No. 24-557

IN THE
Supreme Court of the United States

DAVID ASA VILLARREAL,

Petitioner,

v.

TEXAS,

Respondent.

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

BRIEF OF RETIRED JUDGES AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

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

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INTEREST OF *AMICI CURIAE* *

Amici curiae are former state and federal judges with decades of combined experience on the bench. *Amici* have a longstanding and ongoing interest in ensuring that rules of criminal procedure are administrable by courts and protect the constitutional rights of defendants. Based on their experience handling hundreds of criminal cases—at both the trial and appellate level—*amici* believe the rule adopted by the Court of Criminal Appeals of Texas is unworkable in practice and undermines the evenhanded administration of justice by creating a patchwork of Sixth Amendment rights.

SUMMARY OF ARGUMENT

When this Court "fashion[s] interpretive rules," it seeks "to ensure that they are reasonably administrable" and provide a clear test under which "lower courts . . . may plan and act." *Opati v. Republic of Sudan*, 590 U.S. 418, 429 (2020). That is particularly true in the context of "categorical constitutional guarantees," which eschew "[v]ague standards" that would "leave too much discretion in judicial hands." *Crawford v. Washington*, 541 U.S. 36, 67-68 (2004). This Court has thus rejected proposed rules of criminal procedure as "[un]acceptable" when they "would lead . . . to an unworkable standard" and result in "arbitrary and anomalous distinctions between defendants in different [s]tates." *Montejo v. Louisiana*, 556 U.S. 778, 783 (2009).

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* Under this Court's Rule 37.6, no counsel for a party authored this brief in whole or in part, and no person or entity other than *amici* or their counsel made a monetary contribution intended to fund the preparation or submission of this brief. A complete list of *amici* is included as an appendix to this brief.

That is precisely the mischief that would result from the rule adopted by the Texas Court of Criminal Appeals. It held that a court may bar the defendant from conferring with counsel about the defendant's testimony during an overnight recess so long as the court allows them to confer about other matters. Yet there is no straightforward way to separate discussions of testimony from discussions of trial strategy and other matters. When a defendant waives the Fifth Amendment and elects to testify, that testimony usually becomes the trial's main event. Its impact permeates subsequent trial decisions. So an order prohibiting the defendant and counsel from discussing the defendant's testimony during an overnight recess in the middle of the defendant's testimony will impair strategy discussions at one of the most critical stages of trial. Because a defendant is often the last witness to testify, the rule adopted by the Court of Criminal Appeals can prevent any meaningful attorney-client communication before the jury charge conference and closing arguments that typically take place the next day.

Given the difficulty of severing discussions of trial strategy from discussions of trial testimony, inconsistent application of the vague divide between the two is inevitable. Decisions from jurisdictions trying to apply the divide that the Texas Court of Criminal Appeals adopted show starkly different views of what is encompassed by an order prohibiting the defendant and counsel from discussing the defendant's testimony.

The uncertainty the Court of Criminal Appeals' rule injects into vital attorney-client communications is the opposite of the clear rules that promote fair and efficient criminal trials. It will require courts to

determine and explain what types of discussions relate to the defendant's testimony on top of the other challenges of managing a criminal trial. The vagueness of the trial court's restriction will chill discussions between defendants and their counsel during what is often the most important part of trial, when "the very thing [the defendant] wants most" is to consult with counsel. *State v. Fusco*, 461 A.2d 1169, 1173 (N.J. 1983). Uncertain and inconsistent application of the fundamental constitutional right to consult with an attorney would undermine public confidence in the criminal justice system.

Enforcement of the rule adopted by the Court of Criminal Appeals would also interfere with the attorney-client privilege. For that privilege to be effective, this Court has long held, its scope and protections must be certain. Yet an instruction barring the defendant and counsel from discussing the defendant's testimony during an overnight recess puts the confidentiality of attorney-client communications at risk any time a court suspects the defendant and counsel may have violated that instruction. Enforcing the rule adopted by the Court of Criminal Appeals risks requiring defendants and their lawyers to reveal the contents of their conversations during an overnight recess. That problem with policing the supposed difference between discussions of trial strategy and discussions of trial testimony is another reason why the rule is unworkable.

ARGUMENT

The Rule Adopted by the Texas Court of Criminal Appeals Is Unworkable.

The Texas Court of Criminal Appeals held that the trial court may prohibit discussions of the defendant's testimony during an overnight recess but could not prohibit discussions of trial strategy and other matters. That supposed line is impossible to administer. Once a defendant testifies, that testimony becomes such an important part of the strategic calculus that it will usually be impossible to discuss trial strategy without any reference to the defendant's testimony. So prohibiting discussions related to the defendant's testimony is tantamount to banning most tactical discussions between the defendant and counsel during the recess. The rule will also have a chilling effect on attorneys' ability to advise their clients—both because of the hazy distinction between discussions of the defendant's testimony compared to discussions of other matters and because enforcement of the Court of Criminal Appeals' rule would interfere with the attorney-client privilege.

A. There Is No Straightforward Way to Distinguish Discussions About the Defendant's Testimony from Discussions About Trial Strategy.

The Texas Court of Criminal Appeals concluded that the trial court did not abridge the petitioner's Sixth Amendment right to counsel because it allowed the petitioner to confer with counsel about trial strategy and other matters even while it prohibited petitioner from conferring with counsel about his testimony. Pet. App. 2a-40a. That result is based on

the premise that it is possible to neatly separate discussions relating to a defendant's testimony from discussions of other matters. *Id.* at 48a. That distinction, however, is impossible to draw in practice. The rule adopted by the Court of Criminal Appeals would not be administrable and would inhibit attorneys from conferring with their clients about the trial during the recess.

In defending the rule adopted by the Court of Criminal Appeals, Texas overlooks that discussions about trial strategy are often "inextricably intertwined with the ability to discuss [the defendant's] ongoing testimony." *United States v. Triumph Cap. Grp., Inc.*, 487 F.3d 124, 133 (2d Cir. 2007). Examples abound.

- While discussing strategy and tactics, an attorney may want "to warn [the] defendant about certain questions that would raise self-incrimination concerns, or questions that could lead [the defendant] to mention excluded evidence." *Mudd v. United States*, 798 F.2d 1509, 1512 (D.C. Cir. 1986).
- Testimony offered by a defendant before a recess may affect how an attorney wishes to try the rest of the case. It may, for example, highlight a potential witness who could help the defense, which would prompt the attorney to ask the defendant about the identity, location, and credibility of the potential witness. See *United States v. Sandoval-Mendoza*, 472 F.3d 645, 651 (9th Cir. 2006).
- In response to attempted impeachment of the defendant, a diligent lawyer would want to ask if there is evidence to rebut the

prosecution's attack. See generally *United States v. Cobb*, 905 F.2d 784, 792 (4th Cir. 1990) ("How can competent counsel not take into consideration the testimony of his client in deciding how to try the rest of the case?").

- The defendant's testimony may coincide with the defense's inadvertent disclosure of privileged documents, requiring the defendant and counsel to discuss "the likelihood that [their] defense had been compromised by the [g]overnment's retrieval and review process, or any means to reduce that threat." *United States v. Cavallo*, 790 F.3d 1202, 1215 (11th Cir. 2015).
- The lawyer's assessment of the defendant's pre-recess testimony could influence ever-present discussions about whether to plead guilty before the case goes to the jury. See *Sandoval-Mendoza*, 472 F.3d at 651 (recognizing that an attorney may want to recommend that a client "change his plea after disastrous testimony").
- An assessment of how the defendant's testimony is going may infuse discussions about whether to call character witnesses. See Fed. R. Evid. 404(a)(2)(A).
- An attorney may need to discuss with the defendant the impact of the defendant's testimony on the common closing argument dilemma: whether to emphasize the defendant's innocence or focus on arguing that the prosecution failed to meet its burden. Cf. The Whole Truth (2016).

Yet under the rule adopted by the Court of Criminal Appeals, all of these discussions would likely be barred (or undertaken at the risk of sanction) because they relate to the defendant's testimony—even though their primary purpose is to help the defendant make key strategic decisions.

With such a hazy line between "trial strategy" and "defendant testimony" discussions, consistent application is hopeless. Experience in jurisdictions following the rule adopted by the Court of Criminal Appeals bears this out. Courts have adopted wildly different interpretations—or no meaningful interpretation at all—of what constitutes a discussion about testimony compared to a discussion about other matters.

Start with Kentucky's very broad limit on attorney-client discussions when an overnight recess interrupts the defendant's testimony. Its high court concluded that a trial court's instruction "prohibiting [the defendant] from discussing his testimony with his attorneys during an overnight recess" did not violate the defendant's Sixth Amendment right to counsel. *Beckham v. Commonwealth*, 248 S.W.3d 547, 549, 553-54 (Ky. 2008). The trial court had characterized its instruction as an order prohibiting the defendant and counsel from discussing "the case or any of the evidence that's come forth." Appellant Br. at 3, *Beckham v. Crews*, No. 10-6343 (6th Cir. Sept. 6, 2011), 2011 WL 4037713. Such a broad definition of trial-related testimony did not disturb the Kentucky Supreme Court's conclusion because the trial court's order "did not impermissibly limit *all* attorney-client contact during the waning minutes of the overnight recess." *Benham*, 248 S.W.3d at 554 (emphasis added). The trial court's instruction failed to explain,

however, what the defendant and counsel *could* discuss during the overnight recess.

A federal district court in Florida articulated a similarly expansive interpretation of what a prohibition on discussions relating to a defendant's testimony encompasses. *United States v. Cavallo*, 790 F.3d 1202, 1215 (11th Cir. 2015). After the defendant concluded his first day of testimony, the district court instructed "that he could not discuss his testimony with 'anyone,'" but clarified that the defendant "could talk to his lawyer about his 'constitutional rights.'" *Id.* at 1212. Following the second day of the defendant's testimony, however, the court offered a shifting characterization of the scope of its restriction: It reminded the defendant that he could discuss "constitutional rights" with counsel but instructed that they could not talk "about the case." *Id.* Even the Eleventh Circuit "d[id] not know what the district court meant" as far as what the defendant and counsel could and could not discuss. *Id.* at 1216. And the defendant, for his part, "was of the impression that the court had forbidden him from consulting at all with his attorney about his case"—notwithstanding the district court's emphasis on the defendant's testimony and its caveat that the defendant's "constitutional rights" could be discussed. *Id.*

The Delaware Supreme Court, on the other hand, has adopted a much narrower interpretation of what a restriction on discussions about a defendant's testimony covers. See *Webb v. State*, 663 A.2d 452, 460 (Del. 1995). The court warned that when prohibiting a defendant from discussing his testimony with counsel, "trial judges should be especially vigilant in giving unmistakably clear and limited instructions" that do "not permit any inference that

the defendant and counsel may not discuss other matters." *Id.* The trial court erred, the Delaware Supreme Court held, when it instructed the defendant not to discuss his testimony with counsel during an overnight recess and, upon a request from counsel about the scope of that restriction, stated that "[t]he Court expects [counsel] to understand the difference between what he can and cannot talk to the defendant about." *Id.* at 459. Because that response "could have been construed as an admonition that [the defendant] and his counsel were prohibited from discussing" both the defendant's testimony and "other trial-related matters," the court's "restriction was overbroad and violative of [the defendant's] Sixth Amendment right to effective assistance of counsel." *Id.*

Other courts, including the court presiding over the petitioner's trial, are unable to articulate any meaningful explanation of what types of discussions relate to a defendant's testimony. The court began by instructing the petitioner that he "can't confer with [his] attorney but [at] the same time [has] a [Sixth] Amendment right to talk to [his] attorney." Pet. App. 6a. But after a protracted colloquy in which counsel sought to understand the court's restriction, the court ultimately left the scope of its rule to counsel, instructing that "if [the defendant] asks you any questions," "you're going to have to decide . . . is this something that is going to be considered to be conferring with him" regarding his testimony. *Id.* at 8a.

As these decisions illustrate, the rule advanced by Texas will result in a patchwork of Sixth Amendment rights as courts reach varying views about what discussions relate to a defendant's testimony (and thus may be prohibited during an overnight recess)

and which relate to other matters (and thus are permitted). Because there is no "'one size fits all' rule to be applied" when distinguishing between discussions relating to testimony and discussions about other matters, courts will inevitably draw different lines—to the extent they can draw a line at all—between permissible and prohibited discussions. *Webb*, 663 A.2d at 460. Such divergence in the scope of defendants' right to counsel undermines the criminal justice system. See *Davis v. United States*, 160 U.S. 469, 488 (1895) (Harlan, J.) ("[I]t is desirable that there be uniformity of rule in the administration of the criminal law in governments whose constitutions equally recognize the fundamental principles that are deemed essential for the protection of life and liberty."); cf. *Arizona v. Roberson*, 486 U.S. 675, 680 (1988) ("[o]ne of the principal advantages" of a rule of criminal procedure "is the ease and clarity of its application").

The difficult if not impossible task of administering the distinction Texas tries to draw will have adverse consequences for both the bench and bar. The Court of Criminal Appeals' rule will require courts to make ad hoc, fact-specific determinations of what types of discussions are permissible and impermissible during an overnight recess—while in the meantime managing a criminal trial. If the courts that have adopted Texas's rule are any indication, many will be unable to provide any meaningful guidance to counsel. See, *e.g.*, *Webb*, 663 A.2d at 456 ("The Court expects [counsel] to understand the difference between what he can and what he cannot talk to the defendant about"); Pet. App. 8a ("[Y]ou're going to have to decide, if [the defendant] asks you any questions and such, is this something that is going to

be considered to be conferring with him on the witness stand while the jury is there or not").

The lack of a principled understanding about what may and may not be discussed during an overnight recess will have a chilling effect on attorneys' ability to advise their clients—"a fundamental component of our criminal justice system." *United States v. Cronic*, 466 U.S. 648, 653 (1984). That is all the more troubling because such restrictions on discussions between the defendant and counsel about the defendant's testimony would typically be imposed at a critical time in the case: Because the defendant is often the last witness to testify, their testimony coincides with a period during which the defense is making many significant decisions, such as how to frame the closing argument, what jury instructions to request, and whether the defendant should accept what may be the last chance at a plea. And because "forbid[ding] all consideration of the defendant's ongoing testimony . . . would as a practical matter preclude the assistance of counsel across a range of legitimate legal and tactical questions," *United States v. Santos*, 201 F.3d 953, 965 (7th Cir. 2000) (quotation marks omitted), many lawyers may conclude that they effectively may not consult at all with their clients during an overnight recess—precisely the result that this Court held violates the Sixth Amendment in *Geders v. United States*, 425 U.S. 80 (1976). To avoid that result, this Court should conclude that defendants have the Sixth Amendment right to consult with counsel during an overnight recess—including about matters that relate to the defendant's testimony.

B. Enforcement of the Rule Adopted Below Would Obstruct the Attorney-Client Privilege.

Enforcement of the rule adopted by the Court of Criminal Appeals also risks judicial interference with attorney-client privilege—a privilege that is fundamental to the fair operation of our adversarial system of justice. This Court has long recognized that for the "privilege to be effective, it must be predictable." *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 183 (2011); see *Upjohn Co. v. United States*, 449 U.S. 383, 393 (1981) ("An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all."). Constitutional rules that risk invasion of the privilege, such as the rule adopted by the Court of Criminal Appeals and advanced by Texas, will have a chilling effect on the free flow of information between attorney and client that the privilege safeguards. *Mudd*, 798 F.2d at 1512.

The rule advocated by Texas would result in precisely the uncertainty that this Court has rejected: It puts the confidentiality of attorney-client communications at risk any time a court suspects the defendant and counsel may have violated instructions not to discuss matters relating to the defendant's testimony. That regime, under which courts may require defendants and their lawyers to reveal the contents of their conversations during an overnight recess, demonstrates another reason the rule adopted by the Court of Criminal Appeals is utterly unworkable.

Consider what will likely happen when a court suspects a defendant and his lawyer of violating an

order prohibiting them from discussing the defendant's testimony during an overnight recess. The only way the court could determine whether its suspicion is well-founded is to gather testimony regarding what the defendant and counsel discussed. See *Mudd*, 798 F.2d at 1513. While the defendant and his attorney may at first respond by assuring that they obeyed the court's instructions, that statement would not allow the court to determine whether the defendant's conversations with counsel steered clear of matters relating to the defendant's testimony. For the rule adopted by the Court of Criminal Appeals to be enforced, the court would need to be privy to the contents of attorney-client communications to determine whether they related to the defendant's testimony. Even statements as straightforward as "we discussed redirect strategy" or "I encouraged my client not to get combative" would reveal communications protected by the privilege. See *Upjohn*, 449 U.S. at 393.

Texas's only meaningful explanation of how the attorney-client privilege may coexist alongside its proposed rule is to suggest that defendants and their attorneys can simply confess, upon questioning by the court, that they violated the court's instructions without revealing the contents of their conversations. Br. in Opp. 27. That contention is unsatisfactory. The most common way a violation of the court's instruction would occur—particularly because of the amorphous line separating discussions of the defendant's testimony from strategy discussions—is when the defendant and counsel discussed what they believed to be trial strategy but that the court later deems related to the defendant's testimony. Texas offers no response why the attorney-client privilege would not be invaded in that situation, when a defendant and

his lawyer believe they have obeyed the court's instruction. For the rule adopted by the Court of Criminal Appeals to be more than a rule in name only, a court must understand what the defendant and counsel discussed so it can determine whether those discussions related to the defendant's testimony.

The rule adopted by the Court of Criminal Appeals would compromise the attorney-client privilege when a court has a suspicion that a defendant and counsel have discussed the defendant's testimony during an overnight recess. That possibility will create unacceptable uncertainty for defendants and counsel and deter open dialogue between them. This Court should reject the rule advanced by Texas it cannot be administered without overriding the attorney-client privilege.

CONCLUSION

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

Respectfully submitted.

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June 10, 2025

APPENDIX

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LIST OF *AMICI CURIAE*

The Hon. Abdul Kallon (ret.) served on the United States District Court for the Northern District of Alabama from 2010 to 2022.

The Hon. Jeremy D. Fogel (ret.) served on the Santa Clara County Municipal Court from 1981 to 1986, on the Santa Clara County Superior Court from 1986 to 1998, and on the United States District Court for the Northern District of California from 1998 to 2018. He served as director of the Federal Judicial Center from 2011 to 2018.

The Hon. Paul J. Watford (ret.) served on the United States Court of Appeals for the Ninth Circuit from 2012 to 2023.

The Hon. T. John Ward (ret.) served on the United States District Court for the Eastern District of Texas from 1999 to 2011.

The Hon. Thomas I. Vanaskie (ret.) served on the United States District Court for the Middle District of Pennsylvania from 1994 to 2010 and on the United States Court of Appeals for the Third Circuit from 2010 to 2018.

The Hon. William Scott Bales (ret.) served on the Arizona Supreme Court from 2005 to 2019 and as its Chief Justice from 2014 to 2019.