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

REPLY BRIEF FOR PETITIONER

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Texas does not dispute that the lower courts are deeply divided over whether a defendant may be prohibited from discussing his testimony with his attorney during an overnight recess. Both courts below recognized the conflict. Pet. App. 3a-4a, 48a-49a. As Judge Yeary remarked below, "[t]his is no way to navigate a right as important as the constitutional right to counsel." *Id.* at 21a.

Texas offers five reasons the Court should let the conflict continue to fester. None holds up to scrutiny.

I. Texas lacks any basis for its claim that this issue rarely arises.

Texas suggests that the question presented in this case arises too rarely to warrant certiorari, BIO 13-14, but the state offers no reason to think this claim is correct. One of the judges below thought, to the contrary, that it "must be a common and likely intractable problem." Pet. App. 19a. In truth, no one knows how often trial courts order—or refrain from ordering—the defendant not to discuss his testimony with counsel during overnight recesses. No one compiles statistics on this issue.

What we do know is that the issue has been addressed by six federal courts of appeals and seven state supreme courts, Pet. 13-23—more courts than have addressed most of the questions on which the Court grants certiorari. And this large number of reported decisions almost certainly understates how often the issue arises. In the jurisdictions that interpret the Sixth Amendment correctly, which is most of them if these decisions are representative, the issue can never arise on appeal. The trial court will

properly decide that the defendant may discuss his testimony with counsel, and the prosecutor has no way to appeal this decision, since an acquittal cannot be appealed.

Another thing we know is that in several states, including Texas, trial courts are erroneously depriving defendants of their right to confer with counsel during overnight recesses because the trial courts mistakenly believe that this outcome is mandated by *Perry v. Leeke*, 488 U.S. 272 (1989), a case that did not even involve overnight recesses. If our understanding of the Sixth Amendment is right, the Court should correct this recurring error. If Texas's understanding of the Sixth Amendment is right, the Court should say so, because it certainly hasn't said so yet.

II. The decision below is inconsistent with the original meaning of the Sixth Amendment.

Texas suggests that the decision below is consistent with the Sixth Amendment's original meaning. BIO 14-16. It is not.

The question presented in this case could not have arisen at the Founding, because defendants were not permitted to testify in their own defense until the late nineteenth century. *See Ferguson v. Georgia*, 365 U.S. 570, 577 & n.6 (1961). But there is ample evidence from the eighteenth and nineteenth centuries that the right to counsel was understood, not surprisingly, to be especially important when defendants needed it most, such as in the middle of a trial.

The Court has often noted that statutes enacted by the First Congress are helpful in interpreting the

Constitution. *See, e.g.*, *Marsh v. Chambers*, 463 U.S. 783, 790 (1983). While the states were ratifying the Sixth Amendment, the First Congress enacted the Crimes Act of 1790, which established that in capital cases (which included all serious offenses at the time), the accused had a right "to make his full defence by counsel learned in the law." § 29, 1 Stat. 118 (1790). The Crimes Act specified that "such counsel shall have free access [to the defendant] at all seasonable hours." *Id.* (Texas misquotes "seasonable" as "reasonable." BIO 15.)[1] According to contemporary dictionaries, "seasonable" meant "opportune." *See, e.g.*, Samuel Johnson, *A Dictionary of the English Language* (1785) (unpaginated). No time is more opportune for a defendant to consult with his lawyer than an overnight recess in the middle of the defendant's testimony.

Early American courts thus allowed the defendant to consult his counsel when he most needed counsel's advice. As Justice Story noted approvingly, while denying a motion for a new trial, "during this long and protracted trial, every indulgence, as to time and examination, was granted to the prisoners' counsel; [in] that they had the fullest opportunity to

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[1] Texas also omits some important words from its paraphrase of the Judiciary Act of 1789. BIO 15. Section 35 of the Judiciary Act provided that "the parties may plead and manage their own causes personally or by the assistance of such counsel or attorneys at law as by the rules of the said courts respectively shall be permitted *to manage and conduct causes therein*." Judiciary Act of 1789, § 35, 1 Stat. 92 (1789) (emphasis added). Texas's paraphrase omits the italicized clause, which makes clear that the Judiciary Act did not authorize federal courts to deny counsel to litigants but merely authorized the courts to regulate bar membership.

communicate in court, and out of court, with the prisoners, upon all the matters in evidence." *United States v. Gibert*, 25 F. Cas. 1287, 1313 (C.C.D. Mass. 1834). The Sixth Amendment right to counsel, like the parallel provisions in state constitutions, was "liberally construed to mean the right of being aided by counsel in every step and stage of the prosecution." *State v. Cummings*, 5 La. Ann. 330, 331 (La. 1850). Reflecting the language used by the First Congress, courts recognized that "counsel shall have free access [to the defendant] at all seasonable hours." *Donnelly v. State*, 26 N.J.L. 601, 607 (N.J. 1857).

Texas thus errs in contending that the decision below is consonant with the Sixth Amendment's original meaning. The right to counsel, as understood at the Founding, meant the right to speak with counsel when counsel's advice was most necessary. There can hardly be a time when counsel's advice is more necessary than during an overnight recess in the middle of trial while the defendant is testifying.

III. The decision below is irreconcilable with this Court's precedents.

Texas also errs in describing this Court's precedents. BIO 16-23.

In its discussion of *Geders v. United States*, 425 U.S. 80 (1976), Texas fails to mention the Court's explanation of why it is so important for the defendant to confer with his counsel during overnight recesses. "Such recesses are often times of intensive work," the Court observed, during which "[t]he lawyer may need to obtain from his client information made relevant by the day's testimony." *Id.* at 88. It

would be impossible for the lawyer to obtain this information without discussing the testimony itself.

Texas's discussion of *Perry* is also incomplete. Texas skips the part of *Perry* where the Court distinguished an overnight recess from a brief 15-minute recess in the middle of the day. *Perry*, 488 U.S. at 284. As the Court explained, "[i]t is the defendant's right to *unrestricted* access to his lawyer for advice on a variety of trial-related matters that is controlling in the context of a long recess." *Id.* (emphasis added). As if anticipating the argument Texas advances, the Court added: "The fact that such discussions will inevitably include some consideration of the defendant's ongoing testimony does not compromise that basic right." *Id.*

Instead, Texas makes much (BIO 18) of a footnote in *Perry* in which the Court noted 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. In this footnote, however, the Court was specifically discussing brief daytime recesses such as the one in *Perry*, not overnight recesses.

Texas also emphasizes (BIO 17) the Court's statement in *Perry* that "when a defendant becomes a witness, he has no constitutional right to consult with his lawyer while he is testifying." *Id.* at 281. But this statement was merely an explanation of why defense counsel is not entitled to call a time out in the middle of the defendant's testimony so that counsel may confer with the defendant. The Court was not speaking of court-initiated overnight recesses.

IV. The rule adopted below is utterly unworkable.

Texas defends the workability of the rule adopted by the court below (BIO 23-28), but the state overlooks at least five practical problems with the rule.

First, in the real world it is simply not possible to separate discussions about the defendant's testimony from discussions of trial strategy, or what the court below called "the derivative effects of the testimony." Pet. App. 16a. A defense lawyer has an ethical duty to "explain a matter to the extent reasonably necessary to permit the client to make informed decisions." ABA, *Model Rules of Professional Conduct*, Rule 1.4(b). The decision below prevents lawyers from fulfilling this obligation.

For example, suppose that during an overnight recess, defense counsel tells the defendant, "We can't discuss the substance of your testimony, but now I highly recommend that you take the plea bargain if it is still available." The defendant is likely to respond by asking, "Why?" How can defense counsel answer this question? If counsel doesn't explain the rationale for his advice, counsel fails to serve the client effectively. But if counsel does explain the rationale for his advice, counsel violates the trial court's order not to discuss the defendant's testimony. As Judge Calabresi explained for the Second Circuit, "a defendant's constitutional right to consult with his attorney on a variety of trial-related issues during a long break, such as an overnight recess, is inextricably intertwined with the ability to discuss his ongoing testimony. Thus, a ban on discussing testimony during a substantial recess does materially impede communication of a constitutional quali-

ty." *United States v. Triumph Capital Grp., Inc.*, 487 F.3d 124, 133 (2d Cir. 2007).

Or consider another example. Suppose a legally unsophisticated defendant has inadvertently come very close to mentioning excluded evidence in his testimony. During an overnight recess, if counsel is to represent the defendant effectively, counsel must tell the defendant something like, "I noticed that you nearly mentioned the excluded evidence. Remember that you should not mention it." But such advice would violate the court's order not to discuss the defendant's testimony. As Judge Posner explained for the Seventh Circuit, "while the judge may instruct the lawyer not to coach his client, he may not forbid all consideration of the defendant's ongoing testimony during a substantial recess, since that would as a practical matter preclude the assistance of counsel across a range of legitimate legal and tactical questions, such as warning the defendant not to mention excluded evidence." *United States v. Santos*, 201 F.3d 953, 965 (7th Cir. 2000) (citation and internal quotation marks omitted).

Second, the decision below makes it impossible for defense lawyers to fulfill their ethical obligations to prevent and remedy perjury. Defense lawyers are officers of the court who must "take reasonable remedial measures" if they know that their client has testified falsely. *Model Rules*, Rule 3.3(a)(3). Where an overnight recess takes place in the middle of the defendant's testimony, and counsel is aware that the defendant has offered false testimony, "the advocate's proper course is to remonstrate with the client confidentially, advise the client of the lawyer's duty of candor to the tribunal and seek the client's coop-

eration with respect to the withdrawal or correction of the false statements or evidence." *Id.*, comment 10. But by categorically prohibiting discussion of the client's testimony, the decision below effectively prevents an attorney from fulfilling this duty.

When an attorney suspects—but does not definitively know—that the defendant has testified falsely, the ability to consult with the defendant about his testimony is just as critical. In this situation, the attorney needs to be able to ask the defendant questions about his testimony and to explain the importance of testifying truthfully. Without such an opportunity, the attorney is unable to prevent false testimony from being given or to persuade the defendant to correct his prior misstatements.

Third, the rule adopted below will be extraordinarily difficult to administer. It requires courts to make impossible distinctions between discussion of testimony (forbidden) and discussion of the derivative effects of testimony (allowed). Below, the trial court's difficulty in merely articulating the rule gives some indication of the problem. At one point, the court instructed petitioner: "I'd like to tell you that you can't confer with your attorney but the same time you have a [Sixth] Amendment right to talk to your attorney." Pet. App. 6a. Perhaps realizing the incomprehensibility of this statement, the court tried to provide clarification, but its explanation was no easier to understand: "I believe if you need to talk to your attorneys, I'm not telling you, you can't talk to them." *Id.* This metaphysical distinction between discussion that is allowed and discussion that is forbidden would be hard enough for a philosopher with

oodles of time; it will be even harder for a harried judge in the middle of a trial.

The ambiguity of this distinction is also likely to inhibit defense lawyers in advising their clients, for fear of coming too close to the line. "I do not envy the defense lawyer who risks being held in contempt while trying to navigate this murky distinction," noted one of the judges below. *Id.* at 19a. "How is the most ethically compliant lawyer supposed to determine how to communicate with his client about information made relevant by the day's testimony or the significance of the day's events or trial tactics or the advisability mid-trial of negotiating a plea bargain without some reference, however fleeting or indirect, to the substance or tenor of his client's as-yet-unfinished appearance on the witness stand?" *Id.* (brackets and internal quotation marks omitted). Defense counsel must "act zealously within the bounds of the law and standards on behalf of their clients." ABA, *Criminal Justice Standards for the Defense Function*, Standard 4-1.2(d). But a lawyer's zeal will inevitably be tempered by concern about where, exactly, the trial court will draw the line between allowable and unallowable discussions. As Judge Mikva observed for the D.C. Circuit, "an order such as the one in this case can have a chilling effect on cautious attorneys, who might avoid giving advice on non-testimonial matters for fear of violating the court's directive." *Mudd v. United States*, 798 F.2d 1509, 1512 (D.C. Cir. 1986).

Fourth, the decision below requires trial courts to pry into confidential communications between defense lawyers and their clients. To enforce it, courts will have to ask defendants and their lawyers, "what

did you talk about last night?" Texas suggests that a trial court's order not to discuss the defendant's testimony would give way to the attorney-client privilege (BIO 27), but this suggestion is hard to reconcile with the rest of the state's argument. When the court asks what the defendant and defense counsel talked about last night, if the attorney-client privilege would allow defense counsel to respond, "that's none of your business," the rule Texas favors could never be enforced. For Texas's rule to be put into practice at all, courts would need the power to require defendants and their lawyers to reveal the contents of their privileged conversations.

Finally, the rule adopted below is not necessary to prevent "coaching" or any other unethical practice. If the prosecutor suspects the defendant has been coached, effective cross-examination is a potent weapon for attacking the defendant's credibility. *Geders*, 425 U.S. at 89-90. And in all but the lengthiest trials, the trial court can schedule the defendant's testimony to take place on a single day. *Id.* at 90. Barring the defendant from discussing his testimony with counsel, as a means of preventing coaching, is like using a cannon to kill a fly.

V. This case is an ideal vehicle.

Texas offers two arguments in support of its claim that this case is a poor vehicle for answering the question presented, BIO 29-31, but neither argument is correct.

First, there is nothing "narrow" or "fact-specific," *id.* at 29, about the decision below. The Court of Criminal Appeals straightforwardly held that the Sixth Amendment allows trial courts to bar defend-

ants from discussing their testimony with counsel during overnight recesses. Six circuits and three state supreme courts have held otherwise.

Second, Texas's harmless error argument, *id.* at 29-31, is wrong in three different ways:

(a) Deprivation of the right to counsel during an overnight recess is a structural error requiring reversal without inquiry into prejudice. The Court has made clear that "a showing of prejudice is not an essential component of a violation of the rule announced in *Geders*." *Perry*, 488 U.S. at 278-79.

(b) Even if the deprivation of the right to counsel were subject to harmless error analysis, that would be no reason to deny certiorari. The Court's "normal practice" when the respondent claims an error was harmless is to resolve the question presented and then remand the case for the lower courts "to consider in the first instance whether the … error was harmless." *Neder v. United States*, 527 U.S. 1, 25 (1999).

(c) Finally, even if the Court were to engage in its own harmless error analysis, Texas cannot demonstrate that the error was harmless beyond a reasonable doubt. *See Chapman v. California*, 386 U.S. 18, 24 (1967). David Villarreal's entire case-in-chief was that he acted in self-defense. The overnight recess took place right in the middle of his direct examination, as he was telling his side of the story. After the recess, he continued to testify about the defensive wounds he received during the altercation. The overnight recess came at the most critical stage of the trial, when the jury—after hearing the prosecution's version of events—was finally getting to hear Villarreal's account. At that moment, the outcome of

the trial was still very much in doubt. There is no way to know how the trial would have turned out if the court had not barred him from discussing his testimony with counsel during the recess.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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