable in practice.

Below, the Court of Criminal Appeals tried to draw a line between discussions of testimony, which it said the trial court could prohibit, and discussions of trial strategy, which it said the trial court could not prohibit. Pet. App. 12a-14a. The Court of Criminal Appeals described this line in a few different ways. It said that the defendant may not "confer with counsel regarding his ongoing testimony," but may discuss "all other aspects of the criminal proceeding." *Id.* at 3a. Later in its opinion, the court said that "[d]iscussing or conferring about the ongoing testimony" is not allowed, but "taking 'consideration' of the ongoing testimony" *is* allowed. *Id.* at 14a. Still later, the court described the distinction this

way: "Counsel must be allowed to discuss the derivative effects of the testimony" with the defendant, but they may not discuss the testimony itself. *Id.* at 16a.

This supposed line is no line at all. It is utterly unworkable in practice, whatever the words used to describe it. First, during a trial, the defendant's testimony is inextricably intertwined with all aspects of the defense's strategy, so prohibiting discussion of testimony will deprive defendants of the assistance of counsel guaranteed by the Sixth Amendment. Second, the impossibility of distinguishing between permitted and prohibited discussions will chill the efforts of defense attorneys, who risk being held in contempt for crossing an indiscernible line. Third, the rule adopted below undermines the attorney-client privilege, because the only way to enforce it would be to compel defendants and their counsel to reveal privileged discussions.

1. The defendant's testimony is inextricably intertwined with the defense's trial strategy, so prohibiting discussion of testimony will prevent defendants from receiving the assistance that the Sixth Amendment guarantees.

In the middle of a trial, it is impossible to distinguish discussions of testimony from discussions of trial strategy. Without discussing the defendant's testimony, the defendant and counsel could not confer on essential matters such as which witnesses to call, which evidence to introduce, whether to accept a plea agreement, and the like. During an overnight

recess, the defendant's testimony permeates every aspect of counsel's advice.

a. The rule adopted below prevents defendants from receiving the advice they need to make informed decisions.

The Sixth Amendment guarantees the defendant "the guiding hand of counsel at every step in the proceedings against him," because "[h]e lacks both the skill and knowledge adequately to prepare his defense." *Powell v. Alabama*, 287 U.S. 45, 69 (1932). Counsel has a corresponding ethical obligation to "explain a matter to the extent reasonably necessary to permit the client to make informed decisions." ABA Model Rules of Professional Conduct, Rule 1.4(b). There are several common situations in which defendants will not receive the constitutionally protected guidance they need, and attorneys cannot fulfill their ethical obligations, unless the defendant is able to discuss his testimony with counsel during an overnight recess.

For example, suppose that before trial, the prosecutor offered a plea agreement, which the defendant declined. The defendant testifies at trial, and his testimony is going poorly. Counsel concludes that it would now be prudent to accept the plea agreement if it is still on the table or to ask the prosecutor if the agreement can be revived. During an overnight recess in the middle of the defendant's testimony, counsel advises the defendant, "after hearing your testimony, now I recommend that you take the plea bargain if it is still available." The defendant is likely to respond by asking, "Why?" Counsel has a duty

to answer the defendant's question competently. *Lafler v. Cooper*, 566 U.S. 156, 163-64 (2012). To do so, counsel needs to explain to the client why his testimony has reduced his chances of prevailing at trial. It is the client's decision, not the lawyer's decision, whether to enter a guilty plea. *McCoy v. Louisiana*, 584 U.S. 414, 422 (2018). But the defendant cannot make an informed decision to plead guilty unless counsel discusses his testimony with him.

Guidance from counsel is also essential in protecting the defendant from legal pitfalls. Suppose that while an unsophisticated defendant is testifying, he inadvertently comes very close to opening the door to devastating but otherwise inadmissible evidence. During an overnight recess, to represent the defendant effectively, counsel needs to discuss the defendant's testimony with him. Counsel must tell the defendant something like, "I noticed that you nearly testified about the excluded evidence. Remember that you should not mention it." This basic, necessary advice would be unlawful under the rule adopted below. As the Seventh Circuit explained, "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. Santos*, 201 F.3d 953, 965 (7th Cir. 2000) (citation and internal quotation marks omitted).

Counsel must also discuss the defendant's testimony with him if counsel is to prevent perjury. Defense lawyers are officers of the court who must

"take reasonable remedial measures" if they know that their client has testified falsely. Model Rules, Rule 3.3(a)(3). Where an overnight recess takes place in the middle of the defendant's testimony, and counsel is aware that the defendant has offered false testimony, "the advocate's proper course is to remonstrate with the client confidentially, advise the client of the lawyer's duty of candor to the tribunal and seek the client's cooperation with respect to the withdrawal or correction of the false statements or evidence." *Id.*, comment 10. By prohibiting discussion of the client's testimony, the decision below prevents an attorney from fulfilling this duty.

Where counsel merely suspects, but does not definitively know, that the defendant has committed perjury, it is just as critical for counsel to discuss the defendant's testimony with him, for "under no circumstance may a lawyer either advocate or passively tolerate a client's giving false testimony." *Nix v. Whiteside*, 475 U.S. 157, 171 (1986). Counsel needs to be able to ask the defendant questions about his testimony to find out whether it was false.

And even if counsel merely knows that the defendant *plans* to commit perjury, "the attorney's first duty when confronted with a proposal for perjurious testimony is to attempt to dissuade the client from the unlawful course of conduct." *Id.* at 169. Counsel cannot fulfill this ethical obligation without the ability to discuss the defendant's testimony with him.

Counsel's obligations do not end there. The defendant's perjury is not just unethical; it also constitutes a separate criminal offense. Recantation is a defense to perjury, but only if the defendant recants his false testimony in the same proceeding. 18 U.S.C.

§ 1623(d); Tex. Penal Code § 37.05. Counsel thus has an obligation, during the overnight recess, to urge the defendant to recant his false testimony the following day, before it is too late. The defendant desperately needs the timely advice of counsel on this subject. But he can never receive this advice if counsel is not allowed to discuss the defendant's testimony with him.

Moreover, sentencing guidelines typically provide for enhancements where the defendant has offered false testimony. *See, e.g.*, U.S. Sentencing Guidelines Manual § 3C1.1. For this reason as well, counsel has an obligation, during an overnight recess, to urge the defendant to withdraw his false testimony while he is still on the stand, before it is too late.

Even in the absence of perjury, counsel has an obligation to help the defendant correct false statements in his testimony. It is very common for defendants, like all witnesses, to make honest mistakes. Perhaps the defendant said an event occurred in June when he meant to say it occurred in July. Perhaps the defendant misunderstood a question phrased in the negative (such as "did you not …?") and gave an answer opposite to the one he would have given if the question had been simpler. People misspeak all the time in everyday life, and their nerves make them even more prone to mistakes under the pressure of testifying in court. During an overnight recess, to provide effective representation and to fulfill counsel's duty of candor to the court, counsel must be able to tell the client something like "I realize you meant to say July, but you said June instead. Tomorrow, I'll ask you this question again so you can answer it correctly and explain that you

made a mistake." Under the rule adopted below, counsel is forbidden from discharging these obligations or fulfilling the Sixth Amendment guarantee.

b. The rule adopted below prevents defendants from receiving effective representation.

A defendant has a constitutional right to effective representation. *Strickland v. Washington*, 466 U.S. 668 (1984). Counsel has a corresponding ethical obligation to "act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf." Model Rules, Rule 1.3, comment 1. There are many common situations in which the defendant says something during his testimony that makes counsel realize the importance of taking strategic action. In each of these situations, counsel must discuss the defendant's testimony with him if counsel is to provide effective representation.

For instance, suppose that during his testimony, the defendant says something that causes counsel to see that the defense must call an additional witness or track down an additional document. Surprises sometimes occur in criminal cases, even with the best preparation. Perhaps, on cross examination, the defendant mentions an alibi witness whose importance counsel had not previously appreciated. During an overnight recess, counsel needs to ask the client about this person, what they could testify to, and how they can be contacted. But these questions are off-limits under the rule adopted below. *See 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, subjects *Perry* expressly says a defendant has a right to discuss with his lawyer during an overnight recess, without discussing the testimony itself.").

Or suppose the defendant testifies about a document that would disprove his guilt. During an overnight recess, counsel needs to ask the defendant about the document, what it says, and where it can be found. Again, however, this conversation would be prohibited under the rule adopted below.

It would be no answer to say that counsel can have these discussions with the defendant the next day, after the defendant has completed his testimony, because the next day may be too late. If the defendant is the last witness to testify, for example, closing argument may begin immediately after he leaves the stand.

Similarly, suppose that on cross-examination, the prosecutor attempts to impeach the defendant in some way that defense counsel had not anticipated. Perhaps the prosecutor asks the defendant about a prior act or a prior statement that counsel knows nothing about. This ostensibly impeaching act or statement might have an innocent explanation. The prosecutor might be misinterpreting it or drawing a false inference from it. To represent the defendant effectively, counsel must ask the defendant about it. Counsel may need to call a witness to provide context for this faux impeachment evidence. At the very least, counsel will need to ask the defendant to explain it on rebuttal. Because the supposed impeachment evidence was part of the defendant's testimony, however, the rule adopted below would prohibit

counsel from even asking the defendant about it during an overnight recess. If counsel waits until the next day, after the defendant has completed his testimony, it will be too late.

In addition, lawyers often must advise their clients during overnight recesses about the basic mechanics of testifying. If the defendant was mumbling or looking down during his testimony, he may need a reminder to sit up straight, to look people in the eye, and to speak clearly. A responsible attorney could reasonably be apprehensive that this standard advice is forbidden under the rule adopted below, because it concerns the defendant's testimony.

Clients often leave the stand full of questions for their attorneys. Why did the prosecutor object to some of the questions defense counsel asked on direct examination? Why did the court sustain (or overrule) the prosecutor's objections? Why did the court interrupt the questioning to confer with the attorneys? Why were they talking about "hearsay" and what does that word even mean? Under the decision below, counsel is not allowed to answer these questions, because they are about the defendant's testimony.

Perhaps the most common question a witness asks of counsel during a recess is "how am I doing?" When the defendant asks this question, if counsel replies with anything short of "great," the defendant is likely to ask why. Any meaningful response from counsel will run afoul of the rule adopted below.

c. The rule adopted below prevents defendants from receiving assistance in preparing to testify.

In all litigation, civil and criminal, the lawyers on both sides of the case routinely prepare their witnesses for trial. Part of this preparation involves telling the witnesses what questions they plan to ask and finding out how the witnesses will respond. As Judge Keeton taught, "if you prepare your case properly you will not call a witness to the stand without having asked the witness what his testimony will be on all points as to which you can anticipate he may be questioned." Robert E. Keeton, *Trial Tactics and Methods* 136 (2d ed. 1973).

Indeed, it would be malpractice to do otherwise. "The practical literature uniformly views the failure to interview witnesses prior to testimony as a combination of strategic lunacy and gross negligence. A lawyer who does not prepare all witnesses is derelict in his professional duties." John S. Applegate, *Witness Preparation*, 68 Tex. L. Rev. 277, 287-88 (1989) (internal quotation marks omitted); s*ee also, e.g.*, *Andrus v. Texas*, 590 U.S. 806, 815 (2020) (per curiam) (finding that counsel performed deficiently where, among other failings, "counsel did not prepare the witnesses or go over their testimony before calling them to the stand").

As part of witness preparation, it is standard practice to rehearse the defendant's testimony, by asking questions just as counsel would ask them at trial and letting the defendant practice giving answers. As one veteran litigator observed, this is "a well-established professional practice":

> It helps you know in detail—although never exactly—what the witness's testimony probably will be. It comforts the witness, whose increasing confidence in the accuracy of the testimony and increasing familiarity with legal procedures quells some of the normal anxiety over testifying. Rehearsals also assist the court, which functions more efficiently when the witness gives clear, coherent, and responsive answers.

James M. Altman, *Witness Preparation Conflicts*, 22 Litigation 38, 42 (Fall 1995).

None of this is improper "coaching." As the leading treatise on the ethics of criminal defense practice explains, "[t]rial lawyers spend a considerable amount of time talking to witnesses and preparing them for trial, and they are expected to." John Wesley Hall, Jr., *Professional Responsibility in Criminal Defense Practice* § 25:2 (Westlaw, 4th ed. 2025).

The American Bar Association and the American Law Institute have both endorsed the practice of going over witnesses' testimony with them before they testify. The ABA's Standing Committee on Ethics and Professional Responsibility confirms that "preparing a witness" by "providing testimonial guidance" is "not only an accepted professional function" but "is considered an essential tactical component of a lawyer's advocacy." ABA Standing Committee on Ethics and Professional Responsibility, Formal Opinion 508, at 1 (Aug. 5, 2023) (footnote omitted). The ABA's Ethics Committee further clarifies that while preparing a witness, a lawyer may "identify lines of questioning and potential cross-examination," and

"suggest choice of words that might be employed to make the witness's meaning clear." *Id.* at 4.

The American Law Institute's Restatement of the Law Governing Lawyers draws the same conclusion: "A lawyer may interview a witness for the purpose of preparing the witness to testify." Restatement of the Law (Third), The Law Governing Lawyers, § 116(1). The Restatement provides a list of permissible activities that includes "rehearsal of testimony" and "suggest[ing] choice of words that might be employed to make the witness's meaning clear." *Id.*, comment b.

Ideally, defense counsel prepares the defendant to testify before trial begins. Often, however, some preparation must take place while trial is underway, during overnight recesses. Mid-trial evidentiary rulings can change the topics on which the defendant testifies. Disclosures from the prosecutor may come on the eve of trial or even during trial. (For instance, federal prosecutors need not disclose prior statements of government witnesses until after they testify. 18 U.S.C. § 3500(a).) Sometimes the defense plan is for the defendant not to testify, but events at trial require a change in strategy. Some defendants decide to testify at the last minute. (Whether to testify is a decision for the client, not for counsel. *Jones v. Barnes*, 463 U.S. 745, 751 (1983).) There are any number of reasons counsel may find it necessary to prepare the defendant to testify during an overnight recess.

This need can be particularly acute for public defenders, whose caseloads are often so large that they lack the time before trial to prepare the defendant to testify. *See Luis v. United States*, 578 U.S. 5, 21-22 (2016) (plurality opinion); *Boyer v. Louisiana*, 569

U.S. 238, 249-50 (2013) (Sotomayor, J., dissenting). To make matters worse, their clients are often in jail, so it can take several hours of a lawyer's time just to have a short meeting with the client. Sometimes the defendant needs an interpreter to speak with counsel, but no interpreter is provided in jail. For all these reasons, it is not unusual for recesses to be the defendant's only opportunity to discuss his testimony with counsel.

These discussions of testimony do not constitute impermissible "coaching." They are part of the advice that all defendants need to hear from counsel. They are discussions that all competent attorneys have with their clients. But these discussions are forbidden under the decision below.

d. The rule adopted below will be impossible to administer.

Because so much of counsel's constitutionally protected advice concerns the defendant's testimony, banning discussion of testimony is effectively tantamount to banning consultation altogether. As Judge Calabresi explained for the Second Circuit, "a defendant's constitutional right to consult with his attorney on a variety of trial-related issues during a long break, such as an overnight recess, is inextricably intertwined with the ability to discuss his ongoing testimony." *United States v. Triumph Cap. Grp., Inc.*, 487 F.3d 124, 133 (2d Cir. 2007). Because discussions of testimony cannot be neatly separated from discussions of trial strategy, an "order prohibiting defendant from discussing his testimony with his attorney during a weekend recess [i]s not significantly less invasive of sixth amendment rights than the

order prohibiting all contact between a defendant and his attorney during an overnight recess in *Geders*." *Mudd v. United States*, 798 F.2d 1509, 1515 (D.C. Cir. 1986) (Scalia, J., concurring in part and concurring in the judgment).

The rule adopted below will be impossible to administer. It requires trial courts (and appellate courts reviewing convictions) to make metaphysical distinctions between discussions about the defendant's testimony and discussions about trial strategy. For example, if the defendant's testimony makes defense counsel realize that it will be important to call an additional witness, may defense counsel discuss this with the defendant? If the defendant has said something false or mistaken during his testimony, may defense counsel urge him to correct his misstatement? All sorts of questions like these will arise, questions that will depend on what exactly it means for the defendant and his attorney to discuss his testimony. Trial courts will have to hold mini-hearings with each overnight recess just to identify the topics on which discussion will be allowed or forbidden.

Below, the trial court's difficulty in merely articulating the rule gives some indication of the problem. At one point, the court instructed petitioner: "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." Pet. App. 6a. Perhaps realizing this statement was incomprehensible, the court tried to provide clarification, but its explanation was no easier to understand: "I believe if you need to talk to your attorneys, I'm not telling you, you can't talk to them." *Id.* This distinction between

discussion that is allowed and discussion that is forbidden would be hard enough for a philosopher with oodles of time; it will be even harder for a harried judge in the middle of a trial.

2. The impossibility of distinguishing between permitted and prohibited discussions will chill the efforts of defense attorneys, who risk being held in contempt for crossing an indiscernible line.

The ambiguity of this distinction will inhibit defense lawyers in advising their clients, for fear of coming too close to the line. "I do not envy the defense lawyer who risks being held in contempt while trying to navigate this murky distinction," acknowledged one of the judges below. *Id.* at 19a. "How is the most ethically compliant lawyer supposed to determine how to communicate with his client about information made relevant by the day's testimony or the significance of the day's events or trial tactics or the advisability mid-trial of negotiating a plea bargain without some reference, however fleeting or indirect, to the substance or tenor of his client's as-yet-unfinished appearance on the witness stand?" *Id.* (brackets and internal quotation marks omitted).

Defense counsel must "act zealously within the bounds of the law and standards on behalf of their clients." ABA Criminal Justice Standards for the Defense Function, Standard 4-1.2(d). But counsel's zeal will inevitably be tempered by concern about exactly where the trial court will draw the line between allowable and unallowable discussions. Counsel should be able to devote full attention to the client without

having to worry about being held in contempt for saying the wrong thing. As the D.C. Circuit recognized, "an order such as the one in this case can have a chilling effect on cautious attorneys, who might avoid giving advice on non-testimonial matters for fear of violating the court's directive." *Mudd*, 798 F.2d at 1512.

This chill comes at the direct expense of the defendant's Sixth Amendment right to the assistance of counsel. The decision below prevents responsible counsel from providing essential advice that the Sixth Amendment protects.

3. The decision below destroys the attorney-client privilege.

The rule adopted below cannot be enforced without undermining the attorney-client privilege. To enforce the rule, the trial court would have to ask the defendant and counsel, "what did you talk about last night?" But these discussions are privileged. Neither the defendant nor counsel should be compelled to reveal the content of conversations in which counsel provides legal advice.

The attorney-client "privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client." *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). "[T]he privilege exists to protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice." *Id.* at 390.

If defendants realize that their overnight discussions with counsel will be revealed to the court the

following morning—the same court that is sitting in judgment upon them and may sentence them soon—defendants will not be able to tell counsel anything negative or incriminating. Deprived of this information, counsel will be unable to offer much useful advice. As the Court recognized long ago, in words that apply perfectly to this case, "[i]f a person cannot consult his legal adviser without being liable to have the interview made public the next day by an examination enforced by the courts, the law would be little short of despotic. It would be a prohibition upon professional advice and assistance." *Connecticut Mut. Life Ins. Co. v. Schaefer*, 94 U.S. 457, 458 (1876).

For these reasons, the rule adopted below is unworkable in practice. There is an obvious alternative. The rule below is the minority rule. Most courts (including every federal appellate court to address the issue) allow full discussion and consultation, *see* Pet. 14-21, and have done so without incident. Trial courts do not have to draw metaphysical distinctions between discussions that are allowed and those that are prohibited. Defense attorneys are not inhibited in their zealous representation of their clients. And the attorney-client privilege remains intact. The majority rule is legally sound and superior in practice.

C. The rule adopted below is not necessary to prevent "coaching" or any other forbidden practice.

The court below worried about "coaching," Pet. App. 15a, but there are less intrusive ways to prevent coaching that do not also squelch the legitimate, ethical reasons that counsel and the defendant need to discuss the defendant's testimony. Prohibit-

ing all discussion of testimony, as a means of preventing coaching, "is to burn the house to roast the pig." *Butler v. Michigan*, 352 U.S. 380, 383 (1957).

There are more tailored solutions.

One obvious method of dealing with coaching is for the prosecutor to cross-examine the defendant about it. "Skillful cross-examination could develop a record which the prosecutor in closing argument might well exploit by raising questions as to the defendant's credibility, if it developed that defense counsel had in fact coached the witness as to how to respond on the remaining direct examination and on cross-examination." *Geders*, 425 U.S. at 89-90.

The Court has more recently repeated that "arguing credibility to the jury … is the preferred means of counteracting tailoring of the defendant's testimony." *Portuondo v. Agard*, 529 U.S. 61, 70 (2000); s*ee also Kyles v. Whitley*, 514 U.S. 419, 443 (1995) (observing that "withering cross-examination" can destroy the jury's confidence in a government witness's testimony by "raising a substantial implication that the prosecutor had coached him to give it"); *Thompson v. Henderson*, 143 S. Ct. 2412, 2413 (2023) (Alito, J., respecting the denial of certiorari) (noting that "standard and long-accepted trial practices" include "suggesting [to the jury] that witnesses may have been coached").

If the trial court is concerned with coaching, the court can also schedule the defendant's testimony to take place on a single day. *Geders*, 425 U.S. at 90 ("In addition 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.") Here, for example, the trial court began Mr. Villarreal's testimony at noon, despite knowing that he would call an overnight recess an hour later. A little foresight would have prevented the problem from arising in the first place.

Finally, if the trial court is still worried about coaching, the court can simply remind defense counsel not to coach, which is not allowed at any time—before or during the trial. There is no need to separately forbid the defendant and counsel from engaging in legitimate, non-coaching discussions of testimony.

Decades of experience in the lower courts provides proof that the rule adopted in Texas is not necessary. Most of the courts that have addressed this issue have held that defendants have a right to discuss their testimony with counsel during an overnight recess. *See United States v. Triumph Cap. Grp., Inc.*, 487 F.3d 124, 132-33 (2d Cir. 2007); *United States v. Cobb*, 905 F.2d 784, 791-92 (4th Cir. 1990); *United States v. Santos*, 201 F.3d 953, 965 (7th Cir. 2000); *United States v. Sandoval-Mendoza*, 472 F.3d 645, 651 (9th Cir. 2006); *United States v. Cavallo*, 790 F.3d 1202, 1216 (11th Cir. 2015); *Mudd v. United States*, 798 F.2d 1509, 1512 (D.C. Cir. 1986); *Martin v. United States*, 991 A.2d 791, 794 (D.C. Ct. App. 2010); *State v. Fusco*, 461 A.2d 1169, 1173-74 (N.J. 1983); *People v. Joseph*, 646 N.E.2d 807, 807-08 (N.Y. 1994). There has been no epidemic of coaching in any of these jurisdictions.

Texas suggests that a second rationale for the rule adopted below, separate from fear of coaching, is to deny the defendant "an opportunity to regroup and regain a poise and sense of strategy that the unaided

witness would not possess." BIO 22 (internal quotation marks omitted) (quoting *Perry*, 488 U.S. at 282). The courts below never cited this rationale, perhaps because it dissolves under scrutiny. The quoted passage from *Perry* is not about overnight recesses. It concerns a 15-minute recess during the middle of the defendant's testimony. The Court was explaining why the defense may not insist upon a time-out partway through the defendant's testimony to let him regroup. An overnight recess, by contrast, inevitably breaks the flow. It gives everyone, including the prosecutor and the government's witnesses, an opportunity to regroup, to regain their poise, and to think about strategy for the next day. If no coaching is taking place, there is nothing nefarious about this.

Texas also touts the rule below as ensuring equality among defendants. Otherwise, Texas worries, "the defendant fortunate enough to receive an overnight recess while testifying would obtain a windfall that the short- or no-recess defendant is deprived of." BIO 22. But this is not an equal protection issue. It is a question of preserving Sixth Amendment rights in trials where an overnight recess takes place. Unless we abolish overnight recesses entirely and turn trials into grueling marathons, there is always a chance that an overnight recess might help some parties more than others. The fact that some defendants testify without interruption has nothing to do with the rights of other defendants whose testimony is interrupted by an overnight recess.

In any event, this supposed windfall is entirely within the control of the trial court, which can avoid scheduling the defendant's testimony to begin late in

the day and, if necessary, postpone dinner until the defendant has completed his testimony.

The rule adopted below is thus not necessary to stop unethical lawyers from coaching or to serve any other purpose. All it does is prevent defendants from receiving essential, constitutionally protected advice from ethical lawyers.

D. *Geders v. United States* should not be overruled.

Despite the critical importance of overnight discussions between defense attorneys and their clients, Texas urges the Court to overrule *Geders* and allow trial courts to ban *all* attorney-client contact during overnight recesses. BIO 16 n.1. The Court should reject this invitation. *Geders* was correctly decided. And even if *Geders* were somehow doutbful, none of the traditional considerations justifying a departure from stare decisis is present in this case.

1. *Geders* was correctly decided.

The most obvious reason not to overrule *Geders* is that the case was decided correctly. The Court unanimously recognized that "[i]t is common practice during such [overnight] recesses for an accused and counsel to discuss the events of the day's trial." *Geders*, 425 U.S. at 88. The Court noted that "[s]uch 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." *Id.* "At the very least," the Court observed, "the overnight recess during trial

gives the defendant a chance to discuss with counsel the significance of the day's events." *Id.* All of this was true when *Geders* was decided, and it is still true today.

In *Geders*, the Court also properly concluded that "coaching" can be prohibited without also banning attorney-client communication during an overnight recess. "There are other ways to deal with the problem of possible improper influence on testimony or 'coaching' of a witness short of putting a barrier between client and counsel," the Court explained, including cross-examination by the prosecutor and intelligent scheduling by the trial court. *Id.* at 89-90. This too was true when *Geders* was decided, and it remains true today.

The *Geders* Court did not give as much attention to the text and original meaning of the Sixth Amendment as would be the norm today, but had it done so, it would have reached the same conclusion.

The Sixth Amendment guarantees the accused "the assistance of counsel for his defence." The amendment's text does not limit counsel's assistance to particular topics or particular times of day. If Texas wishes to argue that in 1791 the word "assistance" actually meant "assistance except for discussions of testimony," or "assistance but not overnight," Texas must provide some evidence that the right to counsel was understood in this restricted, non-literal sense. But Texas cannot make this showing.

The precise question presented in this case could not have arisen at the Founding, because defendants were not permitted to testify in their own defense until the late nineteenth century. *See Ferguson v.*

Georgia, 365 U.S. 570, 577 & n.6 (1961). But there is ample evidence from the eighteenth and nineteenth centuries that "assistance" simply meant "assistance"—that is, that the right to the assistance of counsel was not limited to particular topics or times of day.

The Court has often noted that statutes enacted by the First Congress are helpful in interpreting the Constitution. *See, e.g.*, *Marsh v. Chambers*, 463 U.S. 783, 790 (1983). While the states were ratifying the Sixth Amendment, the First Congress enacted the Crimes Act of 1790, which established that in capital cases (which included all serious offenses at the time), the accused had a right "to make his full defence by counsel learned in the law." § 29, 1 Stat. 118 (1790). The Crimes Act specified that "such counsel shall have free access [to the defendant] at all seasonable hours." *Id.* According to contemporary dictionaries, "seasonable" meant "opportune." *See, e.g.*, Samuel Johnson, *A Dictionary of the English Language* (1785) (unpaginated) (defining "seasonable" as "opportune"); Noah Webster, *A Compendious Dictionary of the English Language* 208 (1806) (defining "opportune" as "seasonable").

Early American courts thus allowed the defendant to consult his counsel when consultation would be helpful. There is no indication that they restricted the topics the defendant could discuss with counsel or the times of day at which these discussions could take place. As Justice Story noted approvingly, while denying a motion for a new trial, "during this long and protracted trial, every indulgence, as to time and examination, was granted to the prisoners' counsel; [in] that they had *the fullest opportunity to*

communicate in court, and out of court, with the prisoners, *upon all the matters in evidence*." *United States v. Gibert*, 25 F. Cas. 1287, 1313 (C.C.D. Mass. 1834) (emphasis added).

The Sixth Amendment right to counsel, like the parallel provisions in state constitutions, was "liberally construed to mean the right of being aided by counsel in every step and stage of the prosecution." *State v. Cummings*, 5 La. Ann. 330, 331 (La. 1850). Reflecting the language used by the First Congress, courts recognized that "counsel shall have free access [to the defendant] at all seasonable hours." *Donnelly v. State*, 26 N.J.L. 601, 607 (N.J. 1857). *See also Commonwealth v. Mudgett*, 4 Pa. D. 739, 743 (1895) ("Nor was the defendant without counsel, for during the recesses of court, and in the morning before the opening of court, he was in consultation with the same counsel.").

At the Founding, moreover, the Sixth Amendment could not have been understood to weaken the attorney-client privilege, which was already firmly established in the common law when the Sixth Amendment was ratified. *See* Thomas C. Dawson Jr., John T. Tucker III, & Kevin J. Whyte, *The Attorney-Client Privilege*, 19 Univ. of Richmond L. Rev. 559, 560 (1985) (noting that the attorney-client privilege arose in the sixteenth century and was understood by the late eighteenth century to serve the purpose of encouraging defendants to make full disclosure to their counsel); *Upjohn*, 449 U.S. at 389 (describing the attorney-client privilege as "the oldest of the privileges for confidential communications known to the common law"). As the Court observed soon after the Sixth Amendment was ratified, "[t]he general

rule is not disputed, that confidential communications between client and attorney, are not to be revealed at any time." *Chirac v. Reinicker*, 24 U.S. 280, 294 (1826).

As we explained above in section B-3, the rule adopted by the Texas courts would undermine the attorney-client privilege. The only way the rule could be enforced would be for the trial court to ask the defendant and his attorney, "what did you talk about last night?" The only way the defendant and his attorney could answer this question would be to reveal privileged conversations.

The Founders understood the Sixth Amendment right to counsel to give criminal defendants *more* assistance from an attorney than was afforded by the common law, not less. *Powell*, 287 U.S. at 60-61. They would never have intended the Sixth Amendment to have such a devastating effect on the attorney-client privilege.

2. Texas could not overcome stare decisis even if its concerns had any substance.

Even if *Geders* were somehow in doubt, it should not be overruled. In determining whether to overrule one of its decisions, the Court traditionally considers five factors. *See, e.g.*, *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 268-90 (2022). Here, each factor favors adhering to stare decisis.

a. The nature of the error. One factor is whether the precedent was "egregiously wrong and deeply damaging." *Id.* at 268. *Geders* was not wrong at all. Nor was it damaging. It merely preserved the

traditional role of defense counsel in providing advice during overnight recesses.

b. The quality of the reasoning. A second factor is whether a precedent stands "on exceptionally weak grounds." *Id.* at 270. *Geders* stands on firm ground. It did not invent any new doctrines or draw any novel distinctions. Rather, it applied the traditional understanding of the Sixth Amendment.

c. Workability. A third factor is whether a precedent is "workable—that is, whether it can be understood and applied in a consistent and predictable manner." *Id.* at 280-81. *Geders* has proven to be workable. Its holding, that trial courts may not ban attorney-client consultation during an overnight recess, is a clear rule that is easily administered. In the half century since *Geders* was decided, the lower courts have had no trouble understanding it and applying it consistently. This factor is especially compelling given the obvious practical defects in Texas's novel scheme. There is no reason to inject confusion when settled law already supplies an administrable answer.

d. Effect on other areas of law. A fourth factor is whether a precedent has "led to the distortion of many important but unrelated legal doctrines." *Id.* at 286. *Geders* has not distorted any legal doctrines. Texas's proposed rule, by contrast, would require atextually narrowing the Sixth Amendment.

e. Reliance interests. The fifth factor is whether overruling a precedent "will upend substantial reliance interests." *Id.* at 287. Defense attorneys have always conferred with their clients during overnight recesses. Overruling *Geders* would upset common defense practice in criminal cases across the country.

All these factors thus weigh in favor of stare decisis. There is no reason to overrule *Geders*.

CONCLUSION

The judgment of the Court of Criminal Appeals of Texas should be reversed.

Respectfully submitted,

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