No. 24-557

In the Supreme Court of the United States

DAVID ASA VILLARREAL, PETITIONER

v.

STATE OF TEXAS

ON WRIT OF CERTIORARI
TO THE COURT OF CRIMINAL APPEALS OF TEXAS

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTION PRESENTED

Whether a trial court violates the Sixth Amendment by instructing defense counsel to avoid the topic of the defendant's in-progress testimony in any discussions with the defendant during an overnight recess.

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INTEREST OF THE UNITED STATES

This case concerns whether a trial court violates the Sixth Amendment by instructing defense counsel to avoid the topic of the defendant's ongoing testimony in any discussions with the defendant during an overnight recess. The constitutionality of limiting a defendant's discussion of ongoing testimony with his counsel is an issue that arises in federal as well as state prosecutions. See, *e.g.*, *Perry* v. *Leeke*, 488 U.S. 272, 277 & n.2 (1989). The United States therefore has a substantial interest in the resolution of the question presented.

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment states: "In all criminal prosecutions, the accused shall enjoy the right * * * to have the Assistance of Counsel for his defence." U.S. Const. Amend. VI.

INTRODUCTION

At his trial for murder, petitioner's testimony in his own defense spanned two days, with an overnight recess between them. Before the recess, the trial court issued an order under which petitioner's counsel could confer with petitioner overnight, but any conferral could not include the topic of petitioner's in-progress testimony. That qualification on the scope of the conferral, which was consistent with limitations long applicable to all witnesses, did not violate petitioner's Sixth Amendment "right * * * to have the Assistance of Counsel for his defence." U.S. Const. Amend. VI.

As this Court has made clear, "when a defendant becomes a witness, he has no constitutional right to consult with his lawyer while he is testifying." *Perry* v. *Leeke*, 488 U.S. 272, 281 (1989). No such right can be derived from the constitutional text, which was adopted at a time when defendants were not allowed to testify at all. And while this Court has held that a defendant's ongoing testimony cannot justify a complete bar on meeting with his attorney altogether, see *Geders* v. *United States*, 425 U.S. 80 (1976), qualified conferral orders of the sort at issue here appropriately track the scope of the defendant's rights. They allow conferral on matters that would interest even a nontestifying defendant, but do not give the defendant the windfall advantage of midtestimonial course correction.

This Court's own endorsement of such qualified conferral orders, see *Perry*, 488 U.S. at 284 n.8, reflects their propriety and workability. If a defendant and his counsel can confer without discussing ongoing testimony during a short recess when that testimony is top of mind—as the Court has recognized, see *id.* at 284 & n.8—then they can follow the same procedure over-

night, when the consultation would even more naturally focus on other issues, see *Geders*, 425 U.S. at 88. And given the potential for even well-meaning midstream discussion of testimony to pervert the truth-seeking process, see *Perry*, 488 U.S. at 282, a qualified conferral order that disallows such discussion can reflect sound judicial policy.

The decision whether to issue such an order should be up to the sound discretion of a particular judge, or judicial system; it is not a procedure as to which the Constitution imposes a one-size-fits-all blanket prohibition. Petitioner's efforts to show otherwise lack textual, historical, or precedential footing, and simply seek to embed petitioner's misguided policy preferences into the Constitution. There is no cause to do so, and the decision below should be affirmed.

STATEMENT

Following a jury trial in the 186th District Court of Texas, petitioner was convicted of murder, in violation of Tex. Penal Code Ann. § 19.02 (West 2023), and sentenced to 60 years of imprisonment, Pet. App. 2a. The Texas Court of Appeals affirmed. *Id.* at 41a-69a. The Texas Court of Criminal Appeals (CCA) also affirmed. *Id.* at 2a-40a.

A. Legal Background

Under what is sometimes called just "'the rule on witnesses,'" courts have long had the "broad power to sequester witnesses before, during, and after their testimony." *Geders* v. *United States*, 425 U.S. 80, 87 (1976). A court's power under "the rule," *id.* at 88, allows it to prevent witnesses from hearing other witnesses' testimony, *id.* at 87, and to "instruct a witness not to discuss his or her testimony with third parties," "including his

or her lawyer," "until the trial is completed," *Perry* v. *Leeke*, 488 U.S. 272, 281-282 (1989). More than a century ago, John Henry Wigmore extolled the ancient practice of witness sequestration as "(next to cross-examination) one of the greatest engines that the skill of man has ever invented for the detection of liars in a court of justice." 3 John Henry Wigmore, *A Treatise on the System of Evidence in Trials at Common Law* § 1838, at 2386-2387 (1904); see *id.* § 1837, at 2381-2382 (recounting the biblical story of Daniel separating the accusers of Susanna).

For decades after the Founding, witness sequestration had no direct application to criminal defendants, because until the second half of the 19th century, criminal defendants were not permitted to testify in their own defense at all in state or federal trials. And once defendants did become eligible to testify, a defendant-witness was generally treated like "any other witness." *Reagan* v. *United States*, 157 U.S. 301, 305 (1895). "Assuming the position of a witness, he is entitled to all its rights and protections, and is subject to all its criticisms and burdens." *Ibid.*

In *Geders* v. *United States*, this Court created an exception to that principle, holding that "an order preventing [the defendant] from consulting his counsel 'about anything' during a 17-hour overnight recess between his direct- and cross-examination impinged upon his right to the assistance of counsel guaranteed by the Sixth Amendment." 425 U.S. at 91. But while the Court found that the defendant's presence on the stand could not justify an order of that sort, it emphasized that it did "not reach," or "deal with, limitations imposed in other circumstances." *Ibid.*

Then, in *Perry* v. *Leeke*, the Court distinguished *Geders* and upheld an absolute nonconferral order in the context of a shorter (15-minute) trial recess. 488 U.S. at 280-285. The Court emphasized that a defendant has no "constitutional right to discuss [his] testimony while it is in process." *Id.* at 284. And it expressed approval, at least for shorter recesses, of qualified orders that "permit consultation between counsel and defendant * * * but forbid discussion of ongoing testimony." *Id.* at 284 & n.8.

B. Factual Background And Procedural History

1. On October 16, 2015, petitioner murdered his boyfriend, Aaron Estrada, by stabbing him to death. See 3 Reporter's Record (R.) 25-26; Pet. App. 2a. Petitioner and Estrada had been living together in San Antonio but having relationship problems. 3 R. 188; 4 R. 212, 215. Petitioner spent the days before the murder traveling around the Austin–San Antonio area with the couple's friend and regular methamphetamine-smoking companion, Jimena Valenzuela, in a haze of drug-induced paranoid delusions, during which petitioner asked Valenzuela to kill Estrada. 4 R. 204-214, 217-218.

On the morning of October 16, Valenzuela visited the couple's apartment before work and noticed that petitioner was upset, apparently by a conversation he had overheard between Estrada and one of Estrada's methamphetamine suppliers. 4 R. 196-197; 5 R. 115-119. Later that morning, petitioner appeared at Valenzuela's place of work with a bloody hand and clothes "full of blood." 4 R. 199-200. While Valenzuela drove petitioner to her apartment, petitioner "implied that he had killed" Estrada. *Id.* at 203. Meanwhile, Estrada was found dead in the couple's apartment, lying on the floor "in a semi-fetal position" with multiple stab wounds, including a

"large gash in his jugular." 3 R. 202-204; see *id.* at 83, 198-204; 4 R. 71-80.

Petitioner was arrested later that day. 4 R. 98-103. He was still wearing "very, very bloody pants" and "had a pretty bad cut to his hand." *Id.* at 125-126. After petitioner was taken to a hospital for medical treatment, petitioner made several statements to the police about Estrada's death, including: "He was innocent. Just take me somewhere and shoot me," and "Take me to his grandparent[s'] house so they can just kill me." *Id.* at 131-132; see *id.* at 127-128.

2. Petitioner was charged with murdering Estrada and tried in Texas state court. Pet. App. 2a. At the beginning of the trial, the judge ordered nonparty witnesses to leave the courtroom and directed them not to "talk amongst each other about what you know about this case, what you're going to testify to." 3 R. 8-10.

The prosecution called 11 witnesses during its case-in-chief, including Valenzuela, other friends of petitioner's and Estrada's, Estrada's grandfather, police officers, police crime-scene investigators, and a deputy medical examiner. See 3 R. 3; 4 R. 3; 5 R. 3. The trial judge repeatedly reminded witnesses of the sequestration rule before they left the stand, including before recesses that interrupted their testimony. See, *e.g.*, 3 R. 176 (court to witness: "You're still on the stand, so please don't talk to the lawyers about your testimony, because they couldn't come up here and confer with you while you're on the stand.").

On the third day of trial, petitioner took the stand in his own defense. 5 R. 104. He admitted to stabbing Estrada but claimed that he had done so in response to Estrada "grabb[ing]" and "choking" him. *Id.* at 127-128. He also acknowledged that, although he had be-

lieved that the stabbings had killed Estrada, he had not called the police. *Id.* at 129-130.

At about 1 p.m., before petitioner finished his direct examination, trial had to break for the day because the judge had a scheduling conflict. 5 R. 135-136. The judge had the following exchange with petitioner and his attorneys, Alex Scharff and Alan Brown:

> THE COURT: * * * Mr. Villarreal, we're in an unusual situation. You are right in the middle of testimony. Normally your lawyer couldn't come up and confer with you about your testimony in the middle of the trial and in the middle of having the jury hear your testimony. And so I'd like to tell you that you can't confer with your attorney but the same time you have a Fifth [sic] Amendment right to talk to your attorney.
>
> So I'm really going to put the burden on Mr. Scharff to tell you the truth. Mr. Scharff and Mr. Brown, as well. I'm going to ask that both of you pretend that Mr. Villarreal is on the stand. You couldn't confer with him during that time.
>
> Now, Mr. Villarreal, if—puts us in an odd situation. But I believe if you need to talk to your attorneys, I'm not telling you, you can't talk to them. But I'm going to rely on both Mr. Scharff and Mr. Brown to use your best judgment in talking to [petitioner] because you can't—you couldn't confer with him while he was on the stand about his testimony. * * *
>
> MR. SCHARFF: All right. So just so I am clear and don't violate any court orders, that—because he is still on direct and still testifying, that it is your ruling that we cannot confer with our client?

> THE COURT: Let me help you with that. For instance, suppose we go into a sentencing hearing and you need to start talking to him about possible sentencing issues, you can do that. Does that make sense? I don't want you discussing what you couldn't discuss with him if he was on the stand in front of the [j]ury.
>
> MR. SCHARFF: Okay.
>
> THE COURT: His testimony. I'm not sure whatever else you'd like to talk with him about while he's on the stand. But ask yourselves before you talk to him about something, is this something that—manage[s] his testimony in front of the jury? Does that make sense to you?
>
> MR. SCHARFF: Sure, it does.
>
> MR. BROWN: We aren't going to talk to him about the facts that he testified about.

5 R. 137-138.

After more discussion along the same lines, Scharff said, "Okay. All right. I understand the Court's judgment and just—just for in the future, I'm just going to make an objection under the Sixth Amendment that the Court's order infringes on our right to confer with our client without his defense." 5 R. 139. The judge noted the objection. *Ibid.*

When trial resumed the next day, the judge asked, "Is there anything from either side before we bring in the jury?" 6 R. 5. Both the prosecution and defense said no. *Ibid.* Petitioner resumed his direct testimony. *Id.* at 6. Later, before a brief break in petitioner's cross-examination, the judge told petitioner that "you're still on the stand so the same admonishments I gave your attorney yesterday still apply." *Id.* at 40. Petitioner did not object. *Ibid.*

The jury found petitioner guilty, and he was sentenced to 60 years of imprisonment. Pet. App. 2a.

3. The Texas Court of Appeals affirmed. Pet. App. 41a-69a. The court rejected petitioner's claim that the trial court's instruction regarding the scope of overnight conferral with counsel while he was on the stand violated the Sixth Amendment. *Id.* at 44a-50a.

The court of appeals observed that, unlike in *Geders*, the order was not an absolute bar on conferral, but instead limited only discussion of "the topic of [petitioner's] testimony." Pet. App. 50a. The court also observed that petitioner's attorneys had understood the instruction. *Id.* at 48a. And the court reasoned that *Geders* and *Perry* left the trial court with "discretion to limit [petitioner's] right to confer with his attorneys during an overnight recess to topics other than his ongoing testimony." *Id.* at 49a. Justice Martinez dissented. *Id.* at 50a-69a.

4. The Texas CCA affirmed. Pet. App. 2a-40a.

The CCA accepted that the trial court's instruction implicated "the defendant's right to assistance of counsel" as well as "the truth-seeking function of a trial." Pet. App. 11a-12a. It also took as a given that "a defendant must be able to confer with counsel" during an overnight recess "about the derivative effects of the ongoing testimony"—matters like "'information made relevant by the day[']s testimony'" or "'the possibility of negotiating a plea bargain.'" *Id.* at 13a (quoting *Geders*, 425 U.S. at 88, and *Perry*, 488 U.S. at 284). But it observed that the right to consultation does not encompass discussion of the defendant's "ongoing testimony" itself, nor may counsel "manage" or "coach" the testimony. *Id.* at 13a-14a.

The CCA then identified six factors that contributed to finding that the particular instruction here "threaded the needle with the right to counsel and the need to protect the integrity of the trial." Pet. App. 17a-18a; see *id.* at 15a-17a. First, like the court of appeals, the CCA understood the instruction "as a limited order" that "only restricted discussions of [petitioner's] ongoing testimony and nothing else." *Id.* at 15a. Second, the CCA found that petitioner's attorneys had repeatedly stated that they understood the order. *Id.* at 16a-17a. Third, the CCA found "nothing in the record that suggests [petitioner] and his counsel were unable to confer on constitutionally permissible matters during the overnight recess." *Id.* at 17a. Fourth, petitioner had not objected when the order was reapplied before the brief recess during his testimony the next day. *Ibid.* Fifth, petitioner had not filed any posttrial motion alleging "any potential communication hindrances." *Ibid.* And sixth, the recess and order resulted from the trial judge's scheduling conflict, not any "prodding by the prosecution." *Ibid.*

Three CCA judges filed separate opinions. Judge Yeary concurred, viewing the CCA's decision as consistent with this Court's precedents but urging the adoption of a "bright line rule" to govern orders limiting defendants' conferral with counsel during overnight recesses. Pet. App. 21a; see *id.* at 18a-21a. Judge Keel, joined by Judge McClure, concurred in the judgment. *Id.* at 21a-26a. She would have held that a defendant has a right to discuss "anything," "even his testimony," with counsel during any overnight recess, *id.* at 21a, but found the posited Sixth Amendment violation harmless beyond a reasonable doubt in light of the instruction's limited scope and the "overwhelming" evidence of peti-

tioner's guilt. *Id.* at 25a-26a. And Judge Walker dissented, construing the trial court's instruction as "effectually" giving petitioner "no right to confer with counsel," *id.* at 36a, and deeming the perceived error to warrant automatic reversal. *Id.* at 39a; see *id.* at 37a-40a.

SUMMARY OF ARGUMENT

The Texas CCA correctly recognized that the trial court's qualified conferral order in this case did not violate petitioner's Sixth Amendment rights. It is undisputed that a defendant has no right to take a time-out in the middle of testifying to confer with counsel about his ongoing testimony. And he likewise has no entitlement to such conferral just because an overnight recess fortuitously intervenes. While he is entitled to discuss other matters, of concern to testifying and nontestifying defendants alike, he has no special right—above and beyond other witnesses—to undermine the truth-seeking function of a trial with midstream advice about his testimony.

Nothing in the text or history of the Sixth Amendment supports such a right. A right of that sort would have been unknown at the Founding, when defendants had no right to testify at trial at all. Testimony of defendants did not become common practice until the latter half of the 19th century, postdating even the adoption of the Fourteenth Amendment, which applies the right of counsel to the States. And even in situations where it does have purchase, a defendant's right to confer with counsel—like other Sixth Amendment rights—has always been subject to significant limitations.

Under this Court's precedent, a defendant is not unduly disadvantaged by taking the stand. The Court held in *Geders* v. *United States*, 425 U.S. 80 (1976), that ongoing testimony cannot justify an absolute bar on *all*

overnight consultation with counsel. *Id.* at 91. In doing so, the Court reasoned that the most likely topics of discussion during an overnight recess are topics that would interest a defendant irrespective of whether he happens to be testifying. See *id.* at 88-90. But a defendant cannot leverage a right to discuss those topics into a right to discuss ongoing testimony.

As this Court explicitly recognized in *Perry* v. *Leeke*, 488 U.S. 272 (1989), "when a defendant becomes a witness, he has no constitutional right to consult with his lawyer while he is testifying." *Id.* at 281. Such consultation, even if well-meaning, carries the potential to subvert the truth-seeking function of the trial. See *id.* at 282. The Court accordingly held in *Perry* that during short recesses, where the defendant's ongoing testimony is the most likely topic of discussion, a trial court *can* prohibit the defendant from conferring with his lawyer altogether. *Id.* at 274, 280-285.

Perry also expressly identified qualified conferral orders that preclude only communication about ongoing testimony as an alternative to a complete bar on consultation. 488 U.S. at 284 n.8. And the logic of allowing such qualified conferral orders does not depend on some arbitrary line between shorter and longer recesses. If a defendant and his counsel can avoid discussion of ongoing testimony during a 15-minute recess, when that testimony is the most pressing matter at hand, *ibid.*, then they can avoid such discussion during a longer recess, when the more likely topics are general matters that bear on the testimony only tangentially, if at all, see *Geders*, 425 U.S. at 88.

Petitioner's concern about the workability of qualified conferral orders is therefore misplaced—as is the remainder of his conceptually unsound effort to elevate

his policy views above text, history, and precedent. Defense counsel in *Geders* affirmatively sought (but was denied) precisely the sort of qualified conferral order that petitioner derides as unworkable, and petitioner's own trial counsel confirmed that they understood the scope of the qualified conferral order here. Petitioner also identifies at least one tool—cross-examination—through which such an order could be enforced without unduly infringing on the attorney-client privilege. And even if such orders did depend simply on good-faith compliance, that is not a reason to categorically forbid them. As this Court has recognized, midstream conferrals about ongoing testimony can undermine the truth-seeking function of a trial even if counsel and the defendant have the best of intentions.

The qualified conferral order in this case was accordingly constitutional, and the judgment below should be affirmed. Indeed, even if the order were erroneous in some way, that would not warrant relief, because any such error would be harmless. Any error in carving out ongoing testimony as an overnight discussion topic does not infect the entire trial as to warrant automatic reversal, particularly in a case like this. The nonconferral order here was limited in scope; petitioner made only a minimal objection; the evidence of his guilt was overwhelming; and he has not identified any way in which he was prejudiced. If the order was an error at all, it was not one that warrants setting aside petitioner's murder conviction.

ARGUMENT

A TRIAL JUDGE CAN INSTRUCT COUNSEL TO OMIT THE TOPIC OF THE DEFENDANT'S ONGOING TESTIMONY FROM OVERNIGHT DISCUSSIONS WITH THE DEFENDANT WITHOUT VIOLATING THE SIXTH AMENDMENT

"The basic purpose of a trial is the determination of truth." *Tehan* v. *United States*, 382 U.S. 406, 416 (1966). Judges have long safeguarded that truth-finding function by barring witnesses—including criminal defendants—from discussing their testimony with others after it has begun. In this case, the judge followed that tradition, while still protecting petitioner's Sixth Amendment right to counsel, by allowing overnight consultation on any topic except for petitioner's ongoing testimony. While a defendant cannot be fully sequestered like "a nonparty witness," such as through exclusion from the courtroom, *Geders* v. *United States*, 425 U.S. 80, 88 (1976), he has no "constitutional right to discuss [his] testimony while it is in process," *Perry* v. *Leeke*, 488 U.S. 272, 284 (1989). Petitioner's effort to effectively create such a right lacks any sound basis in constitutional text, history, precedent, or policy.

A. Qualified Conferral Orders Are Consistent With Constitutional Text And History

1. The standard criteria of constitutional interpretation —text and history, see, *e.g.*, *Chiafalo* v. *Washington*, 591 U.S. 578, 588 (2020)—foreclose petitioner's claim of an unfettered right to discuss ongoing testimony with his counsel overnight. Ratified in 1791, the Sixth Amendment protects a criminal defendant's right "to have the Assistance of Counsel for his defence." U.S. Const. Amend. VI. "Constitutional rights are enshrined with the scope they were understood to have when the

people adopted them, whether or not * * * future judges think that scope too broad" or too narrow. *District of Columbia* v. *Heller*, 554 U.S. 570, 634-635 (2008). And the right that petitioner asserts would be highly anachronistic.

As petitioner acknowledges (Br. 45-46), "[t]he precise question presented in this case could not have arisen at the Founding," because defendants were not considered to be competent witnesses at that time. See p. 4, *supra*. Nor did the federal government, or most States, allow defendants to testify at their own trials in 1868, when the Fourteenth Amendment—which applies the right to counsel against the States—was ratified. See *Ferguson* v. *Georgia*, 365 U.S. 570, 576-577 & nn.5-6 (1961); see also, *e.g.*, *Kansas* v. *Ventris*, 556 U.S. 586, 590 (2009) (noting application of right to counsel to States through Fourteenth Amendment). A right for a defendant to consult with counsel about his ongoing testimony during a recess would therefore be an after-the-fact innovation.

Indeed, even when defendants did later gain the right to testify, they were subject to most of the same rules that applied to other witnesses. See, *e.g.*, *Raffel* v. *United States*, 271 U.S. 494, 497 (1926); *Reagan* v. *United States*, 157 U.S. 301, 305 (1895). Although 19th-century authorities took divergent views on certain matters, such as whether party-witnesses should be excluded from the courtroom during other witnesses' testimony, see Wigmore § 1841, at 2393, petitioner identifies no historical evidence at all for a special right to midtestimonial consultation between defendant-witnesses and counsel.

2. Lacking sound footing in constitutional text or history, petitioner frames his claim (Br. 46) at a higher

level of generality by invoking a purported historical Sixth Amendment "right to the assistance of counsel [that] was not limited to particular topics or times of day." But while this Court has long held that the Sixth Amendment guarantees some level of consultation between defendant and counsel, see, *e.g.*, *Hawk* v. *Olson*, 326 U.S. 271, 276-277 (1945), "[n]ot every restriction on counsel's time or opportunity * * * to consult with his client or otherwise to prepare for trial violates a defendant's Sixth Amendment right to counsel," *Morris* v. *Slappy*, 461 U.S. 1, 11 (1983); see *Chambers* v. *Maroney*, 399 U.S. 42, 53-54 (1970).

As petitioner himself recognizes, for example, counsel can be ordered not to explicitly "'coach' the defendant by telling him what to say in his testimony." Pet. Br. 13 (citation omitted). Such limits on consultation are commensurate with the limitations inherent in the right to counsel more generally. The "root meaning" of the right to counsel is simply "[t]he right to select counsel of one's choice." *United States* v. *Gonzalez-Lopez*, 548 U.S. 140, 147-148 (2006). And even that core right is subject to significant limits: a trial court enjoys "wide latitude in balancing the right to counsel of choice against the needs of fairness and against the demands of its calendar." *Id.* at 152 (citation omitted). Other Sixth Amendment rights are themselves qualified in scope. See, *e.g.*, *Taylor* v. *Illinois*, 484 U.S. 400, 410-416 (1988) (right to call defense witnesses); *Illinois* v. *Allen*, 397 U.S. 337, 342 (1970) (right to be present at trial); see also Fed. R. Crim. P. 43(c)(1)(C). The conferral right is no different.

3. Petitioner's own historical sources (Br. 46-47) confirm that the Sixth Amendment right to confer with counsel has always been subject to significant limits.

Perhaps most relevantly, the First Congress included in the Crimes Act of 1790, ch. 9, 1 Stat. 112, a provision ensuring that defense counsel in federal capital cases had "free access" to the defendant, but only "at all *seasonable* hours." § 29, 1 Stat. 118 (emphasis added); see *McClinton* v. *United States*, 143 S. Ct. 2400, 2404 (2023) (Alito, J., concurring in denial of certiorari) ("That same Congress framed and proposed the Sixth Amendment and sent it to the States for ratification, and we have often reasoned that statutes enacted by that Congress are 'persuasive evidence of what the Constitution means'") (citation omitted).*

Whatever "seasonable hours" meant, 1 Stat. 118, it clearly did not mean any hour of the day or night that the defendant deemed "opportune," as petitioner suggests, Br. 46 (citation omitted). Cf. Thomas Dyche & William Pardon, *A New General English Dictionary* 747 (14th ed. 1771) (defining "seasonable" as "proper, fit, convenient; also any thing done in a right manner and a due time"). A roughly contemporaneous state supreme court decision, for example, described a jury's inability "to come to a result in seasonable hours," thereby necessitating that it reconvene the next day. *Brandin* v. *Grannis*, 1 Conn. 402, 402 (1811).

British practice under the Treason Act 1695, 7 Will. 3, c. 3, § 1, which provided for "free Access [to counsel]

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* An amended version of the same law remains on the books today. 18 U.S.C. 3005 (providing for "free access to the accused at all reasonable hours" in treason and other capital cases); see, *e.g.*, *United States* v. *Martinez-Hernandez*, No. 15-cr-75, 2015 WL 6133050, at *9 (D.P.R. Oct. 15, 2015) (applying Section 3005 to allow a defendant "legal consultation between the hours of 8:00 am to 8:00 pm (except between 3:00 and 5:00 p.m. for the [detention facility's] official count)").

at all seasonable Hours" and was a model for the Crimes Act of 1790, is likewise inconsistent with petitioner's all-encompassing definition of "seasonable." In one case, for example, a court granted an accused traitor access to counsel "at all seasonable times, between the hours of ten of the clock in the forenoon, and two of the clock in the afternoon." *Lovat's Case* (1746), *reprinted in* 18 T.B. Howell, *A Complete Collection of State Trials* 529, 534 (1813). If that was consistent with the statutory right to counsel "at all seasonable Hours," then the phrase cannot possibly bear petitioner's outsized interpretation.

In addition, as respondent notes (Br. 48-49), the Founding-era courtroom placement of criminal defendants in the prisoner's dock also imposed substantial limits on their consultation with counsel. See Steven Shepard, Comment, *Should the Criminal Defendant Be Assigned a Seat in Court?*, 115 Yale L.J. 2203, 2206 (2006) ("[T]he dock survived the Atlantic crossing, and lingered in the courthouses of the eastern seaboard well into the twentieth century.") (footnote omitted). Petitioner's invocation (Br. 46-47) of *United States* v. *Gibert*, 25 F. Cas. 1287 (C.C.D. Mass. 1834) (Story, Circuit Justice), thus undercuts his own theory. *Gibert* described the courtroom placement of defendants near counsel rather than in the dock—at that time "the usual place for prisoners, in all capital cases"—as one of a number of exceptional "indulgence[s]" that the trial court allowed to the foreign-born, non-English-speaking defendants in that case. *Id.* at 1313; see *id.* at 1303. There was no suggestion that the Sixth Amendment compelled such an arrangement.

To the contrary, the Sixth Amendment has always been understood to permit reasonable limitations on the

right to confer with counsel. And qualified conferral orders fit that tradition.

B. Qualified Conferral Orders Are Consistent With Precedent

The precedents around which petitioner centers his argument—*Geders* v. *United States* and *Perry* v. *Leeke*, *supra*—likewise permit qualified conferral orders. *Geders* found only that a defendant's presence on the stand cannot justify a complete bar on *any* attorney-client conferral during an overnight recess. And *Perry*, which *upheld* a complete nonconferral order of a shorter duration, strongly supports qualified conferral orders, both by direct endorsement and in its reasoning.

1. This Court's decisions in Geders *and* Perry *support qualified conferral orders*

a. In *Geders*, before an overnight recess interrupted the defendant's trial testimony, "the prosecutor asked the judge to instruct [the defendant] not to discuss the case overnight with anyone." 425 U.S. at 82. Defense counsel "objected, explaining that he believed he had a right to confer with his client about matters other than the imminent cross-examination." *Ibid.* But instead of entering a qualified conferral order along those lines, the judge instead ordered the defendant "not to talk to" counsel "about anything" during the recess. *Ibid.* This Court held that the order violated the Sixth Amendment. *Id.* at 91.

In doing so, the Court reaffirmed judges' "power to control the progress and * * * shape of the trial," including their "broad power to sequester witnesses." *Geders*, 425 U.S. at 87. But it observed that unlike a "nonparty witness," who "ordinarily has little, other than his own testimony, to discuss with trial counsel," a

defendant will likely have other trial-related matters to discuss with counsel—such as "tactical decisions to be made and strategies to be reviewed"—during an overnight recess. *Id.* at 88. The Court then "h[e]ld that an order preventing [the defendant] from consulting his counsel 'about anything' during a 17-hour overnight recess between his direct- and cross-examination impinged upon his right to the assistance of counsel guaranteed by the Sixth Amendment." *Id.* at 91. But it emphasized that it "need not reach," and "d[id] not deal with, any limitations imposed in other circumstances." *Ibid.*

b. The Court subsequently addressed such "other circumstances" in *Perry*, which upheld a similarly absolute nonconferral order that applied to a 15-minute recess. See 488 U.S. at 274, 280-285. Elaborating on *Geders*, the Court made clear that "when a defendant becomes a witness, he has no constitutional right to consult with his lawyer while he is testifying." *Id.* at 281; accord *id.* at 284. The Court grounded that limitation in the ancient witness-sequestration rule, see *id.* at 281-284, and found that even the complete bar on conferral at issue was within the judge's "power to maintain the status quo during a brief recess in which there is a virtual certainty that any conversation between the witness and the lawyer would relate to the ongoing testimony," *id.* at 283-284.

The Court reconciled the results of the two cases by emphasizing that "[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." *Perry*, 488 U.S. at 284. "It is the defendant's right to unre-

stricted access to his lawyer for advice on a variety of trial-related matters that is controlling in the context of a long recess," the Court explained, and "[t]he fact that such discussions will inevitably include some consideration of the defendant's ongoing testimony does not compromise that basic right." *Ibid.* "But in a short recess in which it is appropriate to presume that nothing but the testimony will be discussed, the testifying defendant does not have a constitutional right to advice." *Ibid.*

The Court also explained that another option for a trial court would be to allow conferral only as to topics other than the defendant's ongoing testimony. See *Perry*, 488 U.S. at 284 & n.8. The Court noted that absolute nonconferral orders during brief recesses, while constitutionally permissible, are not compulsory. *Id.* at 284. And it highlighted that "[a]lternatively, the judge may permit consultation between counsel and defendant during such a recess, but forbid discussion of ongoing testimony." *Id.* at 284 n.8 (citing *People* v. *Stroner*, 432 N.E.2d 348, 351 (Ill. App. Ct. 1982), aff'd in part and rev'd in part on other grounds, 449 N.E.2d 1326 (Ill. 1983)).

c. Far from precluding qualified conferral orders, which allow consultation about anything but ongoing testimony, *Geders* and *Perry* support them. In *Geders*, the defense itself sought only a limited right to confer "about matters other than the [defendant's] imminent cross-examination." 425 U.S. at 82. In distinguishing nonparty witnesses from defendants, *Geders* indicated that an absolute order is problematic only because it bars discussion of matters *other* than the defendant's testimony, see *id.* at 88, noting that the defendant "has the opportunity to discuss his testimony with his attorney *up to the time he takes the witness stand*," *ibid.*

(emphasis added). Then, in *Perry*, the Court specifically approved the use of a qualified order as an alternative to an absolute consultation bar for brief recesses. 488 U.S. at 284 n.8.

Logically, if such orders are workable for brief recesses, then they are workable for recesses of greater length—including overnight recesses—as well. If an attorney is capable of separating the defendant's ongoing testimony from other topics for 15 minutes, then the attorney should be able to do so for 20 minutes, 30 minutes, an hour, or however long an overnight consultation would last. The separation between the topics is conceptual, not temporal: anything that could come up overnight could also come up in 15 minutes, or five.

If anything, the logic of *Geders* and *Perry* suggests that the conceptual separation would be *easier* overnight than in the space of a 15-minute recess. The temporal line that the Court drew between *Geders* and *Perry* was founded on a distinction between the topics likely to come up during a recess of each length. See *Perry*, 488 U.S. at 284; *Geders*, 425 U.S. at 88. The rationale for allowing an absolute bar on conferral during a shorter recess, but not an overnight recess, rests on the presumption that the most burning topic during a brief recess would be the ongoing testimony, while overnight discussions would naturally focus on other topics. See *ibid.*

If the more targeted approach of a qualified conferral order—allowing discussion on every topic but the ongoing testimony—is workable when the urge to discuss the forbidden topic is at its zenith, then it follows a fortiori that the approach is workable overnight, when the topic will be less pressing. And because a defendant "has no constitutional right to consult with his lawyer

while he is testifying," *Perry*, 488 U.S. at 281, such a qualified conferral order does not violate the Sixth Amendment.

2. Petitioner misinterprets Geders *and* Perry

Petitioner's contrary reading of *Geders* and *Perry* is untenable. As he would have it (Br. 19), *Geders* and *Perry* dictate that "during an overnight recess, the defendant has a right to confer with counsel about matters essential to the defense," and that conferral right encompasses even discussion of "the defendant's own" in-progress testimony. But *Geders* and *Perry* directly contradict that interpretation: while a defendant has the right "to discuss his testimony with his attorney up to the time he takes the witness stand," *Geders*, 425 U.S. at 88, he has no "right to discuss that testimony while it is in process," *Perry*, 488 U.S. at 284.

As explained above, *Geders* disapproved an overnight bar on conferral because it would likely preclude discussion of matters *other than* the defendant's ongoing testimony; *Perry* approved a shorter bar on conferral because it would not likely preclude discussion of such nontestimonial matters. Neither case established a Sixth Amendment right to discuss the defendant's testimony in medias res. Nor could such a right be squared with the results in the two cases, as it would logically apply to shorter recesses just as much as longer ones. Aside from the conclusory and amorphous assertion that "courts have the power to preserve the status quo should a temporary break be necessary," petitioner offers no principled basis for a "sharp distinction" between the right to discuss testimony during overnight recesses but not "brief daytime" ones. Pet. Br. 22.

Petitioner places great weight (Br. 1-2, 13, 18, 20) on *Perry*'s observation, in distinguishing *Geders*, that "[t]he fact that such [overnight] discussions will inevitably include some consideration of the defendant's ongoing testimony does not compromise" the defendant's "right to unrestricted access to his lawyer for advice on a variety of trial-related matters." 488 U.S. at 284. He takes (Br. 2) that sentence to endorse his view that it is impossible to distinguish discussion of the defendant's testimony from discussion of other trial matters. If that reading were correct, however, the Court's approval of qualified conferral orders (on the same page of its opinion) would be inexplicable. *Perry*, 488 U.S. at 284 n.8. *Perry* meant simply that a *Geders*-style absolute order is not rendered permissible just because the various "trial-related matters" the defense may want to discuss overnight may relate, in some peripheral way, to the defendant's testimony.

Petitioner also emphasizes (Br. 20-22) *Geders*'s discussion of "other ways to deal with the problem of possible improper influence on testimony or 'coaching'" without an absolute overnight nonconferral order, such as cross-examining the defendant about "the extent of any 'coaching'" or arranging for him to complete his testimony "without interruption." 425 U.S. at 89-90. But *Geders* did not purport to provide an exhaustive list of alternatives. And *Perry*—which itself notes the option of qualified conferral orders—subsequently clarified that nonconferral orders serve interests other than preventing "unethical 'coaching.'" 488 U.S. at 282; see *id.* at 284 n.8.

As the Court explained, "[c]ross-examination often depends for its effectiveness on the ability of counsel to punch holes in a witness' testimony at just the right

time, in just the right way." *Perry*, 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." *Ibid.* That "is true even if we assume no deceit on the part of the witness." *Ibid.* Instead, "it is simply an empirical predicate of our system of adversary rather than inquisitorial justice that cross-examination of a witness who is uncounseled between direct examination and 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." *Ibid.*

Neither *Geders* nor *Perry* supports petitioner's effort to enable such interference with the trial's truth-seeking process. Instead, they confirm—as do the constitutional text and history—that a criminal defendant has no Sixth Amendment right to discuss ongoing testimony with his counsel. See *Perry*, 488 U.S. at 284; see also *Geders*, 425 U.S. at 82.

C. Qualified Conferral Orders Are Consistent With Fair And Truth-Seeking Criminal Trials

Petitioner acknowledges (Br. 45) that *Geders*—the one decision on which he most heavily relies—"did not give as much attention to the text and original meaning of the Sixth Amendment as would be the norm today." Nonetheless, his argument to extend *Geders*'s holding about absolute conferral bars to qualified conferral orders doubles down on that same methodology, relying heavily on asserted policy-based reasons. See Br. 24-44. But even assuming policy concerns could justify his approach, but cf., *e.g.*, *Ramos* v. *Louisiana*, 590 U.S. 83, 100 (2020), petitioner's functionalist arguments lack

merit. Qualified conferral orders are a valuable tool for judges in criminal trials, and petitioner's categorical objections to their use are misplaced.

1. Discussion of ongoing testimony during a recess inhibits the truth-seeking function of trial

Qualified conferral orders are an important means of ensuring the integrity of the criminal-justice process. As the Texas CCA explained below, preventing witnesses from discussing their ongoing testimony with others during a recess is critical to protecting the truth-seeking function of the trial process. Pet. App. 13a-14a. Such "mid-testimony conferences are 'an extremely dangerous practice.'" *Buckham* v. *State*, 185 A.3d 1, 10 (Del. 2018) (quoting *Duke* v. *United States*, 255 F.2d 721, 728 (9th Cir.), cert. denied, 357 U.S. 920 (1958)). That is especially true when the witness is a criminal defendant, who is more acutely interested than anyone else in the outcome of the case. Cf. *Wisener* v. *Maupin*, 61 Tenn. 342, 357 (1872) (noting, in a civil case, that "the reason" for sequestration "applies with equal, if not more, force to [a party witness] than to the disinterested witness").

Preventing such discussion helps to prevent unethical conduct like witness coaching. While the prevalence of witness coaching may not be of "epidemic" proportions, Pet. Br. 42, it is a problem that continues to recur in litigation. See, *e.g.*, *Security Nat'l Bank* v. *Jones Day*, 800 F.3d 936, 940 n.3 (8th Cir. 2015) (counsel coached witness during deposition); *United States* v. *Mintmire*, 507 F.3d 1273, 1290 (11th Cir. 2007) (counsel "attempted to orchestrate" witness's grand-jury testimony); *Hernandez* v. *La Fortaleza, Inc.*, No. A-367-22, 2024 WL 65217, at *2 (N.J. Super. Ct. App. Div. Jan. 5, 2024) (per curiam) (attorney caught coaching witness during lunch

recess); ABA, Formal Op. 508, *The Ethics of Witness Preparation* 3 (2023) (noting "a number of reported instances" of "brazen witness-coaching" in connection with remote proceedings). Furthermore, as *Perry* explained, barring midstream discussion of testimony prevents forms of attorney assistance that, even if well-intentioned, may nevertheless hinder the truth-seeking process. See 488 U.S. at 282-283.

Petitioner's suggestion that it would in fact be beneficial to allow an attorney to advise a defendant about his ongoing testimony cannot be squared with *Perry*. He presumes the benefits of, for example, an attorney's efforts to improve the defendant's locution, posture, or demeanor. See Pet. Br. 32. And he cites pre-*Perry* decisions that simply take as a given a need for counsel to "warn [a] defendant about certain questions that would raise self-incrimination concerns" during "his upcoming cross-examination," *Mudd* v. *United States*, 798 F.2d 1509, 1512 (D.C. Cir. 1986), or to discuss overnight the testimony-focused matters that the defendant "wants most to discuss," *State* v. *Fusco*, 461 A.2d 1169, 1173 (N.J. 1983).

Whatever right a defendant has to advice about how best to present his story, and to give the appearance of veracity, "up to the time he takes the witness stand," *Geders*, 425 U.S. at 88, he has no right to midcourse correctives once he is sworn in, *Perry*, 488 U.S. at 282. Even if an attorney's midtestimonial conferral with his client does not cross any legal or ethical line, it is at least reasonable to worry that such communication may be detrimental to the truth-finding process. See *ibid.*

2. Petitioner's policy objections to qualified conferral orders are unsound

a. Petitioner's principal policy objection to qualified conferral orders is his assertion that they are unworkable, which is premised on the theory that "it is impossible to distinguish discussions of [the defendant's] testimony from discussions" of other trial-related matters. Pet. Br. 25; see *id.* at 36-39. But this Court in *Perry*, and defense counsel in *Geders*, viewed qualified conferral orders as both workable and administrable. *Perry*, 488 U.S. at 284 n.8; *Geders*, 425 U.S. at 82. And petitioner's only contrary authority consists of lower-court opinions that contradict the view expressed in *Perry*. See, *e.g.*, *United States* v. *Triumph Capital Grp., Inc.*, 487 F.3d 124, 132-133 (2d Cir. 2007); *United States* v. *Cobb*, 905 F.2d 784, 792 (4th Cir. 1990), cert. denied, 498 U.S. 1049 (1991).

A defendant's testimony is surely an important event in any trial. But to say that it is "inextricably intertwined with all aspects of the defense's strategy" (Pet. Br. 25) overstates the point. Various trial-related matters would interest any defendant, whether or not he is currently testifying—or ever has or will. Such matters include witnesses and evidence presented by the prosecution; other defense witnesses; forthcoming jury instructions and closing arguments; trial procedures; potential plea bargaining; sentencing matters; and grounds for appeal. Those and other matters may be related to the defendant's testimony in the tangential sense that they bear on the trial context in which the testimony is taking place. But that does not mean that they are "inextricably intertwined" with it. A defendant and his counsel can conceptually discuss such matters

without veering into the problematic ground of the ongoing testimony as such.

Analogously, this Court "routinely require[s] judges and juries to attend to some considerations while ignoring others." *Esteras* v. *United States*, 145 S. Ct. 2031, 2044 n.9 (2025) (citing *Samia* v. *United States*, 599 U.S. 635, 646 (2023)). Many jury instructions require lay jurors to draw far finer distinctions than qualified conferral orders do. See, *e.g.*, U.S. Br. at 15, *Samia* v. *United States*, 599 U.S. 635 (2023) (No. 22-196) (listing examples of jury instructions upheld by this Court). And petitioner's own position would create temporal and substantive line-drawing problems with respect to the definitions of "coaching," or the length of a "brief" recess, that would otherwise be unnecessary in the context of qualified conferral orders.

b. Petitioner's other policy objections are equally misconceived. Petitioner contends (Br. 26-36) that a qualified conferral order prevents the defendant from obtaining essential advice from counsel on various matters. That contention proves too much. If advice while testifying were truly essential to the right to counsel, then a defendant would be entitled a midstream timeout to obtain it. But even petitioner agrees (Br. 43) that would be a step too far, and he provides no sound reason why the essentiality of counsel's advice should depend on the happenstance of a fortuitously timed recess. The true answer is that most, if not all, of the important attorney-client discussions that petitioner's brief posits could be held either before or after the defendant's testimony (if about the testimony), during a recess if one arises (if about anything else), or both. See, *e.g.*, Pet. Br. 26-27 (discussion of whether to plead guilty); *id.* at

33-36 (basic witness preparation); see also *Perry*, 488 U.S. at 284 n.8.

Petitioner likewise errs in suggesting (Br. 18) that the potential enforcement of a qualified conferral order "destroys the attorney-client privilege." As a threshold matter, petitioner does not dispute that the extent of any improper coaching during an overnight recess would be a proper subject for cross-examination, *e.g.*, Pet. Br. 41; questioning about whether the defendant discussed his testimony with counsel at all is necessarily a lesser-included inquiry. And even if it might be inappropriate to enforce a particular order by "pry[ing] into privileged conversations" (*id.* at 18), that does not mean that courts should give up altogether. The legal system presumes that attorneys and parties follow court directives. *Geders*, 425 U.S. at 93 (Marshall, J., concurring). Courts instruct juries, for instance, even though a jury's compliance with its instructions cannot be probed. See *United States* v. *Olano*, 507 U.S. 725, 737 (1993).

Finally, petitioner's proposed alternatives to qualified conferral orders, see Br. 41, fail to show that such orders are unconstitutional. This Court has not imposed a least-restrictive-means requirement on trial courts' measures to protect the integrity of the trial process. And even if it had, petitioner's proffered substitutes are inadequate. It is not always possible, for example, to "schedule the defendant's testimony to take place on a single day," *ibid.* Among other things, criminal defendants' testimony regularly exceeds one day. See, *e.g.*, *United States* v. *Patel*, 754 Fed. Appx. 271, 272 (5th Cir. 2018) (per curiam) (defendant "testified in his own defense for 19 days"). More importantly, the Sixth Amendment does not micromanage courts' scheduling practices. "Trial courts have huge caseloads to be pro-

cessed within strict time limits" and "must consider not only attorneys' schedules but also those of witnesses and juries." *Melendez-Diaz* v. *Massachusetts*, 557 U.S. 305, 341 (2009) (Kennedy, J., dissenting); see *Gonzalez-Lopez*, 548 U.S. at 152. Trial recesses are frequently unavoidable, and courts will often be unable to arrange for the defendant to testify without interruption.

c. Petitioner notes (Br. 42) that several lower courts have rejected qualified conferral orders. But others have accepted them. See *Beckham* v. *Commonwealth*, 248 S.W.3d 547, 553-554 (Ky. 2008); *State* v. *Conway*, 842 N.E.2d 996, 1020-1021 (Ohio), cert. denied, 549 U.S. 853 (2006); *Wooten-Bey* v. *State*, 568 A.2d 16, 20 (Md. 1990); *Bailey* v. *State*, 422 A.2d 956, 957-961 (Del. 1980); *Stroner*, 432 N.E.2d at 351. The Constitution does not categorically foreclose one side of this debate.

As this Court has recognized, "state systems of criminal procedure vary widely," and the "flexibility and experimentation" represented by those variations are a good thing. *Gerstein* v. *Pugh*, 420 U.S. 103, 123 (1975); see *Danforth* v. *Minnesota*, 552 U.S. 264, 280 (2008) (noting "[t]he fundamental interest in federalism that allows individual States to define crimes, punishments, rules of evidence, and rules of criminal and civil procedure in a variety of different ways"). Cutting off such variation by imposing new constitutional rules of criminal procedure imposes substantial costs on state and federal criminal-justice systems and should not be done lightly. See, *e.g.*, *Spencer* v. *Texas*, 385 U.S. 554, 562 (1967). And there is no sound policy basis—let alone a textual, historical, or precedential one—for doing so here.

D. The Judgment Below Should Be Affirmed

For the reasons discussed above, the Texas CCA correctly upheld the limited conferral order entered by the trial court here. Defense counsel confirmed that they understood the order's scope, which was consistent with the sort of qualified conferral order identified in *Perry*. 5 R. 137-138; see *Perry*, 488 U.S. at 284 n.8. Both appellate courts below recognized the trial court's instruction "as a limited order" that "restricted discussions of [petitioner's] ongoing testimony and nothing else." Pet. App. 15a; see *id.* at 50a. And both appellate courts correctly recognized that the Sixth Amendment does not guarantee a right to discuss those topics with counsel once the testimony has started. See *Perry*, 488 U.S. at 282.

The judgment below, which upholds petitioner's murder conviction, should accordingly be affirmed. Indeed, that would be so even if there were, in fact, some constitutional infirmity in the qualified conferral order, because any error would be harmless beyond a reasonable doubt. See *Chapman* v. *California*, 386 U.S. 18 (1967). Although the decision in *Perry* stated that "a showing of prejudice" by the defendant "is not an essential component of a violation of the rule announced in *Geders*," 488 U.S. at 278-279, any weight accorded to that statement would not extend beyond the context of "the rule announced in *Geders*"—a rule that prohibits only "an order preventing [the defendant] from consulting his counsel 'about anything' during a 17-hour overnight recess between his direct- and cross-examination." *Geders*, 425 U.S. at 91. Any error in entering a more limited qualified conferral order that allows discussion of most topics would, like all but a select few er-

rors, see, *e.g.*, *Greer* v. *United States*, 593 U.S. 503, 513 (2021), be susceptible to ordinary prejudice analysis.

As this case illustrates, limiting the scope of a defendant's consultation with counsel for a discrete period during trial, even if erroneous, is not the sort of error that might be "subject to automatic reversal on appeal" on the theory that it "affect[s] the entire conduct of the proceeding from beginning to end" in indiscernible ways. *Greer*, 593 U.S. at 513 (brackets, citations, and internal quotation marks omitted). The trial court here recessed for the day and issued the qualified conferral order when petitioner was still in the middle of direct examination, for which the defense had presumably been able to prepare extensively beforehand. 5 R. 135-136. After the court issued the order, the defense lodged a pro forma Sixth Amendment objection without contending that the defense had any need to confer at all during the recess. *Id.* at 139. Nor did the defense suggest the next morning that any such need had arisen overnight. 6 R. 5. And it did not object when the same limitation on conferral was reimposed during a shorter subsequent recess. *Id.* at 40. Thus, particularly given that petitioner's testimony was "weak" and the evidence against him "overwhelming," Pet. App. 26a (Keel, J., concurring in the judgment), reversal of petitioner's murder conviction would not be appropriate.

CONCLUSION

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

Respectfully submitted.

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