No. 24-557

In the Supreme Court of the United States

DAVID ASA VILLARREAL, PETITIONER,

v.

TEXAS, RESPONDENT.

ON WRIT OF CERTIORARI
TO THE TEXAS COURT OF CRIMINAL APPEALS

BRIEF FOR RESPONDENT

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Question Presented

Trial courts may take steps to protect the truth-seeking function of trial. *Perry v. Leeke*, 488 U.S. 272 (1989). To that end, while they may not issue absolute no-conferral orders during long breaks in the defendant's testimony, they may do so during short breaks or, alternatively, qualified orders that allow conferral in all respects except the ongoing testimony. *Id.*

This case concerns a qualified conferral order issued before an overnight recess. Defense counsel was ordered to not manage petitioner's testimony during the break. Counsel and petitioner were able to confer in all other respects. Thereafter, no complaint was made that their ability to confer was unduly hindered.

The question presented is:

When a defendant's testimony is paused for a long break, may the court seek to ensure a fair trial by telling counsel to not manage the ongoing testimony?

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Statement

Throughout the trial, petitioner had access to counsel, including during the overnight break in question. The trial court merely instructed counsel not to manage petitioner's testimony during that break. Such qualified conferral orders are in keeping with this Court's precedents, workable, and compatible with the Sixth Amendment's original meaning. To the extent such orders are thought to pose a problem, courts and legislatures should be trusted to chart the best path forward.

1. *Factual background*. Before the trial court entered its qualified conferral order, petitioner testified that he stabbed his live-in boyfriend, Aaron Estrada, with a knife. (3Tr. 188–89; 5Tr. 126–28.) The medical examiner confirmed that Aaron was stabbed seven times and suffered numerous other incised wounds and abrasions, resulting in his death. (4Tr. 74–75, 82, 89; State's Ex. 87.) Therefore, the offense was established beyond a reasonable doubt. Petitioner claimed, however, that he acted in self-defense. (5Tr. 127.) But as outlined below, his claim was in tension with the rest of the evidence.

Veronica Hernandez, a friend of the couple, testified that she saw the men at their apartment the night before the murder, and they "seemed fine" and "weren't arguing." (3Tr. 191–93, 195.) She planned on staying the night but did not because Aaron sent her a text message saying he was trying to "make peace" with petitioner, indicating that they may

have been having relationship problems. (3Tr. 192, 195–96.)

The next morning, Veronica received a frantic phone call from Jimena Valenzuela, another mutual friend. (3Tr. 198–99; 4Tr. 187–88.) After their conversation, Veronica went to Aaron's apartment. (3Tr. 199.) There, the front door was not closed all the way, and a motorcycle usually driven by petitioner was directly in front of the door as if it were "blocking it." (3Tr. 194, 200.) Veronica entered the home and immediately froze because she saw blood in the entryway. (3Tr. 201.) She ran up the stairs, which also had blood smears, whereupon she saw Aaron's body in a "semi-fetal" position. (3Tr. 202.)

Aaron was unresponsive, so Veronica attempted to call 911 from the apartment's cordless phone. (3Tr. 202.) The power had been cut off, however, so she used her cell phone instead. (3Tr. 202.) When EMS arrived, they asked Veronica to direct them to the power box so they could flip the breakers because "the power was completely off." (3Tr. 203–04.) At the scene, police found a pair of bloody scissors in a basket, as well as multiple pieces of a blood-stained broken knife. (4Tr. 28; State's Exs. 31, 37, 39, 40, 44, 48, 51, 52, 56, 64, 66, 67, 69.)

Jimena also testified. She explained that she, Aaron, and petitioner regularly "smoke[d] meth" together. (4Tr. 196.) A few days before the murder, petitioner arrived at her workplace claiming to have seen "people dumping bodies in bags into a hole" at his work. (4Tr. 198–99.) He also believed he was

being followed. (4Tr. 206.) Petitioner seemed "agitated" and "upset" when he told Jimena his strange story, so she agreed to accompany him to the worksite to see it for herself because, in the past, she too had hallucinated about being followed. (4Tr. 198–99, 204–06.) She stated that petitioner did not appear to be under the influence of drugs at that time; however, she and petitioner "were high all the time." (4Tr. 205.) Ultimately, instead of going to the worksite, the pair went to Aaron's apartment because they wanted him to join them. (4Tr. 205–06.) When they reached his apartment, he declined to join in their paranoid adventure, stating that the two were "crazy." (4Tr. 206–07.)

Petitioner and Jimena then decided to drive from San Antonio to Austin to visit petitioner's ex-girlfriend, Naomi, because he believed that "her neighbors were holding her hostage[.]" (4Tr. 207.) In Austin, petitioner knocked on Naomi's door for a long time. (4Tr. 208.) Naomi eventually peeked outside to reassure petitioner that she was fine. (4Tr. 208.) Petitioner returned to Jimena's truck, but not satisfied that the person he had just seen was actually Naomi, he went back and began knocking again. (4Tr. 208.) Naomi refused to go outside, so petitioner and Jimena called the police. (4Tr. 208–09.) The police arrived and confirmed that Naomi was fine, but petitioner had doubts that the police were legitimate. (4Tr. 209.) Jimena, however, convinced petitioner that everything was all right, and they returned to Jimena's apartment in San Antonio. (4Tr. 209.)

At some point, petitioner had thrown his phone away because he believed that "they" could follow him and Jimena via their phones. (4Tr. 209–10.) Jimena had no cable, internet, or phone in her home, and she left petitioner alone there and went to work. (4Tr. 210.) When Jimena returned home, she found petitioner reading a vampire-themed book titled "Memnoch the Devil." (4Tr. 210.) While he seemed relaxed, petitioner told Jimena that he saw numerous similarities between the main character and himself, as well as between other characters in the book and people in his life. (4Tr. 210.)

Petitioner and Jimena then left to go to Aaron's apartment, but they stopped for gas along the way. (4Tr. 211.) At the station, Jimena told petitioner about how, on a previous occasion when petitioner went missing, she and Aaron were able to locate petitioner through Naomi's Facebook photos. (4Tr. 211.) Upon hearing that information, petitioner "totally freaked out" because he thought Jimena and Aaron were "conspiring against Naomi." (4Tr. 211.) When they arrived at Aaron's apartment, petitioner told Jimena to stay in the truck so that he could speak with Aaron. (4Tr. 211–12.) Petitioner was in the apartment for "a while," but he eventually left. (4Tr. 212.) Jimena noticed that Aaron was "agitated," which was unlike him, and "practically kicking [petitioner] out." (4Tr. 212, 215.)

Petitioner and Jimena went on their way, and began to locate "Misty," a "spiritual healing" therapist whose business card was in petitioner's wallet,

though he disclaimed knowing how the card got there. (4Tr. 211, 212–13.) En route, they saw a bulletin board of a missing child next to a taco truck, and petitioner swore "that that's where [they were] going to get [their] answers." (4Tr. 215–16.) He asked the truck vendor, "What's good off the menu," which Jimena explained was his way of "following leads." (4Tr. 217.) Such abnormal behavior and thoughts were in keeping with what Jimena described as the "map" guiding the pair's shared paranoid odyssey, on which they concocted bizarre plans, looked for security cameras and videos, believed people were speaking to them in code, and followed what they believed were signs and clues of a greater message. (4Tr. 217–18.) Jimena candidly admitted that she and petitioner were "crazy." (4Tr. 218.) At some point along their expedition, she also dissuaded petitioner of the notion that he needed to carry any weapons with him because, if the situation warranted, "anything could be a weapon." (4Tr. 214–15.)

Later, the pair returned to Aaron's apartment because petitioner wanted her to "find out what Aaron knew." (4Tr. 214.) Petitioner also told Jimena to kill Aaron. (4Tr. 214.) She did not, obviously; but she did believe the situation was "getting scary." (4Tr. 214.)

On the day of the murder, around three in the morning, Jimena went to Aaron's apartment to "make sure everything was fine" between him and petitioner. (4Tr. 193–94.) She felt the need to do so because of the "eventful" previous few days. (4Tr.

194.) When she arrived, "everything was okay, everybody was happy," so she only stayed a few minutes. (4Tr. 194–95, 224, 243.) She went home, but she returned to Aaron's apartment a few hours later to "smoke meth," and met Aaron outside. (4Tr. 197.) A friend of his had just left, and Aaron seemed fine. (4Tr. 197.) Petitioner, however, was "agitated[.]" (4Tr. 197.) She did drugs with petitioner and then left for work. (4Tr. 197.)

Later that day, petitioner arrived at Jimena's work driving Aaron's car. (4Tr. 198.) When she saw him, his clothes and one of his hands were "full of blood." (4Tr. 200, 224.) She asked him if he was all right, and he replied that he was. (4Tr. 200.) She then inquired about Aaron, and petitioner indicated that he was not all right, whereupon she called Veronica and told her to check on Aaron. (4Tr. 200.)

When Jimena returned to petitioner, he was "agitated" and stated, "We got to go," and, "This is his car. We shouldn't be in his car." (4Tr. 200–01.) Jimena confirmed that she had previously told the police that petitioner said, "I did it." (4Tr. 202–03.)

Petitioner never mentioned to Jimena that he and Aaron had been in a fight. (4Tr. 221.) But he did tell her he had to hold a knife to Aaron's throat because he had seen her daughter's face in one of Aaron's security videos. (4Tr. 221–22.) He also said he grabbed the scissors after the knife had broken and "gash[ed]" his hand. (4Tr. 220–22.)

Petitioner and Jimena then left her workplace and went to her apartment. (4Tr. 201.) Later, petitioner absconded from her apartment by jumping off a balcony, and he was eventually located by the police at Naomi's home in Austin. (4Tr. 124, 226.) Officer Thomas Villarreal stated that, when located, petitioner was wearing a clean shirt, but his pants were bloody, and he was clutching a hand towel because of a "bad laceration to his right hand." (4Tr. 125.)

After petitioner was arrested, he asked the officer to tell Aaron's parents and grandparents that he was sorry, and that Aaron "didn't deserve it." (4Tr. 127, 141–42.) Also, unprompted, petitioner stated, "Tell him he was innocent. He didn't deserve what happened to him." (4Tr. 128, 142–43.) Further, petitioner said that he wanted Aaron back and that he heard his voice. (4Tr. 128, 141–42.) Later, when petitioner was being booked into jail, he said, "Just take me somewhere and shoot me. I don't deserve jail. Take me to his grandparent's house so they can just kill me." (4Tr. 131–32, 143.)

As stated above, petitioner testified that he stabbed Aaron. He also admitted that, on the morning of the murder, he had used drugs. (5Tr. 116.) Petitioner recalled that, before the stabbing, a man named Eric was at the apartment. Eric and Aaron were having a conversation away from petitioner, but they were close enough for petitioner to overhear Eric make a comment which upset petitioner. (5Tr. 116–18.) Later, petitioner confronted Aaron about

Eric's comment, but Aaron said it was just a joke. (5Tr. 120.) Petitioner insisted on discussing it, and he asked Aaron to turn off his phone, computer, and security cameras because he was "paranoid" that he was being watched. (5Tr. 120–21.) Aaron refused to shut anything off and instead "was just kind of blowing [petitioner] off." (5Tr. 121–22.) Petitioner became "very frustrated" and "turned off all the breaker switches in the breaker box." (5Tr. 122.) That, in turn, caused Aaron to "storm[] out," which was unusual behavior for him, making petitioner "scared." (5Tr. 122.)

After Aaron left the room, petitioner pulled out the smoke detectors because he claimed he had previously found a camera in one. (5Tr. 124.) Petitioner, believing that Aaron was retrieving a gun from a safe, grabbed a knife and placed it in his back pocket. (5Tr. 126–27.) Aaron then returned and asked why petitioner pulled the smoke detectors out. (5Tr. 127.) Then, according to petitioner, Aaron grabbed and choked him, whereupon petitioner stabbed Aaron several times. (5Tr. 127–28.)

When the altercation was over, Aaron was "motionless on the ground." (5Tr. 129.) Petitioner, however, did not call 911. (5Tr. 129.) Instead, he changed his shirt and absconded. (5Tr. 130, 132.) When asked about the bloody scissors found in the apartment, he claimed he did not know whether he used them. (5Tr. 132.) After he spoke to Jimena, he went to her apartment, but eventually "freaked out" and fled to Austin by himself. (5Tr. 132–35.)

The trial judge stopped petitioner's testimony at that point because, as he had explained the day before, he had to attend a meeting. (4Tr. 252–54; 5Tr. 135.) The court then recessed for the evening, and the complained-of qualified conferral order was issued. (Pet. App. 6a–8a; 5Tr. 137–39.)

2. *The qualified conferral order*. After the jury left, the trial court admonished petitioner's attorneys to not manage his testimony during the break. (Pet. App. 5a–8a.) The trial court assured counsel that petitioner's "attorney–client privilege is safe," and it took pains to emphasize that petitioner was allowed to speak with his attorneys about other trial-related matters. (Pet. App. 6a–8a.) Instead, it specified they were only prohibited from discussing "[h]is testimony." (Pet. App. 6a–7a.) It told counsel that they should ask themselves before they "talk to him about something, is this something that – manage[s] his testimony in front of the jury?" (Pet. App. 7a.) One of petitioner's attorneys confirmed that the trial court's admonishment made sense to him, while the other offered assurances to the court, stating, "We aren't going to talk to him about the facts that he testified about." (Pet. App. 7a.) But "just for the future," counsel did object under the Sixth Amendment's right to counsel. (Pet. App. 8a.)

When trial resumed the next day, the court asked if either side had any issues to address. One counsel replied, "Not from the defense at this time, Judge," while the other said nothing. (6Tr. 5.) Petitioner's testimony then resumed and finished. (6Tr. 6–61.)

The jury ultimately found petitioner guilty of murder, and he was sentenced to sixty years' imprisonment. (7Tr. 48, 108, 110.) No motion for new trial was filed that raised this issue presented here.

3. *Procedural history*. The intermediate court of appeals rejected petitioner's contention that the qualified conferral order violated the Sixth Amendment and affirmed the conviction. (Pet. App. 41a, 44a–50a.) It first noted that the proper standard of review is whether the trial court abused its discretion. (Pet. App. 46a.) It then analyzed this Court's decisions regarding absolute no-conferral orders—*Geders v. United States*, 425 U.S. 80 (1976), and *Perry v. Leeke*, 488 U.S. 272 (1989)—and concluded that the trial court successfully "thread[ed] the needle" by allowing discussions about all trial-related matters save petitioner's ongoing testimony. (Pet. App. 46a–50a.)

The Texas Court of Criminal Appeals (TCCA) affirmed. It analyzed this Court's holdings in *Geders* and *Perry*, *supra*, and noted that while, "[a]t first glance, the length of the recess appears to be the determining variable between" the two cases, "the type of communication being restricted is the true controlling factor." (Pet. App. 11a.) "Discussing or conferring about the ongoing testimony is distinct from taking 'consideration' of the ongoing testimony. The former disrupts the truth-seeking function of trial; the latter allows counsel to constitutionally advise his client during the overnight recess." (Pet. App. 14a.) It used the following illustration: A defendant

is being unpersuasive and inconsistent on the stand. An overnight recess is called before the examination is completed. Counsel telling the defendant what to say and how to say it in response to his and the prosecutors' upcoming questions the following day is properly prohibited. However, counsel advising the defendant to take the plea deal after the earlier poor performance is constitutionally protected. (Pet. App. 14a.)

The TCCA outlined six factors for determining the propriety of the order here. *First*, the order was properly limited only to petitioner's ongoing testimony. "The judge's explanation about *managing* the testimony in front of the jury supports the conclusion that the judge was focused on preserving the truth-seeking function of trial by preventing coaching—something a trial court may prevent. The judge did not say anything to prevent *consideration* of the ongoing effects of the testimony." (Pet. App. 15a–16a.)

Second, petitioner's counsel affirmed that they understood the order. "This supports the conclusion that counsel were still able to have constitutionally permissible communications with [petitioner] that afternoon, evening, and the following morning, before the trial resumed with [petitioner] on the stand." The TCCA emphasized that "[c]ounsel must be allowed to discuss the derivative effects of the testimony." (Pet. App. 16a.)

Third, there was nothing in the record suggesting petitioner and his counsel were unable to confer

about constitutionally permissible matters during the overnight recess. *Fourth*, the next day, when a brief recess occurred during petitioner's cross-examination, the trial court reiterated its order and no objection was lodged, suggesting counsel understood it only prohibited conferring about ongoing testimony. *Fifth*, petitioner never filed a motion for new trial explaining that permitted communications were hindered by the order. *Sixth*, "[t]here was no prodding by the prosecution to restrict [petitioner's] communications with counsel." (Pet. App. 17a.)

Therefore, under the facts presented, the qualified order did not violate the Sixth Amendment. (Pet. App. 18a.)

Notably, the two concurring opinions recognized that, even if the order were erroneous, it was likely nonprejudicial or harmless. As Judge Yeary observed, petitioner made no showing that his counsel found the trial court's order "difficult to comply with or inhibitive of his ability to counsel his client as needed—*at all*. Thus, there exists in this case at least an argument that [petitioner] has also failed to demonstrate prejudice." (Pet. App. 19a.)

Likewise, Judge Keel, while believing the order to be improper, concluded that it was harmless beyond a reasonable doubt. (Pet. App. 25a–26a); *see* Tex. R. App. P. 44.2(a). She explained that petitioner's "version of events was weak; any effort to change his testimony overnight would have further damaged his credibility; and the State's case against him was overwhelming and included [petitioner's]

damning, spontaneous expressions of regret and claims that the victim 'didn't deserve it' and was 'innocent.'" (Pet. App. 26a.) Instead, as the State had noted, "the victim's murder was the inevitable conclusion to a days-long, meth-induced rampage, spurred on by petitioner's bizarre paranoid delusions." (Pet. App. 26a (cleaned up)).

Judge Walker dissented, concluding that the order here was functionally equivalent to the one in *Geders*, and that any error was structural. (Pet. App. 26a–40a.)

Summary of the Argument

When the defendant's testimony is paused for a long break, the trial court may tell defense counsel to not manage the testimony, provided counsel may take the testimony into consideration when discussing other trial-related matters.

1. Qualified Conferral Orders Align with Precedent.

1.1. In *Geders v. United States*, 425 U.S. 80 (1976), while counsel agreed that an order merely limiting discussion of ongoing testimony would be acceptable, the trial court instead issued an absolute no-conferral order. This Court, however, found absolute orders unacceptable during long recesses. By contrast, in *Perry v. Leeke*, 488 U.S. 272 (1989), this Court approved both absolute no-conferral and qualified orders during short breaks. It distinguished its situation from *Geders* not by the length of recess, but

by what one could *presume* would be discussed during the break: during short breaks, only ongoing testimony would likely be discussed, whereas during long breaks a variety of other trial-related matters would be as well. In doing so, it recognized a constitutional distinction between discussing ongoing testimony (not protected) and discussing other trial-related matters (protected).

1.2. When discussing protected matters, counsel is always allowed to take consideration of the testimony, which necessarily allows some incidental discussion of it. But direct discussion—i.e., testimonial management—can be prohibited. Petitioner's concerns that the testimony's derivative effects cannot be discussed are unfounded. Counsel can still discuss a range of issues related to the testimony, including calling additional witnesses, plea bargains, legal objections, court orders, excluded evidence, and the implications of perjury, among others. On the other hand, to preserve the trial's truth-seeking function, the court can prohibit testimonial management—that is, coaching, regrouping, and strategizing about the testimony itself, all of which *Perry* recognized as undermining a trial's quest for truth.

1.3. Without being able to issue qualified conferral orders, defendants who receive a long recess would gain a windfall that short- and no-recess defendants are deprived of. But the fortuitous intervention of a long break should not give counsel a chance to manage testimony. Qualified conferral orders allow courts to place all testifying defendants

on near equal footing. The remedy for counsel being faced with unexpected eventualities that arise during the testimony is to prepare the defendant and investigate the facts *before* the testimony begins, not hope for a chance overnight recess. Similarly, qualified orders allow trial courts to prevent gamesmanship by preserving the *status quo*.

1.4. Simply, under this Court's precedents, courts act within their discretion when they balance the defendant's right to counsel with the reliability of trial. Counsel will have to remain mindful to differentiate between protected and unprotected matters, but that is a reasonable price to pay to preserve the truth-seeking function of trial. Here, by merely prohibiting testimonial management, the trial court's order successfully balanced the defendant's rights with the trial's integrity.

2. Qualified conferral orders are workable.

2.1. The record here demonstrates qualified orders are workable. Defense counsel explicitly stated they understood the order and did not outline any practical problems they foresaw or encountered. If they had encountered problems, they could have asked for a reconsideration and continuance or moved for a new trial, but they did not. Nor did they ever indicate they even wanted to discuss petitioner's testimony. The absence of such actions here shows the feasibility of qualified orders generally.

2.2. *Perry*'s approval of qualified conferral orders makes little sense if they undermine discussion of protected matters. Counsel subject to short-break orders would take full advantage of being able to confer with their client and would likely ask for clarification if they could not. Thus, either qualified orders can be complied with, or they cannot—length of recess has no logical bearing on one's ability to comply. And permitting such orders during short breaks but not long ones raises questions about how to define "short." But allowing these orders across the board avoids unnecessary litigation and confusion, and ensures all parties understand the scope of permissible communication.

2.3. Concerns that qualified conferral orders unduly intrude on the attorney–client relationship and privilege are unfounded. This Court's precedents already permit some intrusion. For example, *Perry* blessed qualified orders during short recesses, and there is no reason why privileged communications would not be unduly imperiled during those breaks but would be during long ones. Further, *Geders* allows prosecutors to cross-examine the defendant about any coaching that may have occurred. Qualified orders alleviate any concerns stemming from the prosecution asking questions about privileged communications. And while petitioner concedes that counsel can be told not to coach their clients, he fails to explain how no-coaching orders can be policed without some inquiry into private conversations.

Furthermore, if compliance proves difficult, attorneys can approach the court without breaching the privilege. And courts can take measures to protect confidentiality, such as *in camera* review. Additionally, petitioner places heavy reliance on ethical rules and standards. But, with certain caveats, privileged discussions can be revealed pursuant to court orders without fear of disciplinary action. Moreover, while the ethical rules prohibit inducing false testimony, qualified orders are designed to deal with other truth-inhibiting actions by counsel. Finally, ethical rules are both temporally and spatially mutable, and are mere guides, not constitutional imperatives.

2.4. Petitioner's suggestion that qualified orders undermine pre-testimony preparation is incorrect. By their nature, such orders apply only to breaks that occur while the testimony is ongoing. Consistent with *Perry*, before a defendant takes the stand—and after testimony ends—attorney–client consultation is generally unrestricted.

2.5. Rejecting qualified conferral orders could cast doubt on similar orders, like those preventing disclosure of jury-tampering investigations or retaliation against witnesses. All such orders limit attorney–client communication, necessitate caution by counsel and potentially expose them to censure, and possibly require some intrusion into privileged communications. If no-management orders are unconstitutional, these others could be vulnerable, too.

3. Qualified conferral orders adhere to the Counsel Clause's original meaning.

3.1. As originally understood, the Counsel Clause guaranteed the right to retain counsel, not to have unfettered attorney access. For instance, one early federal statute necessarily shows some restrictions on access were acceptable. And there is no indication that truth-preserving orders were improper. Physical courtroom setups like the "dock" further restricted access. Significantly, Founding-era defendants could not even testify in their own defense, making the notion of mid-testimony conferral a nonissue.

3.2. None of that is to say those early practices were good policies, or that this Court must retreat from its precedents that held contrarily. But it does demonstrate that the Counsel Clause would have either not applied at all to the situation here or allowed restrictions on managing testimony. Thus, while the Court need not overrule *Geders*, it should treat it as the outer limit of questions of this type and go no further.

4. Petitioner wishes to impose a near-unalterable trial-management rule on all trial courts in the country. But courts and legislatures should be trusted to address the propriety of qualified conferral orders. As in *Perry*, trial courts are typically in the best position to decide whether and when qualified orders are appropriate during long recesses. And because competing values should generally be debated and resolved through the democratic

process rather than by constitutional fiat, legislatures can also reflect community standards by crafting appropriate restrictions on court discretion.

5. If this Court does reverse, because neither the TCCA majority nor petitioner addressed the issues of structural error and constitutional harm, it should remand to the TCCA to address those issues in the first instance.

Argument

1. Qualified conferral orders are in keeping with this Court's precedents.

1.1. What matters is the conferral's substance, not the length of recess.

a. Petitioner likens this case to *Geders v. United States*, 425 U.S. 80 (1976). There, when the trial court recessed for the night, "the prosecutor asked the judge to instruct [Geders] not to discuss the case overnight with anyone." 425 U.S. at 82, 83 n.1. Geders's attorney objected, "explaining that he believed he had a right to confer with his client about matters *other than the imminent cross-examination*, and that he wished to discuss problems relating to the trial with his client." *Id.* at 82 (emphasis added). Specifically, during the colloquy with the court, counsel stated, "I feel that I do have the right to confer with him but not to coach him as to what he may say on cross-examination or how to answer questions." *Id.* at 84 n.1. When asked what else they might discuss, counsel replied, "I don't know. Such

as whom should I call as the next witness. . . . There are numerous strategic things that an attorney must confer with his client about." *Id.*

The trial court said it would believe counsel if he said he would not discuss Geders's direct testimony, to which counsel replied, "Your Honor, I can assure you of that." *Id.* But the trial court remained concerned that Geders himself would not understand a testimonial limitation. *Id.* at 84–85 n.1. In the court's estimation, however, he would understand being told to not talk to counsel "about anything" during the overnight recess. *Id.* at 82, 85 n.1, 91.[1]

In his petition to this Court, Geders complained about the absolute nature of the order. He highlighted that the "intention of these orders is plainly more than restricting the Defendant and his attorney from talking about testimony offered by the Defendant" on direct or cross-examination. Brief of Petitioner, *Geders v. United States*, 425 U.S. 80 (1976) (No. 74-5968), 1974 WL 175954, at *11. And he apparently agreed that a qualified order to not discuss his testimony would have been acceptable, asking rhetorically, "Why, for example, didn't the trial

[1] There is no doubt that the court and counsel understood the order to be an absolute prohibition because, the next day, the trial court asked, "You (counsel) have not talked with [Geders] of course, have you?", and counsel confirmed he had not. Brief of Petitioner, *Geders v. United States*, 425 U.S. 80 (1976) (No. 74-5968), 1974 WL 175954, at *6. And, as stated, the prosecutor had requested an absolute order. *Geders*, 425 U.S. at 82, 83 n.1.

judge only limit the incommunicado order to no discussion regarding the Defendant's testimony? Would not an admonition to the Defendant and his counsel to not discuss Defendant's testimony be just as effective as" other types of discussion-limitation orders given throughout trial? *Id.* at *13.

This Court ultimately agreed that *absolute* prohibitions on overnight conferrals violate the right to counsel. *Id.* at 91. But, in keeping with Geders's repeated concession that testimonial restrictions would be proper, it declined to address the appropriateness of qualified conferral orders, stating, "We need not reach, and we do not deal with limitations imposed in other circumstances." *Id.*

In *Perry v. Leeke*, 488 U.S. 272 (1989), this Court addressed another absolute prohibition on attorney–client communications. There, at the conclusion of Perry's direct testimony, the trial court declared a 15-minute recess, and, without advance notice to counsel, ordered that Perry not be allowed to talk to anyone, including his lawyer, during the break. *Perry*, 488 U.S. at 274. After the break, Perry moved for a mistrial, which was denied. *Id.*

This Court ultimately upheld the conviction. It noted that, "when a defendant becomes a witness, he has no constitutional right to consult with his lawyer while he is testifying." *Id.* at 281; *cf. Geders*, 425 U.S. at 88 (defendant may discuss his testimony with his attorney "up to the time he takes the witness stand"). Instead, "when he assumes the role of a witness, the rules that generally apply to other

witnesses—rules that serve the truth-seeking function of the trial—are generally applicable to him as well." *Perry*, 488 U.S. at 282. "Accordingly, it is entirely appropriate for a trial judge to decide, after listening to the direct examination of any witness, *whether the defendant or a nondefendant*, that cross-examination is more likely to elicit truthful responses if it goes forward without allowing the witness an opportunity to consult with third parties, *including his or her lawyer*." *Id.* (emphasis added).

Unlike in *Geders* and *Perry*, the trial court here did not impose an absolute prohibition on attorney–client communications. *Perry* did, however, indicate its approval of qualified conferral orders, stating that "the judge may permit consultation between counsel and defendant during [a short] recess, but forbid discussion of ongoing testimony." *Id.* at 284 n.8. Such language signaled that orders which merely limit communication about ongoing testimony do not impinge on the right to confer with counsel. *See State v. Conway*, 842 N.E.2d 996, 1020–21 (Ohio 2006); *Webb v. State*, 663 A.2d 452, 459 (Del. 1995). As will be established below, *Perry*'s approval of qualified orders holds during long breaks as well.

b. On a superficial level, the difference between *Geders* and *Perry* is the length of the recess. But such a surface-level reading ignores what *Perry* highlighted as the real difference between the two: the *substance* of what one could *presume* would be discussed during the respective breaks. *Cf. United*

States v. Padilla, 203 F.3d 156, 160 (2d Cir. 2000) ("The difference between *Perry* and *Geders* is not the quantity of communication restrained but its constitutional quality."). *Perry* explained that during brief recesses "there is a virtual certainty that any conversation between the witness and the lawyer would relate to the ongoing testimony." *Perry*, 488 U.S. at 283–84. By contrast,

> [t]he interruption in *Geders* was of a different character because the normal consultation between attorney and client that occurs during an overnight recess would encompass matters that *go beyond* the content of the defendant's own testimony—*matters that the defendant does have a constitutional right to discuss* with his lawyer, such as the availability of other witnesses, trial tactics, or even the possibility of negotiating a plea bargain.

Id. at 284 (emphasis added).

Thus, when the Court said discussing some matters is constitutionally protected, and that those matters "go beyond" the defendant's "own testimony," it was necessarily saying direct discussions of a defendant's ongoing testimony are not constitutionally protected. That is the only reason to differentiate a defendant's testimony from other matters.

Perry continued, "It is the defendant's right to unrestricted access to his lawyer for advice on a variety of trial-related matters that is controlling in the context of a long recess." *Id*. In context,

"unrestricted access" applies to the variety of "trial-related matters" discussed in the previous sentence—i.e., the availability of other witnesses, trial tactics, plea bargains, etc.—not ongoing testimony. *Id*. Again, it would have made no sense to differentiate the two categories if they were of the same constitutional quality. Thus, the import of *Perry*'s presumption is that discussing ongoing testimony is not protected; otherwise, the presumption would be irrelevant.

Accordingly, because it can be presumed protected matters will be discussed during overnight recesses, *absolute* prohibitions run afoul of the right to counsel. On the other hand, absolute orders are acceptable during short breaks because it is presumed that *only* unprotected matters will be discussed. But even with such a presumption, the trial court can instead opt for a qualified order. *Id*. at 284 n.8. Consequently, orders that merely tell counsel not to manage the defendant's testimony properly excise discussion of non-protected matters from consultation about protected ones.

Simply, if the dispositive factor is the length of the recess, *Perry*'s focus on the substance of the matters discussed, and its emphasis on the importance of untainted cross-examination, make little sense. Instead, *Geders*'s command is fulfilled if the defendant can effectively confer with his counsel overnight about other "trial-related matters."

1.2. Management may be restricted so long as counsel may consider the testimony when discussing other matters.

a. Petitioner posits that without being able to directly discuss the defendant's testimony, attorneys would effectively be unable to advise their clients about other trial-related matters, such as trial strategy, offering additional witnesses, changing a plea, and reconsidering a plea-bargain offer. (Pet. Br. 25–31.) But his argument ignores that the TCCA's rule already contemplates those scenarios, among others. The TCCA emphasized that, for a qualified conferral order to be constitutionally permissible, "[c]ounsel must be allowed to discuss the derivative effects of the testimony." (Pet. App. 16a.) It noted several of the same examples given by petitioner, such as plea deals, sentencing issues, and new witnesses. (Pet. App. 14a–16a.) And it concluded that the trial court's order did indeed allow discussion of such derivative matters. (Pet. App. 15a–17a.) If the order is such that derivative matters cannot be discussed, then the defense can seek reconsideration of the order, a new trial, or relief on appeal. (*See* Pet. App. 15a–18a.)

The requirement that counsel be able to discuss the testimony's derivative effects is in keeping with *Perry*'s observation that, when giving advice about trial-related matters, overnight "discussions will inevitably include some consideration of the defendant's ongoing testimony[.]" *Perry*, 488 U.S. at 284. Some courts (and petitioner) have mistakenly

conflated "consideration"—that is, incidental discussion—with direct discussion. *E.g.*, *United States v. Triumph Capital Group, Inc.*, 487 F.3d 124, 132–33 (2d Cir. 2007) (in dictum, discussing and citing cases). But the two terms are not synonymous. As the TCCA correctly recognized, "Discussing or conferring about the ongoing testimony is distinct from taking 'consideration' of the ongoing testimony." (Pet. App. 14a, *see also* 15a–16a).[2]

While language in an opinion should not be parsed like a statute, it should be presumed that this Court chooses its words carefully. Doing so, "consideration" is defined variously as "continuous and careful thought," "a matter weighed or taken into account when formulating an opinion or plan," "a taking into account," and "an opinion obtained by reflection." *Consideration*, *Merriam-Webster's Collegiate Dictionary* 246 (10th ed. 1993). None of those definitions require discussion of any kind, let alone direct discussion. On the other hand, "discussion" is defined as "consideration of a question in open and usually informal debate." *Discussion*, *id.* at 332. Thus, while discussion can include consideration, consideration need not include discussion—and it certainly need not include testimonial management. Accordingly, in the context *Perry* used it, the courts

[2] Given the context of the order here, the TCCA equated "discussing or conferring" with management of testimony. (Pet. App. 13a–14a.)

that have conflated "consideration" and "discussion" have taken more from *Perry* than it offered.

Examples of the distinction between consideration and direct discussion abound. An attorney may tell his client, "After today, I highly recommend you take the plea bargain if it is still available." (*See* Pet. App. 14a.) In such a scenario, discussion of a plea bargain has taken "consideration" of the defendant's testimony without directly discussing the testimony itself. If the defendant then asks his attorney why he should now take the bargain (Pet. Br. 26–27), the attorney can respond, "Because you did terribly, and there's no way to rehabilitate you with the jury." That is not managing testimony or coaching. It is merely discussing what has already happened and its derivative effect, namely, the prudence of accepting the plea bargain.

The same is true if an attorney says, "During your testimony, you mentioned a Jane Smith. Do you know her contact information?" Again, that is not coaching, regrouping, or strategizing about the testimony itself. *See Perry*, 488 U.S. at 282. Rather, the attorney is taking into consideration his client's testimony when discussing other constitutionally protected "trial-related matters"—namely, the availability of another potential witness (Jane Smith) and "information made relevant by the day's testimony" (her existence and contact information). *Id*. at 284; *Geders*, 425 U.S. at 88. If the defendant asks why that information is needed, counsel can respond, "Because I've never heard of her before, and I need

to find out what she knows. If she has useful information, we might want her to testify when you're done." They can then discuss the "trial tactics" of whether to call Jane and request a continuance to locate her. *Perry*, 488 U.S. at 284. None of that conversation would require directly discussing and managing the defendant's testimony. Instead, any discussion of his testimony is merely incidental to discussing protected matters.

Counsel may also fully discuss the trial's progression, the day's events, legal issues, and other matters. *Webb*, 663 A.2d at 458. So, counsel is allowed to explain objections and bench conferences that happened during his testimony. (Pet. Br. 32.) For instance, when petitioner was discussing Aaron's conversation with Eric, his answer indicated he might reveal what they said, so the State made a hearsay objection. (5Tr. 118.) It would have been perfectly acceptable to explain to petitioner the reason for the objection and why he could not answer.

Likewise, concerns that counsel could not remind his client to steer clear of excluded evidence are unfounded because that is an inbounds legal issue. (Pet. Br. 27.) Here, for example, the trial court granted the State's motion *in limine* to not mention Aaron's criminal history. (2Tr. 10–11.) If counsel felt petitioner had come close to violating that order, that too would have been fine to mention.

Equally, counsel can discuss the legal ramifications of any perjury the defendant did or may have committed. (Pet. Br. 27–30.) Indeed, preventing the

admission of excluded evidence and perjured testimony strengthens the truth-seeking function of trial, which qualified orders are designed to protect. And, in the real world, it is inconceivable that a trial court concerned with the trial's integrity would have any problem with counsel taking steps to prevent and correct perjury or other materially false testimony.[3]

Moreover, discussions about other evidence that has or should be admitted, court orders that were issued, potential jury charges, anticipated punishment-stage proceedings, etc., are all fair game provided the testimony is not managed. And if there is ever any doubt about what is and is not allowed, counsel is always free to ask that the order be rescinded or to seek clarification of its parameters and ask for a continuance.[4]

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[3] To the extent the rule advanced herein can be read as hindering counsel's efforts to prevent or correct perjury or other materially false testimony, it would be a reasonable exception to allow such discussions since, as explained, doing so supports the integrity of trial. Again, though, the State believes such discussions are compatible with its rule and the TCCA's holding.

[4] It is also worth remembering that with some matters—e.g., potential jury charges, closing arguments, the need for an alibi witness—it is simply more effective to wait until the testimony finishes before discussing them so that counsel can fully assess their import and the best course forward. *Cf. infra* § 2.4.

b. Petitioner focuses on *Geders*'s discussion of how coaching can be prevented or counteracted. (Pet. Br. 40–42.) But *Perry* recognized "the truth-seeking function of the trial can be impeded in ways other than unethical 'coaching.'" 488 U.S. at 282. "Permitting a witness, including a criminal defendant, to consult with counsel after direct examination but before cross-examination grants the witness an opportunity to regroup and regain a poise and sense of strategy that the unaided witness would not possess." *Id.* "This is true even if we assume no deceit on the part of the witness[.]" *Id.* In short, uncounseled cross-examination "is more likely to lead to the discovery of truth than is cross-examination of a witness who is given time to pause and consult with his attorney." *Id.* Qualified conferral orders advance those truth-seeking objectives because "[o]nce the defendant places himself at the very heart of the trial process, it only comports with basic fairness that the story presented on direct is measured for its accuracy and completeness by uninfluenced testimony on cross-examination." *See id.* at 283.

Petitioner dismisses *Perry*'s observation, claiming it only applies to short breaks. (Pet. Br. 42–43.) But that passage's language is not so limited. It speaks in broad terms and is just as applicable to long recesses as to short ones. If anything, it is even more applicable to long breaks due to the extra time counsel and client would have to devise an entirely new plan of attack after a disastrous opening. As *Perry* emphasized, it is an "empirical predicate" of

our system of justice that counseling witnesses about their ongoing testimony undermines the quest for truth. *Id.* at 282. Thus, the more trial courts can preserve the *status quo* and protect against mid-testimonial influences, the more effective the trial is at uncovering the truth.

It must also be remembered that, while certain decisions require client input and approval, strategy is counsel's domain. *Cf. Taylor v. Illinois*, 484 U.S. 400, 417–418 (1988) ("[T]he lawyer has—and must have—full authority to manage the conduct of the trial. The adversary process could not function effectively if every tactical decision required client approval."). Thus, even though qualified orders limit conferral with the defendant, they do not curb the ability of counsel to strategize amongst each other or reassess their present strategy before the testimony resumes.

Consequently, a simple rule emerges: During a long break, the trial court can prohibit testimonial management (coaching, regrouping, and strategizing), as long as counsel can still consider the testimony when discussing other topics. *Cf. Morgan v. Bennett*, 204 F.3d 360, 367 (2d Cir. 2000) (recognizing that, under *Geders* and *Perry*, when "an important need to protect a countervailing interest" is "present and difficult to fulfill in other ways, a carefully tailored, limited restriction on the defendant's right to consult counsel is permissible").

1.3. Qualified orders allow courts to place all testifying defendants on near equal footing and discourage gamesmanship.

a. If it were otherwise, then 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. But "[t]he fortuitous intervention of an overnight recess during the cross-examination of a defendant should not be an occasion for coaching which could not otherwise occur." *Webb*, 663 A.2d at 460. Qualified conferral orders, on the other hand, place all defendants on near equal footing—*near* equal only because, unlike short- and no-recess defendants, long-break defendants still have the benefit of discussing other trial-related matters.

Petitioner raises concerns that counsel would not be able to course correct if the defendant said something unexpected or harmful, strategize with him in the face of unanticipated questions from the prosecution, or advise about the "mechanics of testifying." (Pet. Br. 30–32.) But, again, that is true of short- and no-recess defendants, whose counsel would have no choice but to deal with the situation as it unfolds. That is why it is best for counsel to thoroughly prepare their client, investigate the facts, and anticipate hostile lines of inquiry *before* the testimony begins. In that way, they are set for all eventualities rather than banking on a fortuitous mid-testimony recess.

Petitioner dismisses concerns that short- and no-recess defendants would be placed at a disadvantage, saying "this is not an equal protection issue." (Pet. Br. 43.) But if the purpose of a trial is to uncover the truth of past events, it is absolutely relevant. Imagine two co-defendants charged with the same offense. One testifies without interruption. The trial court then begins the second defendant's testimony and even keeps the jury late in hopes of finishing. But it becomes clear that the jury's attention is waning, so the court breaks for the night and orders counsel to not manage the testimony. Is this not a reasonable course of conduct in order to ensure both equality between the defendants and that their stories remain untainted?

Likewise if the defendants' trials were severed. There, the court would be reasonable in not wanting a chance break during one defendant's testimony working to his benefit when his confederate did not receive an opportunity to regroup and strategize during his trial. And there is no reason why this logic should not apply across all trials if the court sees fit. *Cf. infra* § 4. Simply, trial courts should have the discretion to keep all defendants on near equal footing in a country that values equal justice under law.

b. Similarly, qualified conferral orders have the advantage of limiting potential gamesmanship. While the good faith of counsel should generally be presumed, in situations where the trial court might suspect that counsel is angling to receive a beneficial

recess, a qualified order would help maintain the *status quo*.

This case offers a good example. Petitioner's direct examination began just before noon. (5Tr. 103.) Counsel was aware that trial was going to recess about an hour later. (*See* 4Tr. 252–53; 5Tr. 100.) Yet they never suggested petitioner's testimony start the next day so that it could be completed without interruption. The qualified order, then, eased any concern that they might be trying to benefit from a likely mid-testimony break.

1.4. The order here suitably balanced petitioner's rights with the integrity of trial.

Simply, under *Geders* and *Perry*, trial courts act within their sound discretion when they balance the defendant's right to counsel with the reliability of the proceedings they are entrusted to oversee. Counsel will no doubt have to be mindful of what they are saying when discussing protected matters so as to avoid managing the defendant's testimony. But such caution is a reasonable price to pay to preserve the truth-seeking function of trial.

In this case, by merely prohibiting management of petitioner's testimony, the trial court capably threaded the needle between two interests: safeguarding the integrity of petitioner's testimony, while protecting his right to discuss matters derived from that testimony. *Perry*, 488 U.S. at 282, 284. It

thereby ensured the best of both worlds and remained true to this Court's precedents.

2. Qualified conferral orders are workable.

2.1. The record here shows that qualified orders can be complied with.

Petitioner's workability argument is meritless, or at best theoretical. The fact that petitioner's counsel never once stated they did not understand the order or could not properly comply with it illustrates that, in practice, such orders are indeed workable.

When the order was initially issued, both defense attorneys indicated they understood its limits and their duties thereunder. (Pet App. 7a–8a.) Thus, counsel made no argument or indication that the order would actually stymie their ability to effectively communicate with petitioner about other aspects of the case. While one counsel lodged an objection, it was more an afterthought, with him stating that it was "just for in the future[.]" (Pet. App. 8a.) He confirmed, however, that he understood "the court's judgment" and made no attempt to explain how the

order would encumber his examination of petitioner when trial resumed.[5] (Pet. App. 8a, 16a–17a.)

One might forgive counsel for not making arguments when the order was first issued because any difficulties in navigating its confines may not have been immediately apparent. But the next day, before petitioner's testimony resumed, the court asked if either side had any issues to address, and one counsel replied, "Not from the defense at this time, Judge." (6Tr. 5.) The other said nothing. That is to say, counsel never complained that the order undermined their ability to discuss other trial-related matters with petitioner during the long recess. If counsel could not have balanced their obligations between their client and the court, then one expects they would have explained such difficulties and asked for a continuance or other relief. But they did not, which indicates the order did not undermine their ability to confer with petitioner about protected matters. (*See* Pet. App. 17a ("[T]here is nothing in the record that suggests [petitioner] and his counsel were

[5] Indeed, whether at trial or on appeal, petitioner never advanced any of the "workability" arguments he now makes. Thus, before coming to this Court, he never outlined why such orders cannot be complied with generally or could not in his specific situation. He never argued that attorneys would be confused about which topics were in or out of bounds, or that they could not prevent or correct false testimony. And he never explained how such orders jeopardize the attorney–client privilege or undermine pretrial preparation.

unable to confer on constitutionally permissible matters during the overnight recess.")).

Moreover, if the order actually did hinder counsels' ability to confer with petitioner about protected matters, but such a hindrance was not apparent until his testimony resumed, then there was another remedy available: a motion for new trial. *See* Tex. R. App. P. 21.3(a) (requiring a new trial when the defendant has been denied counsel). In affidavits accompanying the motion, counsel could have explained that they attempted to discuss protected matters but were unable to effectively do so without also directly discussing petitioner's ongoing testimony. But, again, they did not. (*See* Pet. App. 17a.)

Thus, the fact that petitioner's attorneys never expressed the order hamstrung their ability to effectively confer with him about derivative matters indicates that, unlike the absolute order in *Geders*, qualified conferral orders can be complied with. *Cf. United States v. Nelson*, 884 F.3d 1103, 1109 (11th Cir. 2018) ("[A] condition precedent to a *Geders*-like Sixth Amendment claim is a demonstration, from the trial record, that there was an actual 'deprivation' of counsel—i.e., a showing that the defendant and his lawyer desired to confer but were precluded from doing so by the district court.").

2.2. Allowing qualified orders in all instances is the more workable rule.

If qualified conferral orders rendered discussion of derivative matters impossible, then *Perry*'s approval of such orders during short breaks would make little sense. *Perry v. Leeke*, 488 U.S. 272, 284 n.8 (1989). Counsel subject to a short-break qualified order would not suddenly avoid conferring with their client about non-testimonial matters. Nor would they refrain from asking for clarification if unsure how to properly comply. Why then would the same not be true for counsel subject to a long-break order? Either such orders can be complied with, or they cannot—length of recess has no logical bearing on one's ability to comply.

Indeed, petitioner's rule actually creates its own workability problem: If qualified orders are allowed during short breaks but not long ones, then it becomes necessary to determine what constitutes a "short break." *Cf. id.* at 296 (Marshall, J., dissenting) (lamenting that the majority's rule would result in conflicting decisions about when a short break becomes a long one). Is an hourlong lunch break too long? A three-hour recess while the court deals with other matters? A six-hour period that is still within the normal workday, e.g., 9:00 a.m. to 3:00 p.m.? An eight-hour period where the court decides to stop in the morning but (to the jury's dismay) start up again in the early evening? Allowing qualified orders no matter the length of the recess makes such questions immaterial.

That benefit would also accord with unquestionably long breaks. It would not matter whether the recess is twenty-four hours or five days since counsel could not manage testimony regardless. Thus, allowing qualified orders during all breaks creates a straightforward, workable rule that attorneys can easily comply with no matter the circumstances. And of course, as stated previously, counsel can always request clarification or reconsideration of the order.

2.3. Qualified orders do not improperly intrude upon the attorney–client relationship and privilege.

Petitioner also claims that qualified orders unduly intrude on the attorney–client relationship and privilege. (Pet. Br. 39–40.) They do not.

a. This Court's precedents already endorse reasonable intrusions on the attorney–client relationship following mid-testimony recesses. For instance, as explained above, *Perry* already blessed qualified orders during short recesses. *Perry*, 488 U.S. at 284 n.8. It is unclear how the attorney–client relationship would remain completely inviolate during such breaks. If the court suspected that counsel did not abide by its order, would not some intrusion on the relationship be warranted? But surely this Court did not bless undue interference with the relationship during short breaks. Instead, some intrusion must have been contemplated and deemed acceptable. And since there is no logical reason why the attorney–client privilege would be safe during short

recesses but imperiled during longer ones, this Court's blessing of qualified orders during the former necessarily extends to the latter.

Furthermore, as petitioner repeatedly notes (Pet. Br. 21, 41, 45), one way *Geders* suggested to deal with possible improper testimonial influence or coaching is for a "prosecutor [to] cross-examine a defendant as to the extent of any 'coaching' during a recess, subject, of course, to the control of the court." *Geders v. United States*, 425 U.S. 80, 89 (1976). The Court noted that skillful cross-examination could reveal that the defense attorney coached the witness, allowing the prosecutor to question the defendant's credibility during closing arguments. *Id.* at 89–90.

It is impossible to see how a prosecutor could conduct such a cross-examination without some intrusion on the attorney–client relationship. And since qualified conferral orders are designed to prevent coaching in the first instance, they actually alleviate the inherent dangers of prosecutors questioning defendants about attorney–client communications. Petitioner is concerned about the trial court asking the defense, "What did you talk about last night?" (Pet. Br. 39.) But he is apparently fine with the prosecution asking essentially the same. Most defense attorneys, however, would probably rather be told to not manage testimony than have privileged communications probed into by the prosecution.

Relatedly, petitioner concedes that trial courts can tell counsel to not coach "at any time—before or during trial." (Pet. Br. 42.) But he fails to explain

how no-coaching orders are supposed to be enforced without the trial court inquiring into attorney–client communications. Under petitioner's reasoning, the only way to know whether counsel coached his client during an overnight recess—or, really, any length of recess—is to ask, "What did you talk about last night?" (Pet. Br. 39.) Thus, petitioner seems to have given away the store because, as it relates to divulging privileged conversations, no-coaching orders are distinctions without a difference from other qualified conferral orders.

b. In any event, if compliance with the order proved too cumbersome or impossible, counsel can always approach the court without fear of undermining the attorney–client privilege. When speaking with the court, counsel would not have to go into the substance of any discussions that either took place or, absent the order, would have taken place. Instead, it would only be necessary to assert that they foresaw problems with complying, or that they attempted to comply but were unable to do so.

By way of analogy, this Court has recognized that when counsel realizes there is a conflict of interest in representing multiple defendants, he may inform the court of such conflict; move to appoint separate counsel; and based on his representations, the motion should be granted. *Holloway v. Arkansas*, 435 U.S. 475, 485 (1978). That is because, as officers of the court, attorneys' "declarations are virtually made under oath." *Id.* at 486. Thus, claims of a conflict of interest should be afforded appropriate

weight given the potentially significant sanctions attorneys risk for deceit, as "courts have abundant power to deal with attorneys who misrepresent facts." *Id.* at 486 nn.9 & 10. Accordingly, trial courts can be trusted to examine "defense counsel's representations regarding a conflict of interests without improperly requiring disclosure of the confidential communications of the client." *Id.* at 478.

The same would be true with qualified conferral orders. Without revealing the details of any attorney–client communications, counsel could explain that they attempted to discuss protected matters without managing the defendant's testimony but were unable to effectively do so. And if there is any need to explore the matter beyond counsels' assertions, the trial court could review the matter *in camera* so as to protect the privilege while reconsidering its order. *Cf. United States v. Zolin*, 491 U.S. 554, 574 (1989) (holding "*in camera* review may be used to determine whether allegedly privileged attorney–client communications fall within the crime–fraud exception"). Courts can also take other steps to ensure the privilege is protected. *E.g.*, Fed. R. Evid. 502(d) ("A federal court may order that the privilege or protection is not waived by disclosure connected with the litigation pending before the court—in which event the disclosure is also not a waiver in any other federal or state proceeding."); *accord* Tex. R. Evid. 511(b)(3) (similar provision). Simply, trial courts can just as effectively protect the attorney–

client privilege when issuing qualified conferral orders as they can in other situations.

Indeed, when issuing the order here, the trial court assured counsel that petitioner's "attorney–client privilege is safe[.]" (Pet. App. 8a.) So, the order itself was limited by that privilege. There is no indication from the record that the court would have demanded disclosure of privileged communications if it were asked to reconsider or clarify its order, or that it would have rejected an offer to hear any concerns *in camera*.

c. Finally, petitioner places emphasis on the American Bar Association's model rules and standards. But as it relates to the attorney–client privilege, the model rules allow for disclosure of privileged information to comply with court orders. A.B.A. Model Rules of Pro. Conduct r. 1.6(b)(6); *accord* Tex. Disciplinary Rules of Pro. Conduct § 1.05(c)(4) (same). Consultation with the defendant would need to take place, and certain remedial measures may be required. But, if need be, the attorney could reveal privileged information without fear of disciplinary action when either seeking clarification or reconsideration of the order, or in response to questions from the trial court. And, as outlined above, there is no reason why such discussion could not take place *in camera*.

Further, while the model rules prohibit lawyers from counseling or assisting witnesses to testify falsely, A.B.A. Model Rules of Pro. Conduct r. 3.4(b), they do not prohibit them from engaging in the other

types of conduct qualified orders are designed to prevent. For instance, so long as counsel does not facilitate false testimony, no rule prevents counsel from "course-correct[ing] a disastrous direct examination" by "telling the defendant what to say and how to say it in response to his and the prosecutors' upcoming questions[.]" (Pet. App. 14a.) Thus, to fortify the integrity of the defendant's testimony, the trial court may need to take actions that go further than prohibitions on inducing false testimony.

Finally, while reference to ethical rules and standards can help in determining effective assistance, it must be remembered that "they are only guides." *Strickland v. Washington*, 466 U.S. 668, 688 (1984). Since such rules vary from state to state and change over time, they do little to inform the constitutional parameters of a trial court's discretion in issuing qualified conferral orders.

2.4. Qualified orders like the one here apply only during breaks in the defendant's testimony, not before and after.

Petitioner argues that mid-testimony qualified orders prevent receiving assistance in preparing to

testify. (Pet. Br. 33–36.) He is wrong.[6] Such orders apply only to breaks in the defendant's testimony once it has begun and before it has finished. This is based on *Perry*'s observation that "when a defendant becomes a witness, he has no constitutional right to consult with his lawyer while he is testifying," whereas he does have "an absolute right to such consultation before he begins to testify[.]" 488 U.S. at 281; *see also Geders*, 425 U.S. at 88 ("[T]he defendant as a matter of right . . . has the opportunity to discuss his testimony with his attorney up to the time he takes the witness stand."). And once his testimony is finished, consultation is once again generally unrestricted.

2.5. Petitioner's rule imperils other types of qualified conferral orders.

The rule petitioner proposes potentially undermines similar orders that are also designed to protect the truth-seeking function of trial. For instance, orders to not disclose investigations into witness and jury tampering would be jeopardized. *See United States v. Padilla*, 203 F.3d 156, 158–60 (2d Cir. 2000) (evaluating such orders under *Geders* and

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[6] Notably, petitioner failed to advance this argument in both the courts below and his petition to this Court. *See Rivers v. Guerrero,* 145 S. Ct. 1634, 1646 (2025) (noting that Rivers's alternative argument suffered from the "legally fatal problem" that it made its first appearance in his merits brief to this Court); *Taylor v. Freeland & Kronz*, 503 U.S. 638, 645–46 (1992) (declining to consider argument raised for first time in merits brief).

Perry). As would orders made to protect witnesses and their families from retaliation. *See Morgan v. Bennett*, 204 F.3d 360, 362–68 (2d Cir. 2000) (same).

It is not clear why no-management orders would violate the Counsel Clause while such related orders would not. Each hinders the free flow of communication between counsel and client. Each requires caution on the part of counsel and potentially subjects them to contempt. And in none can compliance be evaluated without some intrusion into the attorney–client relationship. Therefore, disallowing no-management orders would necessarily imperil similar orders designed to protect "the integrity of the trial process." *Padilla*, 203 F.3d at 160.

3. Qualified conferral orders are compatible with the Counsel Clause's original meaning.

3.1. As originally understood, the Counsel Clause is of limited scope.

a. Qualified conferral orders also adhere to the Counsel Clause's original meaning. The Counsel Clause replaced the English common law, which had permitted counsel to represent defendants charged with misdemeanors but not felonies (other than treason). *Luis v. United States*, 578 U.S. 5, 25 (2016) (Thomas, J., concurring) (citing William M. Beaney, *The Right to Counsel in American Courts* 8–9 (1955)); *see also* 4 William Blackstone, *Commentaries* *348–50 (explaining and criticizing the common-law rule). The Clause as originally understood meant only that defendants had a right to employ

counsel or use their volunteered services. *Scott v. Illinois*, 440 U.S. 367, 370 (1979); *Luis*, 578 U.S. at 26 (Thomas, J., concurring); *Padilla v. Kentucky*, 559 U.S. 356, 389 (2010) (Scalia, J. dissenting). But, as outlined below, unfettered access to counsel was not guaranteed; nor were trial courts prevented from taking steps to ensure the jury received reliable testimony.

The Crimes Act of 1790, passed contemporaneously with the proposal and ratification of the Sixth Amendment, illustrated the Counsel Clause's limited scope. *Cf. Seila Law LLC v. CFPB*, 591 U.S. 197, 214 (2020) (noting the First Congress's understanding of the Constitution "provides contemporaneous and weighty evidence of the Constitution's meaning"). That act allowed a capital defendant to make his defense by counsel, and the trial court was, upon request, required to assign him up to two attorneys who would have "free access to him at all seasonable hours." Act of April 30, 1790, ch. 9, § 29, 1 Stat. 118 (1790). The "seasonable hours" qualification necessarily shows that counsel's contact with his client could be restricted. "Seasonable" meant "opportune," but it also meant "happening or done at a proper time; proper as to time." *Seasonable*, Samuel Johnson, *A Dictionary of the English Language* (1785) (unpaginated). If some hours were proper, then others were necessarily improper, which presumably included the overnight hours. In other words, petitioner assumes "seasonable" meant opportune *for the defendant*. But if that is what the act meant it

would have just said "at all hours." Thus, the "seasonable" qualifier was likely designed to prevent counsel from accessing the jail in the dead of night, demonstrating that access to counsel was not unlimited.

But even if access to the defendant at all hours was intended, it does not follow that orders seeking to prevent testimonial management during long recesses were prohibited. As petitioner concedes, counsel can be told not to coach their clients "at any time" (Pet. Br. 42), which obviously includes "opportune" times. There is no reason, then, why the Counsel Clause would forbid other truth-preserving efforts even if in effect during "opportune" times.

b. Furthermore, early American courts limited conferral by placing a physical barrier between counsel and client, namely, the "dock" or "prisoner's bar." *See United States v. Gibert*, 25 F. Cas. 1287, 1313 (Story, Circuit Justice, C.C.D. Mass. 1834) (No. 15,204); *see also* Steven Shepard, Comment, *Should the Criminal Defendant Be Assigned a Seat in Court?*, 115 Yale L.J. 2203, 2205–07 & nn.11–20 (2006) (outlining the dock's history). As Justice Story noted in *Gibert*, the dock was the "usual place" for capital defendants. *Gibert*, 25 F. Cas. at 1313. The *Gibert* defendants were, however, given the "accommodation" of sitting closer to counsel. *Id*. But Justice Story never suggested that such an accommodation (or any other) was required, and he ultimately rejected their motion for new trial that had protested their inability to sit even closer to counsel. *Id*. Again,

use of the dock at the Founding demonstrates that access to counsel was not unfettered because physical separation in the courtroom would necessarily have hindered conferral. And *Gibert*'s facts highlight the discretion generally given to trial courts to control the proceedings, including access to counsel.[7]

Moreover, as petitioner acknowledges (Pet. Br. 45–46), at the time the Sixth Amendment was ratified, defendants were not permitted to testify in their own defense. *See Ferguson v. Georgia*, 365 U.S. 570, 573–77 & n.6 (1961). Thus, to Founding-era courts, asking whether the Counsel Clause would prohibit qualified conferral orders would be like asking, "What's north of the North Pole?" Since they would never have been issued in the first place, the Clause would not have even contemplated them, let alone forbidden them.[8]

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[7] Though the dock's popularity waned over time, it marshaled on in at least Massachusetts until the latter half of the 20th Century. *E.g.*, *Moore v. Ponte*, 186 F.3d 26, 34–37 (1st Cir. 1999) (reviewing a 1976 trial and holding that use of the dock did not violate due process under the circumstances).

[8] There is "no daylight" between the Fourteenth Amendment and the provision it incorporates. *Timbs v. Indiana*, 586 U.S. 146, 150 (2019). Thus, the incorporated Counsel Clause would also not prohibit qualified conferral orders. But even if the protections could diverge, at the time the Fourteenth Amendment was ratified, it appears only nine of the then-37 states—less than a quarter—allowed defendants to testify in their own defense. *See Ferguson*, 365 U.S. at 577 & n.6. That is hardly an indication that the Fourteenth Amendment prohibited qualified conferral orders.

3.2. This Court should not move even further from the Counsel Clause's original meaning.

None of this is to say that the above-outlined practices and limitations were good policies, or that this Court should revisit its precedents that run counter to them. *See Rock v. Arkansas*, 483 U.S. 44, 49–53 (1987) (recognizing right to testify on one's own behalf). Rather, they demonstrate that the Counsel Clause, as originally understood, either allowed some restrictions on attorney–client conferral or would not have applied in situations like the one here.

Thus, it is *Geders* that is out of sync with the Counsel Clause's original meaning. This Court need not overrule *Geders* to affirm the judgment below. But "[i]t is a necessary concomitant of the doctrine of *stare decisis* that a precedent is not always expanded to the limit of its logic." *Hein v. Freedom From Religion Foundation*, 551 U.S. 587, 614–15 (2007) (plurality opinion); *see also Mitchell v. United States*, 526 U.S. 314, 336 (1999) (Scalia, J., dissenting) (noting that a prior holding being "a wrong turn . . . is not cause enough to overrule it, but is cause enough to resist its extension"). Therefore, this Court should refrain from extending the *Geders* rule to new situations not contemplated by the Founders. *Cf. City of Grants Pass v. Johnson*, 603 U.S. 520, 547–51 (2024) (refusing to extend the rule from *Robinson v. California*, 370 U.S. 660 (1962)); *Samia v. United States*, 599 U.S. 635, 647–54 (2023)

(declining to expand rule from *Bruton v. United States*, 391 U.S. 123 (1968)); *Seila Law LLC*, 591 U.S. at 220, 228 (not reconsidering several precedents, but declining to extend their holdings to a new situation).[9]

4. Courts and legislatures should be trusted to address the propriety of qualified conferral orders.

Petitioner would have this Court impose on every trial judge in the nation a rigid trial-management rule—which, as a constitutional mandate, would be nearly impossible to amend. But to the extent these orders are believed to pose problems, this Court should stay upon its recent path of trusting courts and legislatures to resolve them. *Cf. City of Grants Pass v. Johnson*, 603 U.S. 520, 551–52 (2024); *Samia v. United States*, 599 U.S. 635, 644–54 (2023); *Jones v. Mississippi*, 593 U.S. 98, 119–21 (2021); *Kahler v. Kansas*, 589 U.S. 271, 296–97 (2020). "As a matter of discretion in individual cases, or of practice for individual trial judges, or indeed, as a matter of law in some States, it may well be appropriate to permit"

[9] To preserve the argument, the State suggested at the petition stage that *Geders* be overruled. (BIO 16 n.1.) But upon further consideration, the absolute order in *Geders* is sufficiently distinguishable from qualified orders like the one here and, thus, overruling it is unnecessary. Indeed, as outlined above, Geders himself would have been fine with a qualified order. *See supra* subsection 1.1. Therefore, instead of overruling *Geders*, the Court should treat it as the outer bounds of questions of this type and go no further.

unqualified access to counsel during long recesses. *See Perry v. Leeke*, 488 U.S. 272, 284 (1989). Others, however, may have different, equally valid perspectives.

Accordingly, instead of imposing a one-size-fits-all rule, this Court should allow trial courts to issue qualified conferral orders on the rare occasions they are warranted. *Cf. Geders v. United States*, 425 U.S. 80, 86 (1976) ("The trial judge must meet situations as they arise and to do this must have broad power to cope with the complexities and contingencies inherent in the adversary process."). That would allow the laboratory of ideas to create solutions in keeping with the values of our nation's respective legal communities. *Cf. Jones*, 593 U.S. at 120–21 (citing Jeffrey S. Sutton, *51 Imperfect Solutions: States and the Making of American Constitutional Law* (2018)).

Simply, as then-Justice Rehnquist once eloquently stated:

> [I]t is not for us to choose one set of values over the other. If [one side is] correct, and the view which they advocate is indeed the more enlightened and sensible one, presumably the people . . . will ultimately come around to that view. And if they do not do so, their failure is some evidence, at least, of the fact that there are two sides to the argument.

Richardson v. Ramirez, 418 U.S. 24, 55 (1974).

5. If the Court does reverse, it should remand to address harm-related issues.

In *Perry*, before considering if the order there was erroneous, the Court first addressed an issue that had divided the lower courts, namely, whether a showing of prejudice is "an essential component of a violation of the rule announced in *Geders*." *Perry v. Leeke*, 488 U.S. 272, 277 & n.2, 278–79 (1989). It concluded such violations do not require the defense to show prejudice to establish error, contrasting them with *Strickland*-like ineffective-assistance claims, which do.[10] *Id.* at 278–80.

Notably, the Court did not decide that such violations are structural error. After all, just because *the defendant* is relieved of showing prejudice by a preponderance of the evidence does not mean *the government* cannot establish harmlessness beyond a reasonable doubt. *Cf. Deck v. Missouri*, 544 U.S. 622, 635 (2005) (government can potentially rebut "inherently prejudicial" error with constitutional-harm analysis); *Satterwhite v. Texas*, 486 U.S. 249, 256–57 (1988) (harmless-error review warranted when Sixth Amendment violation did not affect the entire criminal proceeding); *Coleman v. Alabama*, 399 U.S. 1, 10–11 (1970) (denial of counsel at preliminary

[10] Since *Perry* ultimately concluded that there had been no error at all, it is arguable this portion of the opinion was dictum since it was "quite unnecessary" to the Court's holding. *Perry*, 488 U.S. at 285 (Kennedy, J., concurring); *cf. Judicial dictum*, *Black's Law Dictionary* (12th ed. 2024).

hearing subject to harmless-error review); (Pet. App. 25a–26a (Keel, J., concurring) (agreeing that error was not structural and was harmless beyond a reasonable doubt)). But even if *Perry* implicitly held that it is structural error to give a no-conferral order during a long break, it does not necessarily follow that giving a qualified order is too, as the latter is by definition not a total deprivation of counsel. (*See* Pet. App. 25a–26a (Keel, J., concurring)).

Because the TCCA majority found no error, it had no reason to address the issues of structural error and constitutional harm. Nor has petitioner raised them here. Therefore, if this Court does reverse, it should remand to the TCCA to address them in the first instance. *E.g.*, *Smith v. Arizona*, 602 U.S. 779, 801 (2024) (noting this is "a court of review, not of first view"); *Coleman*, 399 U.S. at 10–11 (remanding to state court to address constitutional harm in the first instance).

Conclusion

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

Respectfully submitted.

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