No. 24-557

In the Supreme Court of the United States

DAVID ASA VILLARREAL,

Petitioner,

v.

TEXAS,

Respondent.

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

REPLY BRIEF FOR PETITIONER

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The parties' dispute has narrowed considerably. Texas now concedes that a defendant has a Sixth Amendment right to discuss his testimony with counsel during an overnight recess in at least the following circumstances:

- Counsel can explain why the defendant's testimony has been going well or poorly, and the defendant can discuss with counsel how his testimony affects plea negotiations. Texas Br. 27.
- The defendant and counsel can discuss whether the defendant mentioned potential new witnesses in his testimony. Texas Br. 27-28.
- The defendant and counsel can discuss specific exchanges during his testimony, such as why particular testimony prompted an objection or a bench conference. Texas Br. 28.
- Counsel can advise the defendant about how to testify without violating the court's evidentiary rulings. Texas Br. 28.
- The defendant and counsel can discuss the legal consequences of any perjury the defendant committed or planned to commit. Texas Br. 28-29.
- The defendant and counsel "may also fully discuss the trial's progression, the day's events, legal issues, and other matters." Texas Br. 28. A defendant's own testimony—often a trial's linchpin—surely qualifies as part of "the trial's progression" and "the day's events," and just as surely bears on "legal issues."

These undisputed points require reversal. The trial court's order here prohibited these very discussions. Pet. App. 2a (Texas Court of Criminal Appeals explains that under the trial court's order, "defense counsel could confer with defendant on everything except his ongoing testimony"); U.S. Br. 2 (under the trial court's order, "any conferral could not include the topic of petitioner's in-progress testimony"). The trial court prohibited counsel from discussing "[h]is testimony" with the defendant. Pet. App. 7a. *See also id.* (barring counsel from "discussing what you couldn't discuss with him if he was on the stand in front of the Jury"); *id.* at 6a ("[P]retend that Mr. Villarreal is on the stand. You couldn't confer with him during that time."). The trial court's order prohibited counsel from discussing, for example, whether Mr. Villarreal's testimony was going so poorly that plea negotiations would be advisable, why his testimony prompted an objection, whether his testimony implicated excluded evidence, and how he should correct or otherwise avoid impermissible testimony going forward. Yet Texas now concedes (Texas Br. 27-29) that all these subjects are constitutionally protected.

This is the only view of the Sixth Amendment consistent with text, history, precedent, and logic. The Sixth Amendment's guarantee of the assistance of counsel ensures a defendant's "unrestricted access to his lawyer for advice on a variety of trial-related matters" during an overnight recess—even when that involves "consideration of the defendant's ongoing testimony." *Perry v. Leeke*, 488 U.S. 272, 284 (1989). Counsel of course maintains the legal and ethical obligations—applicable in all contexts—not to suborn perjury or coach witnesses. But when it

comes to legitimate advice, the Sixth Amendment permits no restriction on consultation during an overnight recess.

Having conceded so much of the question presented, Texas's only remaining quibble is that courts should be able to prohibit not just witness coaching but also "managing" a defendant's testimony during an overnight recess. Texas Br. i, 1, 9, 13, 14, 15, 17, 25, 26, 29, 31, 34, 46, 48. That distinction is as baseless as it is elusive.

The United States' more extreme position fares no better. According to the United States, defendants can be ordered to entirely "omit the topic of the defendant's ongoing testimony" from overnight consultation with counsel. U.S. Br. 14. Under the United States' view, when deciding whether to accept a plea deal, the defendant could not ask counsel, "Do you think the jury believed my testimony or the prosecution witnesses'?" Counsel could not advise the defendant how to testify consistently with the court's evidentiary rulings. Counsel could not urge the defendant not to commit perjury.

The Sixth Amendment does not permit this result. "To the extent that conflict remains between the defendant's right to consult with his attorney during a long overnight recess in the trial" and concerns about "improper 'coaching,' the conflict must, under the Sixth Amendment, be resolved in favor of the right to the assistance and guidance of counsel." *Geders v. United States*, 425 U.S. 80, 91 (1976).

The Court should hold that "a prohibition on attorney-defendant discussion during substantial recesses, even if limited to discussion of testimony, violates the sixth amendment and that, like the similar

violation at issue in *Geders,* it constitutes *per se* reversible error." *Mudd v. United States*, 798 F.2d 1509, 1515 (D.C. Cir. 1986) (Scalia, J., concurring in part and concurring in the judgment).

A. The decision below is contrary to the Sixth Amendment's text and history and to this Court's precedents.

1. The text and history of the Sixth Amendment demonstrate that the right to "the assistance of counsel" encompasses the right to consult counsel on trial strategy without any content-based restrictions as to subject matter. That defendants didn't testify until the late nineteenth century shows that an exception for testifying defendants lacks any historical basis. Neither Texas (Texas Br. 46-51) nor the United States (U.S. Br. 14-19) identifies anything in the historical record supporting such an exception.

Nor does anything in the Sixth Amendment's text or history suggest that the substance of counsel's advice may be restricted where access to counsel is otherwise guaranteed. All the United States' ostensibly contrary examples involve situations where the defendant lacks the right of access to counsel in the first place, such as defendants in prison in the middle of the night, or defendants seeking to call a timeout in the middle of their testimony. During an overnight recess, by contrast, a defendant has the "right to unrestricted access to his lawyer for advice." *Perry*, 488 U.S. at 284. Where the defendant has the right to consult with counsel, there is no basis in text or history to interpret "the assistance of counsel" non-literally, to exclude assistance on particular topics.

Texas and the United States err further in making the even more extreme claim that because defendants were not allowed to testify at the Founding, states therefore possess unlimited authority to deny the right to counsel when defendants testify today. Under this reasoning, testifying defendants would have no constitutional rights at all. The Court would have to overrule a host of cases, including *Geders*.

Of course, the right to counsel has always been subject to "reasonable limitations" (U.S. Br. 18). But the limitation imposed in this case is not reasonable, because, without serving any useful purpose, it prevents the defendant and counsel from discussing the matters they most need to discuss.

2. *Geders* and *Perry* confirm that the Sixth Amendment's text means what it says—that the defendant has an unrestricted right to confer with counsel during an overnight recess, even if the discussion includes consideration of the defendant's testimony. Texas can prevail only if the Court completely uproots the stable constitutional framework that has governed for the last fifty years, but Texas offers no reason to do so.

Geders and *Perry* hold that a defendant has the "right to unrestricted access to his lawyer for advice" during an overnight recess. *Perry*, 488 U.S. at 284 (citing *Geders*, 425 U.S. at 88). "The fact that such discussions will inevitably include some consideration of the defendant's ongoing testimony does not compromise that basic right." *Perry*, 488 U.S. at 284. If the defendant's right to discuss his testimony with counsel conflicts with the government's interest in preventing coaching, "the conflict must, under the

Sixth Amendment, be resolved in favor of the right to the assistance and guidance of counsel." *Geders*, 425 U.S. at 91. (By contrast, during a brief daytime recess in the middle of the defendant's testimony, the trial court may "maintain the status quo" by prohibiting all contact between the defendant and counsel. *Perry*, 488 U.S. at 283.)

The import of *Geders* and *Perry* is clear: The trial court may not prohibit the defendant from discussing his testimony with counsel during an overnight recess. If the court is worried about coaching during the recess, it "may direct that the examination of the witness continue without interruption until completed." *Geders*, 425 U.S. at 90. If the prosecutor suspects coaching has occurred, the "prosecutor may cross-examine a defendant as to the extent of any 'coaching' during a recess" to "develop a record which the prosecutor in closing argument might well exploit by raising questions as to the defendant's credibility." *Id.* at 89-90. But a concern about coaching is not enough to deprive the defendant of the assistance of counsel.

To get around *Geders* and *Perry*, Texas offers a few creative reinterpretations of the two decisions. All are implausible.

a. Texas argues (Texas Br. 22) that while "[o]n a superficial level, the difference between *Geders* and *Perry* is the length of the recess," the "real difference between the two" is "the *substance* of what one could *presume* would be discussed during the respective breaks." This argument cannot be squared with *Perry*, which explained that the issue in the case was "whether the *Geders* rule applies to a similar order

entered at the beginning of a 15–minute afternoon recess." *Perry*, 488 U.S. at 274. The Court held that the *Geders* rule applies only to "an overnight recess," and not to "a short recess." *Id.* at 284. As the Court explained, "[w]e merely hold that the Federal Constitution does not compel every trial judge to allow the defendant to consult with his lawyer while his testimony is in progress if the judge decides that there is a good reason to interrupt the trial for a few minutes." *Id.* at 284-85. The difference between *Geders* and *Perry* is the length of the recess.

Texas relies (Texas Br. 23) on *Perry*'s observation that during a brief daytime recess there is usually no time to discuss trial strategy. In this passage, however, the Court was explaining why the harm identified in *Geders*—the inability to discuss strategy—is unlikely to materialize during a brief daytime recess. During an overnight recess, by contrast, anything short of "unrestricted access to his lawyer" would infringe the defendant's right to receive counsel's advice on trial strategy. *Id.* at 284.

Texas errs further in suggesting (Texas Br. 38) that *Perry*'s distinction between overnight recesses and daytime recesses is not a bright line. It *is* a bright line. Texas cites no cases in which lower courts have had any trouble deciding whether a recess is an overnight recess or a daytime recess. We are not aware of any. To come up with a hard case, Texas is forced to imagine scenarios that do not exist in the real world, like a trial conducted only at night with eight-hour recesses during the day.

b. According to Texas (Texas Br. 25-27), *Perry* holds that the defendant and counsel may *consider*

the defendant's testimony, but they may not *discuss* it.

This is not a reasonable interpretation of *Perry*. The Court did not say that "consideration" is allowed but "discussion" is forbidden. It said that discussions "will inevitably include some consideration of the defendant's ongoing testimony," confirming that such consideration is part of the protected discussions. When an attorney is giving legal advice, "consideration" of a client's testimony necessarily involves a dialogue with questions and answers—in short, "discussion."

Texas's misinterpretation of *Perry* cannot be rescued by supposing (Texas Br. 26) that "consideration" means "incidental discussion," as distinct from "direct discussion." This is the line the Court of Criminal Appeals tried to draw, but, as we showed in our opening brief (Pet. Br. 24-40) and will discuss further in point B below, the line cannot be drawn in practice. During an overnight recess, counsel and the defendant must discuss the defendant's testimony if they are to review the events of the day and prepare for the rest of the trial. Are these discussions "direct"? Are they "incidental"? We have no idea, and neither will counsel or the trial court.

In any event, the examples provided by Texas (Texas Br. 27-29) are all cases in which the state concedes that the defendant and counsel *do* have a right to discuss the defendant's testimony. We certainly agree that they do, but not because these involve "consideration" rather than "discussion" of testimony. It is because discussion of testimony during an overnight recess is a crucial part of the assistance of counsel guaranteed by the Sixth Amendment.

The state's list of examples is virtually identical to our own (Pet. Br. 25-38). Both sides now agree that there are many common situations in which the defendant and counsel must be allowed to discuss the defendant's testimony during an overnight recess, including situations in which such discussion was barred by the trial court's instruction below.

c. Texas acknowledges (Texas Br. 30) that in *Geders*, the Court explained that there are other ways to prevent coaching that don't deprive the defendant of the assistance of counsel. Texas, ostensibly on the authority of *Perry*, worries instead (Texas Br. 31) about "regrouping" and "strategizing," which it considers methods of "testimonial management" as nefarious as coaching. But there is nothing wrong with regrouping or strategizing, and *Perry* did not say there was.

"Regrouping" is merely pausing to think before continuing one's task. An overnight recess indeed affords the defendant and counsel an opportunity to regroup. For example, "the overnight recess during trial gives the defendant a chance to discuss with counsel the significance of the day's events." *Geders*, 425 U.S. at 88. This is a good thing, not a bad one. Discussion between the defendant and counsel during an overnight recess could be called "regrouping," but the Sixth Amendment calls it "the assistance of counsel."

"Strategizing" during an overnight recess is also an important part of the assistance of counsel. "Such recesses are often times of intensive work, with tactical decisions to be made and strategies to be reviewed," the Court observed in *Geders*. *Id.* "The law-

yer may need to obtain from his client information made relevant by the day's testimony, or he may need to pursue inquiry along lines not fully explored earlier." *Id.* There is nothing insidious about strategizing during an overnight recess. That's what lawyers and their clients are supposed to do.

Texas errs in claiming that *Perry* condemned regrouping and strategizing during overnight recesses. All that *Perry* said on this topic was that "[p]ermitting 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." 488 U.S. at 282. The only conclusion the Court drew from this observation was that "just as a trial judge has the unquestioned power to refuse to declare a recess at the close of direct testimony—or at any other point in the examination of a witness—we think the judge must also have the power to maintain the status quo during a brief recess." *Id.* at 283. *Perry* hardly classified "regrouping" and "strategizing" as impermissible practices during overnight recesses.

Moreover, it bears remembering that the rule Texas defends is the minority rule. In most jurisdictions that have addressed the issue, defendants have a Sixth Amendment right to discuss their testimony with counsel during overnight recesses. *See* Pet. 14-21. If there has been too much regrouping or strategizing in these jurisdictions, we're not aware of it.

d. Texas also errs (Texas Br. 32-33) in praising the decision below for ensuring equality between de-

fendants whose trials include overnight recesses and those whose trials are completed in a single day. The two classes are not similarly situated. The fact that some defendants finish their testimony in one day does not justify cutting off protected advice for other defendants facing an overnight recess. Indeed, the same argument could be used to deny the existence of any legal right, because all rights must be invoked in response to events that happen to some people but not others. By this reasoning, *Geders* would have been wrongly decided, because defendants with single-day trials were left similarly disadvantaged.

Texas's hypothetical involving co-defendants (Texas Br. 33) can be easily handled without abridging the right to counsel. If the court wants to treat the defendants equally, it can simply schedule both to testify without interruption. Courts make scheduling decisions like this every day. There is no need to prohibit the discussion of testimony.

Texas also errs in asserting (Texas Br. 33-34) that trial courts should bar defendants and counsel from discussing testimony to prevent "gamesmanship" by defense attorneys. If the trial court suspects that counsel is "angling to receive a beneficial recess," the solution is to schedule the defendant's testimony to take place on a single day, not to prevent the defendant from receiving the assistance of counsel. And there is no basis whatsoever for Texas's accusation (Texas Br. 34) that defense counsel in this case engaged in such gamesmanship.

B. The decision below is unworkable.

Texas (Texas Br. 35-46) and the United States (U.S. Br. 28-31) defend the decision below as workable in practice, but they are mistaken.[1]

Below, the Court of Criminal Appeals tried to draw a line between discussions of testimony, which it said the trial court could prohibit, and discussions of trial strategy, which it said the trial court could not prohibit. Pet. App. 12a-14a. We showed in our opening brief that this is no line at all. Pet. Br. 24-40. The defendant's testimony permeates every aspect of trial strategy. Deciding which witnesses to call, assessing whether to accept a plea offer, helping the defendant abide by evidentiary rulings—none of these strategic conversations would be possible if counsel were barred from discussing the defendant's testimony with him. Responsible counsel, facing the prospect of being held in contempt if they cross this invisible line, will be chilled from providing the assistance the Sixth Amendment guarantees.

The United States is wrong to dismiss this point as a mere "policy" preference (U.S. Br. 3, 13, 25, 28, 29). The Court always considers the workability of a proposed rule. *See, e.g.*, *Rucho v. Common Cause*,

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[1] Texas also errs in suggesting that the Question Presented is unpreserved for this Court's review. Texas Br. 35-37 (arguing that trial counsel failed to make a sufficient objection), 36 n.5 (complaining that some of the arguments in our brief were not made below), 45 n.6 (same). The state courts below addressed the Question Presented on the merits without suggesting that trial counsel failed to preserve the issue. And "[o]nce a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Yee v. City of Escondido*, 503 U.S. 519, 534 (1992).

588 U.S. 684, 710 (2019) ("Appellees and the dissent propose a number of 'tests' for evaluating partisan gerrymandering claims, but none meets the need for a limited and precise standard that is judicially discernible and manageable."); *Luis v. United States*, 578 U.S. 5, 22 (2016) ("[T]he constitutional line we have drawn should prove workable."). It would be foolish not to.

Here, the inseparability of strategy from testimony means that a ban on discussing testimony will inevitably prevent the defendant and counsel from discussing strategy as well. But the discussion of strategy is one of the most important things that the right to counsel protects. This is why the defendant has a right to discuss strategy with counsel during an overnight recess. *Geders*, 425 U.S. at 88.

1. The United States errs in claiming (U.S. Br. 28-29) that it is possible to separate discussions of testimony from discussions of strategy. While perhaps they are distinguishable "conceptually" (U.S. Br. 28), they are inextricably intertwined in practice. The United States's sole argument here is a conceptual one—that strategic matters are important to non-testifying defendants too. But this doesn't make it possible to separate discussions of testimony from discussions of strategy when defendants *do* testify. If the defendant is not allowed to discuss his testimony with counsel, crucial strategic discussions between the defendant and counsel will be off-limits.

Texas and the United States seize on a footnote in *Perry*, 488 U.S. at 284 n.8, that authorizes trial courts to draw this line during brief daytime recesses. Texas (Texas Br. 38) and the United States (U.S.

Br. 28) suggest that if trial courts can do it during brief daytime recesses, they can do it during overnight recesses too. But this argument ignores the fundamental problem with trying to draw such a line: Barring discussions of a defendant's testimony necessarily impairs discussions of trial strategy. This restriction on strategy discussions was acceptable for the brief recess in *Perry*, because *Perry* permitted the even greater restriction of no consultation at all. But it is not acceptable during an overnight recess, when a defendant must have "unrestricted access" to counsel for advice on trial strategy. *Id.* at 284.[2]

2. Texas also errs in suggesting (Texas Br. 39-44) that the rule adopted below is consistent with the attorney-client privilege. We explained in our opening brief (Pet. Br. 39-40) that the only way the trial court could enforce the Texas rule would be to ask the defendant and counsel "what did you discuss last night?" These discussions are, of course, privileged.

Rather than disagreeing with us, Texas again cites the same footnote in *Perry* and suggests (Texas Br. 39) that because trial courts can already intrude on the attorney-client privilege during brief daytime

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[2] The United States errs doubly by claiming (U.S. Br. 28) that "defense counsel in *Geders*" thought a ban on discussing testimony was workable. The Court is hardly bound by the view of a single defense lawyer who was desperately trying to secure at least some access to his client. And this lawyer did not even take the view the United States ascribes to him. Rather, he insisted on a broad right to discuss the case with his client but promised not to do any coaching: "I feel that I do have the right to confer with him but not to coach him as to what he may say on cross-examination or how to answer questions." *Geders*, 425 U.S. at 83 n.1.

recesses, they should be allowed to do so during overnight recesses as well. Again, however, the privilege problem rarely arises during brief daytime recesses, because the trial court can tell the defendant and counsel not to talk at all. During overnight recesses, by contrast, the privilege problem will arise in every case.

Nor is Texas correct (Texas Br. 40-41) that the attorney-client privilege is also infringed when the prosecutor cross-examines the defendant about whether he was coached, and when the trial court reminds defense counsel that coaching is forbidden. The privilege does not insulate the defendant from being cross-examined about coaching. *See Geders*, 425 U.S. at 89-90 (describing cross-examination as the appropriate way to deter coaching); *Portuondo v. Agard*, 529 U.S. 61, 70 (2000) (noting that "arguing credibility to the jury … is the preferred means of counteracting tailoring of testimony"). And the trial court can easily enforce a no-coaching order without intruding on the attorney-client privilege. The court need not ask what counsel discussed with the defendant. The court just needs to ask whether any coaching took place.[3]

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[3] Texas's argument here does contain a grain of truth. If the trial court, disbelieving counsel's assurance that no coaching took place, questions the defendant and counsel about what they discussed overnight, such questioning would indeed intrude on the attorney-client privilege. But this only underscores the Court's observation in *Geders*, 425 U.S. at 89-90, that the appropriate way to combat coaching is not to restrict discussion between attorneys and their clients, but rather for the prosecutor to cross-examine the defendant about the extent of any coaching, and for the trial court to schedule the defendant's testimony to take place on a single day.

Texas suggests (Texas Br. 41-44) that the rule adopted below could be enforced in *in camera* proceedings, on the theory that when defense counsel reveals to the court his discussions with the defendant, the court will keep them confidential. Texas overlooks the fact that the privilege protects attorney-client discussions from disclosure, not just to the prosecutor, but to the court as well. To provide an effective defense, counsel needs to hear the whole story from the defendant, including any negative or incriminating information. But no defendant will reveal incriminating facts to his lawyer if he knows that his lawyer will tell them to the judge—the same judge who is about to sentence him and who may even be the factfinder. This is an instance where "examination of the evidence, even by the judge alone, in chambers" will "jeopardize the security which the privilege is meant to protect." *United States v. Zolin*, 491 U.S. 554, 570 (1989) (internal quotation marks omitted).

3. Texas contends (Texas Br. 44-45) that the rule adopted below will not limit the assistance of counsel because counsel can provide all the assistance the defendant needs before the defendant testifies. That might be true if trials were scripted like plays, with no surprises. As we showed in our opening brief (Pet. Br. 26-36), however, trials are not like plays. Witnesses, including defendants, often say unexpected things. Prosecutors often ask surprising questions. Trial courts often make unanticipated evidentiary rulings. An overnight recess is typically the only time that counsel and the defendant can discuss these events and strategize about how to respond.

These overnight conversations necessarily include discussion of the defendant's testimony.

Texas also worries (Texas Br. 45-46) that the defendant's right to discuss his testimony with counsel during an overnight recess will jeopardize the lawfulness of (a) court orders not to disclose investigations into witness and jury tampering, and (b) court orders protecting witnesses and their families against retaliation. There is no connection between these disparate issues. In most jurisdictions that have addressed the question presented, defendants have a right to discuss their testimony with counsel, but courts in these jurisdictions have not lost their authority to issue the types of orders about which Texas expresses concern.

Amici Ohio et al. are equally unjustified in worrying (Ohio Br. 10-12) that if defendants discuss their testimony with counsel during overnight recesses, trial courts will lose the authority (a) to limit self-representation, (b) to deny defendants' requests to pause their testimony to confer with counsel, and (c) to prohibit counsel from discussing classified evidence with the defendant. Again, there is no connection between these disparate issues. And again, defendants in most jurisdictions have a right to discuss their testimony with counsel, but courts in these jurisdictions have not lost their authority over these matters.

C. The rule adopted below is not necessary to prevent coaching or any other forbidden practice.

What purpose is served by prohibiting the defendant and counsel from discussing the defendant's tes-

timony during an overnight recess? Texas and the United States offer different verbal formulations, but both versions boil down to deterring coaching, which can be deterred without abridging the right to counsel.

1. Texas's theory is that the state's rule prevents counsel from "managing" the defendant's testimony. Texas Br. 13, 14, 15, 25, 26, 27, 28, 29, 31, 34, 40, 42, 46. But Texas offers shifting definitions of this term.

Sometimes Texas says that managing testimony is the same thing as discussing (or "directly" discussing) testimony. *See, e.g.*, Texas Br. 14 (arguing that "direct discussion—i.e., testimonial management—can be prohibited"). At other times, Texas equates managing with coaching. *See, e.g.*, Texas Br. 31 (arguing that "the trial court can prohibit testimonial management (coaching, regrouping, and strategizing)"). Neither definition of the term provides any reason for prohibiting discussion of the defendant's testimony.

If "managing" means "discussing," Texas's argument is difficult to square with its concession (Texas Br. 27-29) that in many circumstances, defendants *do* have a right to discuss their testimony with counsel. The state's argument is also circular. Texas is contending that discussion of testimony must be prohibited so that there will be no discussion of testimony. Missing from its argument is a reason why discussion of testimony *should* be prohibited.

Texas can provide no such reason because there is none. Defendants and their counsel need to discuss the defendant's testimony during an overnight recess so they can review the events of the day and strate-

gize for the remainder of the trial. *Geders*, 425 U.S. at 88 ("Such recesses are often times of intensive work, with tactical decisions to be made and strategies to be reviewed. The lawyer may need to obtain from his client information made relevant by the day's testimony, or he may need to pursue inquiry along lines not fully explored earlier. At the very least, the overnight recess during trial gives the defendant a chance to discuss with counsel the significance of the day's events."). Discussion of the defendant's testimony during an overnight recess is therefore an important part of the assistance of counsel guaranteed by the Sixth Amendment. *Perry*, 488 U.S. at 284 (noting that the defendant has the "right to unrestricted access to his lawyer for advice" during an overnight recess and explaining that "[t]he fact that such discussions will inevitably include some consideration of the defendant's ongoing testimony does not compromise that basic right").

If "managing" means "coaching," on the other hand, Texas's argument is no longer circular. It is simply wrong.

Everyone agrees that coaching is impermissible. The defendant's testimony should be an account of what he personally knows, not a recitation of what counsel told him to say. There is no dispute about that.

To prevent coaching, however, it is hardly necessary to prohibit defendants from receiving the assistance of counsel during overnight recesses. The trial court can simply prohibit coaching. If the prosecutor nevertheless suspects the defendant has been coached, the prosecutor can cross-examine the defendant about it and argue to the jury that the de-

fendant's testimony should not be believed. *Geders*, 425 U.S. at 89-90. And in all but the most exceptional of cases, the trial court can definitively prevent any coaching from taking place by scheduling the defendant's testimony to take place on a single day. *Id.* at 90.

Here, for example, Mr. Villarreal's entire testimony, including direct, cross, redirect, and recross, lasted less than three hours.[4] If the trial court was worried about coaching, it could easily have fit Mr. Villarreal's testimony into a single day. There was no need to deny him the assistance of counsel.

2. The United States argues that prohibiting the discussion of testimony promotes the "truth-seeking" function of the trial. U.S. Br. 11, 12, 13, 25, 26, 27. But the United States never explains what counsel might say to the defendant—apart from coaching—that would impair this function. Instead, the United States erroneously asserts that truth-seeking will be impaired if counsel merely provides the defendant with "advice about his testimony" (U.S. Br. 11), with

[4] This is an estimate. We know that his first day of testimony lasted for a bit less than an hour and occupies 33 pages of transcript. Trial Transcript 5:103 (court states that the time is 11:58 and testimony begins), 5:136 (court calls recess for the day), 5:140 (court recesses at 12:58). The transcript of his second day of testimony does not include any statements of the time. His second day of testimony occupies 56 pages of transcript. Trial Transcript 6:5 (start), 6:61 (end). If we assume roughly 33 pages per hour, his testimony lasted approximately two hours and 42 minutes. The exact length of time is unimportant. The important thing is that his entire testimony could have fit into a single day.

"consultation" (U.S. Br. 12), or with "assistance" (U.S. Br. 27).

In fact, as we showed in our opening brief (Pet. Br. 25-36), defendants often need advice about their testimony during an overnight recess, and this advice—again, putting aside coaching—*promotes* truth-seeking. Counsel must discuss the defendant's testimony with him to prevent the defendant from committing perjury. Counsel must help the defendant correct mistakes in testimony he has already given. Counsel must advise the defendant about how to testify without running afoul of the court's evidentiary rulings. Counsel must ask the defendant about potential witnesses or potential evidence he has mentioned in his testimony. Counsel must prepare the defendant by rehearsing his testimony to ensure that he tells his story in a clear and coherent way. As Texas rightly concedes (Texas Br. 29), this advice "strengthens the truth-seeking function of the trial."

The United States errs in suggesting that these forms of legitimate advice impair the truth-seeking function of the trial. When we remove them from the list of dangers, the only danger left is coaching. But coaching, as we have already seen, can be deterred without abridging the defendant's right to the assistance of counsel.

D. The judgment below should be reversed.

We agree with Texas (Texas Br. 53-54) that the Court should reverse and remand to the state courts. The United States's harmless error argument (U.S. Br. 32-33) is wrong in four different ways.

First, as amicus NACDL shows at length (NACDL Br. 14-26), 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.

Second, even if harmless error were the proper standard, the lower courts should address it in the first instance. None of the courts below decided whether the error was harmless. This fact-intensive issue is outside the question presented. Texas did not brief it, and the United States addresses it in a single conclusory paragraph. In this situation, the Court's "normal practice," appropriately, 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).

Third, the United States is not a party to this case. Texas explicitly asks the Court *not* to consider whether the error was harmless. The United States does not explain how the Court could rule in favor of a party on a ground the party itself has affirmatively disclaimed. *See United States v. Sineneng-Smith*, 590 U.S. 371, 375-76 (2020).

Finally, 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. The overnight recess came at the most critical stage of the trial, when the jury—after hearing the prosecu-

tion's version of events—was finally getting to hear Mr. 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 judgment of the Court of Criminal Appeals of Texas should be reversed.

Respectfully submitted,

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