No. 24-557

# In the Supreme Court of the United States

DAVID ASA VILLARREAL, PETITIONER,

*v.*

TEXAS, RESPONDENT.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS*

## BRIEF IN OPPOSITION


JOE D. GONZALES
*Criminal District Attorney*
*Bexar County, Texas*

ANDREW N. WARTHEN
*Assistant Criminal District Attorney*
*Counsel of Record*

*Bexar County Criminal District Attorney's Office*
*101 W. Nueva Street, 7th Floor*
*San Antonio, Texas 78205*
*(210) 335-1539*
*awarthen@bexar.org*



LEGAL PRINTERS LLC ● Washington, DC ● 202-747-2400 ● legalprinters.com

## 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, they may restrict defense counsel from conferring with their clients during their ongoing testimony by issuing absolute no-conferral orders of short duration. *Id.*

This case concerns a qualified conferral order issued before an overnight recess. Petitioner's defense counsel was ordered to not discuss petitioner's ongoing testimony with him in a manner that managed his testimony. 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 an overnight recess is called during the defendant's testimony, may a trial court protect the trial's truth-seeking function by issuing an order that allows conferral in every respect except direct discussions of the defendant's testimony?

## Table of Contents

## Table of Authorities

**Cases:**

**Statutes & Rules:**



**Other Authorities:**

## Statement

1. *Factual background*. Before the trial court entered its qualified conferral order, petitioner testified that he stabbed his boyfriend, Aaron Estrada, with a knife. (5R. 126–28.) The Medical Examiner's Office confirmed that Estrada died by stabbing. (4R. 74–75, 82, 89.) Therefore, the offense was established beyond a reasonable doubt. Petitioner claimed, however, that he acted in self-defense because Estrada "grabbed" and "started choking" him. (5R. 127.) But that claim was in tension with the rest of the evidence.

Veronica Hernandez, a friend of petitioner and Estrada, testified that the two men lived together. (3R. 188–89.) The night before the murder, Hernandez saw the couple at their apartment, and they "seemed fine" and "weren't arguing." (3R. 191–93, 195.) She planned on staying the night but did not because Estrada sent her a text message saying he "was trying to make peace with" petitioner, indicating that they may have been having relationship problems. (3R. 192, 195–96.)

The next morning, she received a frantic phone call from Jimena Valenzuela, another mutual friend and petitioner's paramour. (3R. 198–99; 4R. 187–88, 223.) After their conversation, Hernandez went to Estrada's apartment. (3R. 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." (3R. 194, 200.) Hernandez entered the home and immediately froze

because she saw blood at the entryway. (3R. 201.) She ran up the stairs, which also had blood smears, whereupon she saw Estrada's body in a "semi-fetal position[.]" (3R. 202.) Estrada was unresponsive, so Hernandez attempted to call 911 from the apartment's cordless phone. (3R. 202.) The power had been cut off, however, so she used her cell phone instead. (3R. 202.) When EMS arrived, they asked Hernandez to direct them to the power box so that "they could flip the breakers" because "the power was completely off." (3R. 203–04.) At the crime scene, a pair of bloody scissors were found in a basket. (4R. 28; State's Exs. 31, 37, 40, 64.) Multiple pieces of a blood-stained broken knife were also found. (State's Exs. 39, 44, 48, 51, 52, 56, 66, 67, 69.)

Valenzuela also testified. She explained that she, Estrada, and petitioner regularly "smoke[d] meth" together. (4R. 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. (4R. 198.) Petitioner seemed "agitated" and "upset" when he told Valenzuela his strange story, so she agreed to accompany him to the work site to see it for herself. (4R. 198–99, 205.) But instead of taking petitioner to his work site, Valenzuela decided to go to Estrada's apartment. (4R. 205.) When asked why she went there instead, she stated that, several years before, she too had "suffered a lot of audio hallucinations" similar to the one petitioner was suffering, so she began to think "maybe there was some truth to" petitioner's story,

and she and petitioner wanted Estrada to join them. (4R. 205–06.) Valenzuela 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." (4R. 205.) She also confirmed that she and petitioner believed they were being followed. (4R. 206.) When they reached Estrada's apartment, he declined to join in their paranoid adventure, stating that the two were "crazy." (4R. 206–07.)

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

At some point, petitioner had thrown his phone away because he believed that "they" could follow him and Valenzuela via their phones. (4R. 209–10.) Valenzuela had no cable, internet, or phone in her

home, so she left petitioner alone there and went to work. (4R. 210.) When Valenzuela returned home from work, she found petitioner reading a vampire-themed book titled "Memnoch the Devil." (4R. 210.) While he seemed relaxed, petitioner told Valenzuela 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. (4R. 210.)

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

Petitioner and Valenzuela left, 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. (4R. 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." (4R. 215–16.) He asked the truck vendor, "What's good off the menu," which Valenzuela explained was his way of "following leads." (4R. 217.) Such abnormal behavior and thoughts were in keeping with what Valenzuela 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. (4R. 217–18.) Valenzuela candidly admitted that she and petitioner were "crazy." (4R. 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." (4R. 214–15.)

Later, the pair returned to Estrada's apartment because petitioner wanted her to "find out what [Estrada] knew." (4R. 214.) Petitioner also told Valenzuela to kill Estrada. (4R. 214.) Valenzuela testified that on the day of the murder, around 3:00 a.m., she went to Estrada's apartment to "make sure everything was fine" between him and petitioner. (4R. 193–94.) She felt the need to do so because of the "eventful" previous few days. (4R. 194.) When she arrived, "everything was okay, everybody was happy," so she only stayed a few minutes. (4R. 194–95, 224, 243.) She went home, but she returned to Estrada's apartment a few hours later to "smoke meth," and

met Estrada outside. (4R. 197.) A friend of his had just left, and he "seem[ed] fine." (4R. 197.) When she saw petitioner, however, he was "agitated[.]" (4R. 197.) She did drugs with petitioner and then left for work. (4R. 197.)

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

When Valenzuela returned to petitioner, he was "agitated" and stated, "We got to go," and, "This is his car. We shouldn't be in his car." (4R. 200–01.) Valenzuela confirmed that she had previously told the police that petitioner said, "I did it." (4R. 202–03.) Petitioner never mentioned to Valenzuela that he and Estrada had been in a fight, but he did say that he had to grab the scissors because the knife had broken. (4R. 221–22.) Petitioner also told her he had to hold a knife to Estrada's throat because he had seen the face of Valenzuela's daughter in one of Estrada's security videos. (4R. 221–22.)

Petitioner and Valenzuela then left her workplace and went to her apartment. (4R. 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. (4R. 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." (4R. 125.) After petitioner was arrested, he asked the officer to tell Estrada's parents and grandparents that he was sorry, and that Estrada "didn't deserve it." (4R. 127, 141–42.) Also, unprompted, petitioner stated, "Tell him he was innocent. He didn't deserve what happened to him." (4R. 128, 142–43.) Further, petitioner said that he wanted Estrada back and that he heard his voice. (4R. 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." (4R. 131–32, 143.)

As stated above, petitioner testified that he stabbed Estrada. He also admitted that on the morning of the murder, he had used drugs. (5R. 116.) Before the stabbing, a man named Eric was at the apartment. He and Estrada were having a conversation away from petitioner, but they were close enough to where petitioner could overhear Eric make a comment which upset petitioner. (5R. 116–18.) Later, petitioner confronted Estrada about Eric's comment, but Estrada said it was just a joke. (5R. 120.) Petitioner insisted on discussing it, and he asked Estrada to turn off his phone, computer, and security cameras because he was "paranoid" that he was being watched. (5R. 120–21.) Estrada refused to shut anything off and instead "was just kind of blowing [petitioner] off." (5R. 121–22.) Petitioner became

"very frustrated" and "turned off all the breaker switches in the breaker box." (5R. 122.) That, in turn, caused Estrada to "storm[] out," which was unusual behavior for him, making petitioner "scared." (5R. 122.)

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

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

At that point in petitioner's testimony, the court recessed for the evening and the complained-of order was issued.

2. *The qualified conferral order*. As stated, during petitioner's direct examination, the trial court had to pause the proceedings and break for the day, whereupon the jury was released. (Pet. App. 5a–6a.) The

trial court then admonished petitioner's attorneys to not confer with him about his testimony during the break. (Pet. App. 6a–8a.) During its admonishment, the trial court took pains to emphasize that petitioner was allowed to speak with his attorneys about all other trial-related matters, and it specifically stated that they were only prohibited from discussing "[h]is testimony." (Pet. App. 6a–7a.) The trial court 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 trial court, stating, "We aren't going to talk to him about the facts that he testified about." (Pet. App. 7a.)

3. *Procedural history*. The 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 the needle" by allowing discussions about all trial-related matters save petitioner's ongoing testimony. (Pet. App. 46a–50a.)

The Court of Criminal Appeals (CCA) 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 CCA 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 CCA 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 concurrences 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)).

**Reasons for Denying the Petition**

At all times during trial petitioner had access to counsel, including during the overnight recess at issue here. During that recess, counsel was merely ordered to not discuss petitioner's ongoing testimony in a manner that managed his testimony. While there is a split of authority concerning such orders, they are so rarely issued that this Court's review is unwarranted. Moreover, these orders are compatible

with the Sixth Amendment's original meaning and otherwise in keeping with this Court's precedents. Further, as this case illustrates, such orders are indeed workable, and to the extent there is a problem, other avenues would better address this situation. In any event, this case is not a good vehicle to review this issue because the rule articulated below was narrow and fact-specific, and, even if petitioner gains relief here, any error will almost certainly be found harmless.

**1. Review is unnecessary because qualified conferral orders are rarely issued.**

The first case to consider this issue was decided nearly 45 years ago. *Bailey v. State*, 422 A.2d 956 (Del. 1980). Since then, there have been countless criminal trials in this country. Yet petitioner points to only a handful of cases that have addressed this issue. Indeed, the universe of cases in which this issue would arise is minuscule as an unusual series of events would have to occur for such orders to be issued in the first place: The defendant would have to elect to testify, there would have to be an overnight break during his testimony, and the trial court would have to decide that a qualified conferral order is warranted. Likewise, petitioner offers nothing to show that qualified conferral orders are regularly issued and then not reviewed on appeal. And even when they are issued, reviewing courts sometimes sanction them only after they are supported by certain factors—*see* (Pet. App. 15a–17a); *Webb v. State*, 663 A.2d 452, 456 (Del. 1995) (order cannot be

vague, imprecise, and unconstitutionally overbroad)—making them even less impactful. Thus, review by this Court would be a solution in search of a problem.

**2. The rule below is consistent with the Sixth Amendment's original meaning.**

Petitioner does not discuss the Sixth Amendment's original meaning or scope, but it is relevant to determining the propriety of qualified conferral orders like the one here. 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 W. Beaney, *The Right to Counsel in American Courts* 8–9 (1955)); *see also Powell v. Alabama*, 287 U.S. 45, 60–65 (1932) (recounting the history of the right to counsel). The Clause as originally understood and ratified meant only that a defendant 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).

That understanding was codified in early federal statutes passed contemporaneously with the proposal and ratification of the Sixth Amendment. The Judiciary Act of 1789—passed only one day before the Sixth Amendment was sent to the states for their consideration—provided that parties in federal

courts could manage and plead their own causes personally or by the assistance of counsel as provided by the rules of the respective courts. Act of Sept. 24, 1789, ch. 20, § 35, 1 Stat. 73, 92 (1789); *see* Beaney, *supra*, at 28; *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"). The court-rules qualifier in this provision shows that the right to counsel was not unlimited and could generally be restricted by the trial court.

The next year, while the Sixth Amendment was still being considered by the states, Congress passed another law indicating the limited nature of the right to counsel. That law allowed every person indicted for capital offenses to make his defense by counsel, and the court before which he was tried was, upon his request, required to assign him up to two counsel who would have "free access to him at all reasonable hours." Act of April 30, 1790, ch. 9, § 29, 1 Stat. 118 (1790). The "reasonable hours" qualification again shows that the right to counsel was not unlimited; rather, counsel's contact with his client could be restricted. And if some hours were "reasonable," then others were necessarily unreasonable, which assuredly included the overnight hours.

Thus, it is *Geders v. United States*, 425 U.S. 80 (1976)—which disapproved of absolute no-conferral orders during overnight recesses, and upon which petitioner chiefly relies—that does not comport with

the Sixth Amendment's original meaning. Though it could, this Court need not overrule *Geders* to affirm the judgment below. It should, however, refrain from extending its 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)); *Seila Law LLC*, 591 U.S. at 220, 228 (not reconsidering several precedents, but declining to extend their holdings to a new situation); *Hein v. Freedom From Religion Foundation*, 551 U.S. 587, 614–15 (2007) (plurality opinion) ("It is a necessary concomitant of the doctrine of *stare decisis* that a precedent is not always expanded to the limit of its logic.").[1]

### 3. The rule below comports with this Court's precedents.

Original meaning aside, qualified conferral orders are in keeping with this Court's precedents. As stated, petitioner likens this case to *Geders v. United States*, 425 U.S. 80 (1976). There, the trial court, concerned that Geders and his attorney would discuss his ongoing testimony, ordered counsel to not talk "about anything" with Geders during an overnight recess. *Geders*, 425 U.S. at 82. This Court concluded that absolute prohibitions on overnight conferrals violate the right to counsel, but it specifically

[1] In the event the petition is granted, and to the extent necessary to preserve the argument, respondent urges the Court to overrule *Geders*.

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.* at 91.

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 petitioner 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 overruled. *Id.*

This Court upheld the conviction, noting that "when a defendant becomes a witness, he has no constitutional right to consult with his lawyer while he is testifying." *Id.* at 281. It explained, "[W]hen [the defendant] 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." *Id.* 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).

Here, because the trial court did not impose an absolute prohibition on attorney-client

communications, *Geders* and *Perry* are not directly on point. The *Perry* Court, however, did contemplate a situation similar to the one presented here, and indicated its approval of qualified conferral orders, stating that "the judge may permit consultation between counsel and defendant during such a recess, but forbid discussion of ongoing testimony." *Id*. at 284 n.8. Such language sent a strong signal that orders that merely limit communication about ongoing testimony do not impinge on the right to confer with counsel. *See United States v. Rosales*, 650 F. Supp. 2d 823, 829 (N.D. Ill. 2009), *aff'd*, *Gaya v. United States*, 647 F.3d 634 (7th Cir. 2011).

And that goes to the heart of the matter because, on a superficial level, the difference between *Geders* and *Perry* is the length of the recess. But such a surface-level reading ignores what the *Perry* Court 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."). The *Perry* Court differentiated the situation before it from the one in *Geders*, stating,

> The interruption in *Geders* was of a different character because the normal consultation between attorney and client that occurs during an overnight recess would encompass matters that go beyond the content of the defendant's

> own testimony—matters that the defendant does have a constitutional right to discuss with his lawyer, such as the availability of other witnesses, trial tactics, or even the possibility of negotiating a plea bargain.

*Perry*, 488 U.S. at 284.

Thus, when the Court stated that discussion of certain matters is constitutionally protected, and that those matters "go beyond" the defendant's "own testimony," it was necessarily saying that direct discussions of a defendant's ongoing testimony—as opposed to discussions of its derivative effects—are not constitutionally protected. That is the only reason to differentiate a defendant's testimony from other matters. And because it can be presumed that those constitutionally protected matters will be discussed during an overnight recess, *absolute* prohibitions during such recesses run afoul the right to counsel.[2] A qualified order to not confer about ongoing testimony, however, properly excises discussion of non-protected matters from discussion of protected ones.

The *Perry* Court also stated, "It is the defendant's right to unrestricted access to his lawyer for advice on a variety of trial-related matters that is controlling in the context of a long recess." *Id.* at 284. In

---

[2] That contrasts with a short recess where the presumption is that *only* the ongoing testimony will be discussed. In that case, absolute orders are acceptable. But, again, even with such a presumption, qualified conferral orders can instead be issued. *Perry*, 488 U.S. at 284 n.8.

context, this Court's discussion of "unrestricted access" referred to the variety of "trial-related matters" discussed in the previous sentence—i.e., the availability of other witnesses, trial tactics, and plea bargains—not ongoing testimony. *Id.* It would have made no sense to differentiate the two categories if they were of the same constitutional quality. Thus, *Geders*'s command is fulfilled if a defendant can confer with his counsel overnight about "trial-related matters" other than his ongoing testimony.

Immediately after the above-quoted sentence, the *Perry* Court stated, "The fact that such [overnight] discussions will inevitably include some *consideration* of the defendant's ongoing testimony does not compromise that basic right," *id.* (emphasis added)—that is to say, the right to discuss "trial-related matters." As the CCA 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.) Some courts have conflated "consideration" with "discussion," but the two terms are not synonymous.

For example, an attorney may tell his client, "We can't discuss the substance of your testimony, but 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 discussing the testimony itself. The same is true if an attorney says, "I can't talk about your testimony, but

you mentioned a Jane Smith during one of your answers. Do you know her contact information?" Again, that is not a discussion about the testimony. There is not any coaching, regrouping, or strategizing regarding the testimony itself. *See Perry*, 488 U.S. at 282. Rather, the attorney is taking into consideration his client's testimony when discussing another constitutionally protected "trial-related matter."

In short, if the dispositive factor is the length of the recess, *Perry*'s focus on the substance of the matters discussed between attorney and client, and its emphasis on the importance of untainted cross-examination, makes little sense. Consequently, as long as a defendant has access to his counsel to discuss other matters, the trial court can ensure a fair cross-examination by issuing a qualified conferral order regardless of the recess's duration. *Cf. Morgan v. Bennett*, 204 F.3d 360, 367 (2d Cir. 2000) ("We conclude that *Geders* and *Perry* stand for the principle that the court should not, absent an important need to protect a countervailing interest, restrict the defendant's ability to consult with his attorney, but that when such a need is present and is difficult to fulfill in other ways, a carefully tailored, limited restriction on the defendant's right to consult counsel is permissible.").

In the instant case, the trial court's qualified conferral order threaded the needle between protected and unprotected matters. It thereby harmonized two competing interests: safeguarding the integrity of petitioner's testimony by preventing potential

coaching, regrouping, or strategizing about his ongoing testimony, while protecting his right to discuss matters derived from that testimony. *Perry*, 488 U.S. at 282, 284. The tailored order thus ensured the best of both worlds.

Petitioner focuses on *Geders*'s discussion of how coaching can be prevented or counteracted. (Pet. 25–26, 30.) But he ignores that *Perry* recognized "the truth-seeking function of the trial can be impeded in ways other than unethical 'coaching.'" *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." *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. *See id*. at 283 ("Once 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.").

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. *Webb v. State*, 663

A.2d 452, 460 (Del. 1995) ("The 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."). But qualified conferral orders like the one here place all defendants on equal footing.

Simply, a deeper reading of *Geders* and *Perry* reveals that trial courts act within their sound discretion when they balance a defendant's right to counsel with the reliability of the proceedings they are entrusted to oversee. Caution by counsel will no doubt have to be taken to ensure compliance with qualified conferral orders. But such caution may be the price to be paid to preserve the truth-seeking function of trial. The CCA thus correctly upheld the order here.

**4. The rule below is workable, and a one-size-fits-all solution should not be imposed.**

Petitioner claims the rule below is unworkable. (Pet. 28–30.) At the outset, it must be noted that he never made a workability argument in the courts below. It is therefore forfeited. *E.g.*, *Kingdomware Technologies, Inc. v. United States*, 579 U.S. 162, 173 (2016).

In any event, petitioner's workability argument is meritless, or at best theoretical. He posits that without being able to discuss the defendant's testimony, counsel would be unable to advise their clients about trial strategy, calling additional witnesses, changing a plea, and reconsidering a plea-

bargain offer. (Pet. 28–29.) But his argument ignores that the CCA's rule already contemplates those scenarios, among others. The CCA 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.) If the order is such that derivative matters cannot be discussed, then it runs afoul the right to counsel, allowing the defense to seek reconsideration of the order, a new trial, or relief on appeal.

But the fact that petitioner's counsel never once stated they did not understand the order or could not properly comply with it illustrates that such orders are indeed workable. When the trial court initially issued its order, both defense attorneys indicated that they understood its limits and their duties thereunder. (Pet App. 7a–8a.) Thus, petitioner's counsel made no argument or indication that the order would actually stymie their ability to effectively communicate with him 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 further attempts to explain how the order would encumber his examination of petitioner when trial resumed. (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 trial court asked if either side had any issues to address, and one counsel replied, "Not from the defense at this time, Judge." (6R. 5.) The other said nothing. And later that day, when, during petitioner's cross-examination, the court took a short break, it reiterated the order with no objection from counsel. (Pet. App. 9a, 17a.) That is to say, counsel never complained that the order undermined their ability to discuss other trial-related matters with petitioner during the long or short recesses. 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. 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 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 to them until his testimony resumed, then there was another remedy available: a motion for new trial. 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 discussing petitioner's ongoing testimony. But, again, they did not. (*See* Pet. App. 17a.)

The Eleventh Circuit has adopted a similar rule. There, "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." *United States v. Nelson*, 884 F.3d 1103, 1109 (11th Cir. 2018). While it is not clear whether an objection fulfills such a showing, *see id.* at 1109–10, assuming it does, an objection was lodged here. But, as discussed previously, that objection was an afterthought, made merely for "the future," not because counsel actually desired to discuss petitioner's testimony during the overnight recess. In fact, not only did counsel fail to assert that he wished to discuss petitioner's testimony with him, he stated he understood the order and confirmed that it made sense to him. (Pet. App. 7a–8a.)

Thus, the fact that petitioner's attorneys never expressed that the order undermined their ability to effectively confer with him indicates that, unlike the absolute order in *Geders*, a qualified conferral order can adequately protect both the defendant's rights and the integrity of the factfinding process. Indeed, if qualified conferral orders rendered discussion of non-testimonial 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). Either such orders can be complied with, or they cannot—length of recess has no logical bearing on one's ability to comply.

Petitioner also claims that such orders intrude on the attorney–client relationship. (Pet. 29–30.) They do not. First, 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.

Second, if compliance with the order proves too cumbersome or impossible, 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, when a defendant decides to accept or reject a plea bargain or to testify or not, defense counsel often puts on the record that he discussed the matter with his client. Despite counsel's explanation that a discussion took place, the substance of the conversation is not revealed. The same is true here. Without revealing the substance of any attorney–client communications, counsel could explain that they attempted to discuss protected matters but were unable to effectively do so.

Third, again, this Court has already blessed qualified conferral orders during short recesses. *Perry*, 488 U.S. at 284 n.8. There is no logical reason why

the attorney–client privilege would be safe in that situation but imperiled during longer ones. Thus, concerns about impinging on attorney–client privilege are unfounded.

Instead of imposing a one-size-fits-all solution, it would be better to allow trial courts to issue qualified conferral orders on the rare occasions they believe them 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."); *Morgan v. Bennett*, 204 F.3d 360, 367 (2d Cir. 2000). Since, as discussed above, petitioner does not advance any argument that qualified conferral orders run afoul the Sixth Amendment's original meaning, to the extent these orders are believed to pose a problem, the better avenue is to trust federal and state courts and legislatures to resolve them. *See City of Grants Pass v. Johnson*, 603 U.S. 520, 551–52 (2024); *Jones v. Mississippi*, 593 U.S. 98, 119–21 (2021); *Kahler v. Kansas*, 589 U.S. 271, 296 (2020); *Perry*, 488 U.S. at 284. That would allow the laboratory of ideas to create solutions in keeping with the values of our respective legal communities. *See Richardson v. Ramirez*, 418 U.S. 24, 55 (1974); *see generally* J. Sutton, *51 Imperfect Solutions: States and the Making of American Constitutional Law* (2018).

**5. This case is not a good vehicle for reviewing this issue.**

This case is not a good vehicle for reviewing this issue for two reasons. First, the CCA emphasized its holding was "narrow" and dependent on a variety of factors specific to this case. (Pet. App. 15a–18a.) The language of the trial court's order, the statements of counsel, a lack of information regarding an inability to comply, and the State's non-involvement were all considerations crucial to validating the order. Instead, a case from another jurisdiction where the rule is broad and not heavily fact-specific would provide a better opportunity to review this issue. *See, e.g.*, *State v. Conway*, 842 N.E.2d 996, 1020–21 (Ohio) (allowing qualified conferral orders during an overnight recess without outlining any factors for trial courts to consider), *cert. denied*, 549 U.S. 853 (2006).

Second, contrary to petitioner's claim that "[t]here are no other issues left in the case" (Pet. 31), if the case were reversed and remanded, harm would still need to be addressed. In that event, the result would still be the same because any error was harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 24 (1967); Tex. R. App. P. 44.2(a). This Court has recognized that the presence of overwhelming evidence supporting the finding in question—here, whether petitioner unjustifiably murdered Estrada—can be a factor in determining whether error was harmless beyond a reasonable doubt. *Milton v. Wainwright*, 407 U.S. 371, 372–73

(1972). At the time the order was issued, the evidence of petitioner's guilt was overwhelming and unlikely to be contravened.

To begin, because petitioner armed himself with a knife and hid it in his pocket, the jury could have completely disbelieved his claim that Estrada attacked him first, and instead believed petitioner's attack was premeditated. Petitioner's claim was further undermined by the fact that he could not account for the bloody scissors, which were conspicuously hidden in a basket, and Valenzuela's testimony that petitioner told her he grabbed the scissors after the knife had broken. Notably, petitioner did not make any mention to Valenzuela about a fight between him and Estrada, whereas he made an outlandish claim that he had seen her daughter's face on a security video. Estrada's unlikeliness to attack petitioner was also supported by Valenzuela's account that he was in a good mood when she saw him shortly before the murder, and also by Estrada's text to Hernandez, in which he expressed a desire to make peace with petitioner.

Petitioner, on the other hand, was "agitated" and "paranoid" in the days leading up to the murder and on the morning thereof. The record supported an inference that Estrada's murder was the inevitable conclusion to a days-long, meth-induced rampage, spurred on by petitioner's bizarre paranoid delusions that he was being watched or that Naomi was in danger, including a specific belief that Valenzuela and Estrada were "conspiring against Naomi."

Indeed, petitioner actually instructed Valenzuela to kill Estrada. And, after he was arrested, petitioner stated Estrada was "innocent" and "didn't deserve what happened to him."

Further, the order could not have affected petitioner's ability to give the jury his version of events because, by the time the order was issued, *he had already done so* and moved on to recounting his flight from the scene and attempts to hide. And, because his testimony had already been thoroughly discredited by that time, any *post hoc* modification or clarification of his story would only have further eroded his already damaged credibility. Consequently, no conferral between petitioner and his counsel about his testimony would have made any difference from that point forward. (*See* Pet. App. 25a–26a (Keel, J., concurring)).

Finally, the fact that counsel never mentioned that the order was difficult to comply with or inhibited their ability to confer with petitioner demonstrates it was likely not prejudicial. (*See* Pet. App. 19a (Yeary, J. concurring)). Accordingly, this Court's review will likely make no difference to this case's ultimate outcome.

## Conclusion

The petition for a writ of certiorari should be denied.

Respectfully submitted,

JOE D. GONZALES
*Criminal District Attorney*
*Bexar County, Texas*

ANDREW N. WARTHEN
*Assistant Criminal District Attorney*
*Counsel of Record*

February 2025