

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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DAVID ASA VILLARREAL,)
Petitioner,)
v.) No. 24-557
TEXAS,)
Respondent.)
- - - - -

Pages: 1 through 97

Place: Washington, D.C.

Date: October 6, 2025

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1 P R O C E E D I N G S

2 (10:04 a.m.)

3 CHIEF JUSTICE ROBERTS: We will hear
4 argument first this morning in Case 24-557,
5 Villarreal versus Texas.

6 Mr. Banner.

7 ORAL ARGUMENT OF STUART BANNER

8 ON BEHALF OF THE PETITIONER

9 MR. BANNER: Mr. Chief Justice, and
10 may it please the Court:

11 During an overnight recess, the
12 defendant and his counsel have a lot that they
13 need to talk about. They need to go over the
14 testimony that took place that day. They need
15 to prepare for the testimony that's going to be
16 given the next day. These are basic
17 discussions that any competent lawyer would
18 have with a client. This is the assistance of
19 counsel that the Sixth Amendment guarantees.

20 But the defendant and counsel can't
21 have these conversations if they're not allowed
22 to discuss the defendant's testimony. For
23 example, if the defendant's testimony has gone
24 poorly, counsel may need to advise the
25 defendant to accept a plea agreement, but

1 counsel can't do that without discussing the
2 defendant's testimony. The defendant needs
3 advice about how to testify without violating
4 the trial court's evidentiary rulings, but
5 counsel can't give this necessary advice
6 without discussing the defendant's testimony.
7 Counsel has an obligation to prevent the
8 defendant from committing perjury, but that
9 would be impossible without discussing the
10 defendant's testimony.

11 Our brief has many more examples, but
12 the point is that the defendant and counsel
13 often must discuss the defendant's testimony
14 during an overnight recess.

15 Now the court below tried to
16 distinguish between discussions of trial
17 strategy, which it allowed, and discussions of
18 testimony, which it prohibited. But that's no
19 line at all. It's often impossible to discuss
20 trial strategy without discussing testimony,
21 and responsible defense lawyers, worried about
22 being held in contempt for crossing this
23 invisible line, will be chilled from offering
24 the assistance that the defendant needs and
25 that the Sixth Amendment guarantees.

1 The only conceivable rationale for
2 restricting overnight discussion between
3 defendant and counsel is to prevent
4 impermissible coaching. But, as the Court
5 explained in Geders, there are other ways to
6 prevent coaching. There's no need to prohibit
7 the defendant and counsel from discussing the
8 defendant's testimony.

9 I invite the Court's questions.

10 JUSTICE THOMAS: In the judge's
11 instructions, he says: I don't want you
12 discussing what you couldn't discuss with him
13 if he was on the stand in front of the jury.

14 What's wrong with that?

15 MR. BANNER: Because, if he was on the
16 stand in front of the jury, he wouldn't be --
17 they wouldn't be allowed to discuss --

18 JUSTICE THOMAS: No, he's saying --

19 MR. BANNER: -- in-court testimony.

20 JUSTICE THOMAS: -- I don't want you
21 discussing anything that you couldn't discuss
22 involving his testimony before it, the jury.
23 That's the standard for the -- what's permitted
24 and not permitted at -- that evening.

25 MR. BANNER: Okay. Well, the --

1 the -- the trial court, if you read -- if you
2 read the entirety of the trial -- the colloquy
3 between the trial court and defense counsel,
4 it's -- it's clear enough that the -- the trial
5 court prohibited all discussion of testimony,
6 the defendant's testimony, during the overnight
7 recess, and that is how the Texas Court of
8 Criminal Appeals interpreted it.

9 So the -- the Court of Criminal
10 Appeals -- the Court of Criminal Appeals
11 interpreted the -- the -- let me get the
12 word -- exact wording exactly right from the --
13 from the court's opinion. The court -- the
14 Court of Criminal Appeals said -- they
15 described the question presented as: Does a
16 trial judge's sua sponte order that defense
17 counsel could confer with defendant on
18 everything except his ongoing testimony violate
19 the defendant's Sixth Amendment right to
20 counsel?

21 JUSTICE THOMAS: So would it violate
22 the defendant's Sixth Amendment right to
23 counsel if the -- during trial he was precluded
24 from being coached or managed by the -- his
25 attorney?

1 MR. BANNER: You mean during an
2 overnight recess to talk?

3 JUSTICE THOMAS: No. During trial.

4 MR. BANNER: Oh, during trial. No.
5 During trial --

6 JUSTICE THOMAS: What's the
7 difference?

8 MR. BANNER: Under -- under Perry --
9 well, Perry drew a sharp line between overnight
10 recesses and brief daytime recesses. The --
11 the -- and the Court said that during a brief
12 daytime recess, like -- like I think you're
13 talking about here --

14 JUSTICE THOMAS: No, what I'm talking
15 about is why is the standard different between
16 what a lawyer can coach or manage with respect
17 to testimony while he's on the stand, which is
18 basically a concern, and what he can coach or
19 manage during the recess.

20 MR. BANNER: No, no. It's -- it's the
21 same. The -- the -- the -- the distinction --
22 let's be clear about the distinction between
23 impermissible coaching and legitimate,
24 necessary counseling, right, because that's a
25 sharp line. And in answer to your question,

1 that line is the same at all times during the
2 proceeding; that is, whatever is impermissible
3 before trial begins is also impermissible
4 during an overnight recess. It's impermissible
5 at any time. And let's talk about what that
6 difference is, right?

7 So the -- the impermissible coaching
8 is where a -- the -- the lawyer tries to get a
9 witness, the defendant or any other witness, to
10 testify -- to -- where the lawyer tries to
11 change the substance of the witness's testimony
12 to try to get the witness to testify to
13 something other than that which the witness
14 believes to be true.

15 The court -- but contrast that with
16 conventional counseling, which is talking about
17 the -- the testimony in all other contexts, so,
18 for example, advising how to comply with
19 evidentiary rulings. Even -- even -- even
20 rehearsing the questions and the answers ahead
21 of time.

22 JUSTICE THOMAS: But did any of that
23 happen here? Do we have evidence that any of
24 that happened?

25 MR. BANNER: But it couldn't have

1 happened, it didn't happen, because the trial
2 court barred the defense counsel from
3 discussing Mr. Villarreal's testimony with him
4 during the overnight recess.

5 JUSTICE JACKSON: Can I follow up
6 on --

7 CHIEF JUSTICE ROBERTS: Counsel, if
8 you -- one of the things you say could protect
9 against any problems with your approach --

10 MR. BANNER: Yes.

11 CHIEF JUSTICE ROBERTS: -- I'm looking
12 at page 14 of your brief -- you say that the
13 prosecutor could cross-examine the defendant
14 after -- after the --

15 MR. BANNER: Right.

16 CHIEF JUSTICE ROBERTS: -- when the
17 trial picks up again the next day as to the
18 extent of any coaching.

19 Isn't that a real problem with respect
20 to the attorney-client privilege? What is the
21 prosecutor going to say? Okay, you had a
22 break, you spent the evening with counsel, what
23 did you talk about? Objection, Your Honor,
24 attorney-client -- you see how -- I don't see
25 how that could a reasonable counterweight to

1 the problems.

2 MR. BANNER: I understand what you're
3 saying. The -- the -- the -- the
4 attorney-client privilege has never been
5 understood to insulate a defendant or any
6 witness from being cross-examined about the
7 extent of impermissible coaching. So the --
8 the -- the -- the dialogue would go: Well,
9 didn't your lawyer tell you to say that? No,
10 he didn't, or yes, he did --

11 CHIEF JUSTICE ROBERTS: Well, what
12 did --

13 MR. BANNER: -- or something like
14 that.

15 CHIEF JUSTICE ROBERTS: Well, what --
16 what did he tell you to say? You say, didn't
17 your lawyer tell you to say that or whatever?
18 And he says no. He said, well, what did he
19 tell you to say or what did he tell you to
20 change?

21 MR. BANNER: The -- the Court in
22 Geders said -- and we're -- we're merely
23 following that -- that the way -- the way to
24 deter impermissible coaching is for the
25 prosecutor to cross-examine the defendant about

1 it.

2 Now you're right -- you're right
3 that -- to say that functionally it seems like
4 it might raise the same -- same sorts of
5 privilege problems as having the court ask it,
6 but that's what the Court said in Geders and
7 not just Geders, subsequent cases as well, that
8 the appropriate -- two appropriate ways to
9 deter impermissible coaching. One is
10 cross-examination by -- by opposing counsel,
11 and the other is just for the trial court to
12 manage the -- the -- the schedule
13 appropriately, do some -- you know, give some
14 foresight to how long the -- the defendant's
15 testimony is going to last, and if the -- if
16 the court is worried about impermissible
17 coaching, just delay the overnight recess some.

18 JUSTICE JACKSON: But, counsel, I
19 guess I don't understand why you're so focused
20 on impermissible coaching as you have defined
21 it. You say here and you say in your briefs
22 that impermissible coaching is where the lawyer
23 is trying to get the witness to change his
24 testimony or whatnot and that was impermissible
25 both before and after and during --

1 MR. BANNER: Right.

2 JUSTICE JACKSON: All that's fine.

3 MR. BANNER: Right.

4 JUSTICE JACKSON: That is not what I
5 understood to be the concern here. Going back
6 to Justice Thomas's point, the management of
7 testimony, the talking with the witness about
8 his answers and what some people would call
9 coaching, prepping your witness, can occur
10 beforehand, right?

11 MR. BANNER: Right. That's right.

12 JUSTICE JACKSON: But it can't occur
13 while the witness is on the stand. So --

14 MR. BANNER: It --

15 JUSTICE JACKSON: -- Justice Thomas, I
16 think, is pointing to a critical point, which
17 is, to the extent that the lawyer couldn't
18 manage, coach, prep, practice with the
19 lawyer -- with the witness while he's on the
20 stand, why should he be allowed to do so during
21 an overnight recess?

22 MR. BANNER: This -- this is straight
23 out of Perry, straight out of Perry. So the
24 Court -- the Court in Perry said that during
25 a -- a brief daytime recess, the -- the -- the

1 court -- the -- the trial court can prevent all
2 contact between the defendant and counsel.

3 JUSTICE JACKSON: I understand.

4 MR. BANNER: Yeah.

5 JUSTICE JACKSON: I'm focusing on the
6 content of the crime.

7 MR. BANNER: Yeah. No, I understand.
8 I understand.

9 JUSTICE JACKSON: Right.

10 MR. BANNER: But the -- but the --
11 I'm -- I'm --

12 JUSTICE JACKSON: So Perry doesn't
13 help us with that because --

14 MR. BANNER: No. Yes, it does because
15 I'm get -- I'm getting to that, right?

16 JUSTICE JACKSON: Yeah.

17 MR. BANNER: So the -- the Court said
18 that -- after explaining all of that for a
19 brief daytime recess, the Court then, in the --
20 in the next section, in Section -- Section 3
21 of -- of Perry, the Court says: Well,
22 overnight recesses are completely different.

23 The Court says: Admittedly, the line
24 between the facts of Geders -- that's an
25 overnight recess -- and the facts of this case

1 is a thin one. It is, however, a line of
2 constitutional dimension.

3 The Court goes on to say: During an
4 overnight recess, it is the defendant's right
5 to unrestricted -- unrestricted access to his
6 lawyer for advice on a variety of trial-related
7 matters that's controlling.

8 And then here's the key sentence: The
9 fact that such discussions will inevitably
10 include some consideration of the defendant's
11 ongoing testimony does not compromise that
12 basic right.

13 JUSTICE JACKSON: Right. So that's --
14 that's precisely what I'm getting at.

15 MR. BANNER: Yeah.

16 JUSTICE JACKSON: I think there might
17 be -- and I want you to help me with this --

18 MR. BANNER: Yeah.

19 JUSTICE JACKSON: -- a difference
20 between discussions that take into account the
21 testimony, maybe even the fact of the
22 testimony, and something that one could call
23 managing --

24 MR. BANNER: Right.

25 JUSTICE JACKSON: -- or prepping --

1 MR. BANNER: Right.

2 JUSTICE JACKSON: -- or, you know, the
3 kind of thing that you have even admitted a
4 lawyer does --

5 MR. BANNER: Right.

6 JUSTICE JACKSON: -- legitimately to
7 help his client before he takes the stand.

8 MR. BANNER: Right.

9 JUSTICE JACKSON: And what I
10 understood the trial court here to be doing was
11 just eliminating that very narrow category of
12 conduct that a lawyer engages in to actually
13 prepare his witness with respect to particular
14 questions and answers on something.

15 MR. BANNER: And that -- and that's
16 the line the Court of Criminal Appeals tried to
17 draw, right, between discussion of -- what
18 you're calling prepping the testimony and
19 discussion of testimony in other contexts.

20 JUSTICE JACKSON: And why are they
21 wrong about that?

22 MR. BANNER: Because that line just --
23 I mean, to even call it a line is wrong. It's
24 not a line. It's a Rorschach blot, right?

25 JUSTICE KAGAN: But that's the line

1 that Perry drew. I mean, if you go up a few
2 sentences from the sentence that you read, the
3 Court says, you know, an overnight witness --
4 an overnight recess is different. Why is it
5 different? Because an overnight recess will go
6 to matters that go beyond the content of the
7 defendant's own testimony, matters that the
8 defendant does have a constitutional right to
9 discuss with his lawyer, suggesting that as
10 to only the defendant's own testimony, the
11 defendant does not have a constitutional right
12 to discuss with his lawyer.

13 Now then it talks about how, of
14 course, when you talk about the protected
15 matters, there might be some incidental
16 discussion of the testimony itself. So it
17 concedes that perfectly willingly. But it
18 draws a pretty sharp line between matters going
19 to trial strategy and matters going to trial
20 testimony of the defendant itself and says that
21 that's the reason why the recess -- the
22 overnight recess versus 15-minute recess makes
23 a difference.

24 MR. BANNER: And, like I said, that's
25 no line at all. And the way you can --

1 JUSTICE KAGAN: But that's Perry's
2 line. I mean --

3 MR. BANNER: But, no, I don't -- no,
4 I --

5 JUSTICE KAGAN: -- it might -- it
6 might be that Perry was wrong, but that's
7 Perry's line.

8 MR. BANNER: No, I -- I -- I disagree.
9 Perry -- Perry -- again, Perry -- Perry goes on
10 to say that a defendant has an unrestricted
11 right of access to his lawyer during an
12 overnight recess, including for consideration
13 of the defendant's testimony.

14 So let me -- let me get -- so
15 you're -- you're drawing -- you're trying to
16 draw the same line that the Court of Criminal
17 Appeals drew.

18 JUSTICE KAGAN: Yeah, I'm not trying
19 to draw it. I'm suggesting that Perry --

20 MR. BANNER: Yeah.

21 JUSTICE KAGAN: -- says it right
22 here --

23 MR. BANNER: Okay.

24 JUSTICE KAGAN: -- on page 284.

25 (Laughter.)

1 MR. BANNER: Yeah.

2 JUSTICE KAGAN: That's -- that that's
3 the key language from Perry.

4 Now Perry goes on to say, as I think
5 your friend in Texas goes on to say, that there
6 can be all kinds of places where the testimony
7 has to be talked about as incidental to what is
8 protected, which is the discussion of trial
9 strategy, but not in and of itself.

10 MR. BANNER: Okay. First of all, I --
11 I dis- -- disagree respectfully with -- with
12 your view of what -- of what Perry held, but if
13 Perry held that, I think it's -- I think it's
14 just incorrect, right? So let's -- let's work
15 through some examples.

16 So -- so the -- before -- before the
17 overnight recess, in his -- in his testimony,
18 the defendant has come very -- an
19 unsophisticated defendant has come very close
20 to mentioning excluded evidence that would
21 be -- that would be absolutely devastating.

22 During the -- the -- the -- the
23 overnight recess, defense counsel needs to say
24 to the defendant: Look, you nearly mentioned
25 this -- this -- this evidence. Look, when we

1 resume again tomorrow, you better remember not
2 to mention that because we're -- we're going to
3 be in big trouble if you -- if you -- if you --
4 if you mention that tomorrow.

5 Okay. Is that -- is that --

6 JUSTICE GORSUCH: See, I --

7 MR. BANNER: -- consideration or is
8 that discussion? You have to factor into
9 that --

10 JUSTICE GORSUCH: Mr. -- Mr. Banner,
11 I -- I -- I think maybe I'm missing something,
12 but I would think that would be permissible
13 because it doesn't refer to the testimony
14 itself. It can simply be a reminder: Hey,
15 don't -- don't go here, that might implicate --

16 MR. BANNER: No, but it -- but it
17 does -- it does refer --

18 JUSTICE GORSUCH: If I might finish.
19 If I might finish.

20 MR. BANNER: Oh, sorry. I'm sorry.

21 JUSTICE GORSUCH: I -- I -- I think
22 what my colleagues are getting at and -- and
23 what I kind of thought you even conceded in
24 your brief is that coaching -- and maybe we're
25 defining coaching differently, perhaps that's

1 it -- but that there are some things that a
2 district court can constitutionally prohibit
3 counsel from doing and -- while a witness is on
4 the stand, even if there's a recess.

5 You -- you agree with that, right?
6 You think there are some things that can be
7 prevented?

8 MR. BANNER: Absolutely. Coaching,
9 in the sense of suborning perjury, altering the
10 substance of the witness's --

11 JUSTICE GORSUCH: Well, I'm not
12 talking about suborning perjury. I'm talking
13 about coaching.

14 MR. BANNER: Well, but -- but -- but
15 we --

16 JUSTICE GORSUCH: All right. If you
17 don't like that word, let's use management,
18 okay, which is the word Texas used.

19 MR. BANNER: I like that word even
20 less.

21 JUSTICE GORSUCH: Okay.

22 MR. BANNER: Yeah.

23 JUSTICE GORSUCH: Why -- why --
24 what -- what in the Constitution, what in
25 history suggests that you have a right to

1 manage a witness's testimony during a break --

2 MR. BANNER: Okay.

3 JUSTICE GORSUCH: -- as opposed to
4 derivative or collateral matters that you do
5 need to advise him on?

6 There's a plea agreement, and the way
7 things have gone today, maybe we ought to take
8 that plea. There's some excluded evidence, be
9 careful not to step into that.

10 I -- I can see all of those kinds of
11 comments, but I'm -- I'm having a hard time
12 understanding historically, traditionally, what
13 have you got that says that there's a right of
14 a witness to -- to be coached or, if you don't
15 like that word, managed by his attorney while
16 he's not on the stand?

17 MR. BANNER: Okay.

18 JUSTICE GORSUCH: Whatever the length
19 of time.

20 MR. BANNER: Yeah. So let's -- let's
21 talk about the -- the -- the history.

22 So the -- the precise question
23 presented in this case could not have arisen at
24 the founding because defendants weren't allowed
25 to testify until the late --

1 JUSTICE GORSUCH: Obviously.

2 MR. BANNER: -- 19th century. Right.

3 And so the question is, what's the appropriate
4 inference to be drawn from historical practice,
5 right?

6 JUSTICE GORSUCH: And -- and -- and
7 historical practice is that once you become a
8 witness, you -- you are generally subject to
9 the rule that you can't talk about your
10 testimony, and that's generally understood to
11 mean coaching and managing but not advice about
12 other legal matters. That -- that's -- that's
13 my understanding of the traditional rule.

14 MR. BANNER: Okay. I've got -- I've
15 got three points I'd like to make about the
16 history.

17 JUSTICE GORSUCH: Please.

18 MR. BANNER: Okay. First of all, it's
19 crystal-clear at the -- at the founding and
20 all -- all the way until now that while the
21 defendant -- there are times when a defendant
22 can certainly be denied access to counsel.
23 When he does have access to counsel, he has a
24 right to whatever assistance, including
25 discussion of testimony, will be -- will be --

1 will be useful to him, right?

2 So the -- there's -- there's --
3 there's -- while there's certainly historical
4 warrant, as the government points out, both --
5 both governments point out, there's certainly
6 historical warrant for saying that there are
7 times when a defendant lacks access to counsel.
8 So, you know, in a prison in the middle of the
9 night or something like that, sure.

10 But there's no historical warrant for
11 saying that when a defendant does have access
12 to counsel, the trial court can say: Well, you
13 can talk about Topic A, but you can't talk
14 about Topic B.

15 JUSTICE GORSUCH: Would your rule
16 apply to witnesses who have counsel?

17 MR. BANNER: No. No, no, no, because
18 non-party witnesses, they don't have a Sixth
19 Amendment right that a -- that a defendant has.

20 JUSTICE GORSUCH: Well --

21 MR. BANNER: This is a rule specific
22 to the defendant.

23 JUSTICE GORSUCH: Well, they have --
24 they have a right to counsel and they brought
25 counsel. I mean, would -- would --

1 MR. BANNER: During a criminal -- a
2 right to counsel during --

3 JUSTICE GORSUCH: Would it apply as
4 well in civil proceedings too --

5 MR. BANNER: No. No, no, no, no.

6 JUSTICE GORSUCH: -- to the defendant
7 there?

8 MR. BANNER: No, no, no, no, no. The
9 trial court can sequester non-party witnesses.
10 This case isn't about that. This case is
11 about -- about the defendant as a witness.

12 JUSTICE GORSUCH: In civil -- in civil
13 proceedings, where there's a right to counsel,
14 presumably? Yeah, it would apply there, I
15 think, your rule.

16 MR. BANNER: I -- I don't know. I
17 mean, the -- the -- the --

18 JUSTICE GORSUCH: It's just that
19 there's a long historical tradition of
20 witnesses going on the stand being told
21 something like what the trial court said here.

22 MR. BANNER: Non -- non-defendant
23 witnesses.

24 JUSTICE GORSUCH: Yeah.

25 JUSTICE BARRETT: So, Mr. Banner, can

1 I just clarify?

2 You're entirely rejecting the line
3 that Justice Kagan drew to your attention, and
4 you're saying that even during the day, let's
5 say it was an hour -- you're saying this is
6 all about time -- so, even if the recess was
7 for an hour for lunch, you are saying that the
8 district judge cannot restrict what the counsel
9 and the client, the defendant, can discuss?
10 That's not what you're saying?

11 MR. BANNER: No, no, no, no. No, no,
12 no. So, again, this is -- this is Perry.
13 Perry says that during a -- a -- a -- a
14 daytime, brief daytime recess, the court can
15 cut off all contact.

16 JUSTICE BARRETT: But what if he
17 doesn't cut off all contact?

18 MR. BANNER: Well, and then there's a
19 footnote in --

20 JUSTICE BARRETT: So, if -- so you're
21 saying that once the district court allows
22 contact, no restrictions?

23 MR. BANNER: No, no, no, because --
24 there's a footnote in Perry, maybe is what
25 you're leading up to, that -- that -- that

1 basically the greater includes the lesser; that
2 is, if -- if -- where the trial court can cut
3 off access to counsel, the trial court could
4 allow selective access to counsel.

5 But that -- that logic doesn't apply
6 during an overnight recess, when the court has
7 held there's an unrestricted right of access to
8 counsel.

9 JUSTICE BARRETT: So it's all about
10 time?

11 JUSTICE ALITO: Mr. --

12 MR. BANNER: It's all about time.

13 JUSTICE BARRETT: If it were three
14 hours, if it were four hours, and it was
15 daytime --

16 MR. BANNER: Well, look, the --

17 JUSTICE BARRETT: -- how do you -- how
18 do you decide when it's too long?

19 MR. BANNER: So -- so, in theory,
20 there could be some hard cases between 15
21 minutes in Perry and overnight in -- in Geders.
22 I have to say, in practice, the lower courts
23 have had no trouble drawing this line.

24 Daytime recesses are usually pretty
25 short. Overnight recesses are much, much

1 longer. It's very easy to tell -- to -- to --
2 to draw that line. Now, in theory, you know,
3 if a court were to say, look, we're going to
4 have a recess from 9 a.m. to 5 p.m. and we're
5 all going to -- we're going to be like a
6 vampire court and just do it at night, you
7 know, maybe --

8 JUSTICE BARRETT: Okay. So --

9 MR. BANNER: -- you get some hard
10 drawn lines.

11 JUSTICE BARRETT: -- your rule then is
12 that anytime during the day when there is a
13 recess, the district court could, subject to
14 maybe some extreme case where it goes on for
15 too long and you have a vampire court, the
16 court could say you can talk to your lawyer
17 about everything, except the lawyer cannot
18 manage your testimony during the day?

19 MR. BANNER: Again, because --

20 JUSTICE BARRETT: During the day?

21 MR. BANNER: During the day, again,
22 because the greater includes the lesser.

23 JUSTICE BARRETT: Right.

24 MR. BANNER: Quite right.

25 JUSTICE BARRETT: And you can't -- but

1 you can't do that at night?

2 MR. BANNER: Night, correct, because,
3 at night, during over --

4 JUSTICE BARRETT: It's unrestricted
5 because Geders says that. So there's no --

6 MR. BANNER: Well --

7 JUSTICE BARRETT: You can't have a
8 line at night?

9 MR. BANNER: Well, Geders says that --

10 JUSTICE BARRETT: You can have a line
11 during the day but not at night, right?

12 MR. BANNER: Yeah, because Geders says
13 that, but Geders -- Geders was correct in
14 saying that, right? Geders -- Geders pointed
15 out correctly that overnight recesses are --
16 have always been times of intense strategizing,
17 discussion, and so on and -- and whereas Perry
18 said, well, not so for -- for -- for brief
19 daytime recesses.

20 Let me, if I could --

21 JUSTICE ALITO: Mr. Banner, can I ask
22 you --

23 MR. BANNER: Yeah.

24 JUSTICE ALITO: -- a concrete
25 question? I can read Geders and Perry, but I'd

1 like a con -- an answer to a concrete question.

2 And let me give you an example. Let's
3 suppose that a very important issue in a case
4 is the meaning of Exhibit A, and in preparing
5 the witness to testify, defense counsel goes
6 over what the witness is going to say about
7 Exhibit A. Doesn't put words in his mouth, but
8 you know how it's done. So it's all prepared,
9 a way of dealing effectively from the defense
10 standpoint with Witness A -- with Exhibit A.
11 Then, when the witness gets on the stand and is
12 under cross-examination, the witness fall --
13 you know, the witness departs from that and
14 says things that are quite damaging.

15 Now, during a recess overnight or
16 during the day, well, let's just say overnight,
17 can defense counsel talk to the witness about
18 that and say, look, you know, the understanding
19 was you were going to say this, but you said
20 something different, this is very damaging,
21 that's allowed?

22 MR. BANNER: Well, sure, the -- yes.
23 The -- the defense counsel can say, look, we --
24 when we rehearsed this ahead of time, you were
25 going to say A, B, and C.

1 JUSTICE ALITO: Right.

2 MR. BANNER: Right? But, instead,
3 you've said something totally different, which
4 is D. Now you've got -- you've got to tell me
5 which of these is actually correct because, if
6 you said D accidentally, then tomorrow we need
7 to correct that in -- in questioning. If -- if
8 you said D --

9 JUSTICE ALITO: Okay. The next day --

10 MR. BANNER: Yeah.

11 JUSTICE ALITO: -- the next day, when
12 the defendant takes the stand, everything is
13 cleared up. Now he's back to -- you know, it's
14 a sea change back to what was rehearsed, your
15 word, in your words, before trial.

16 Can -- can the prosecutor on
17 cross-examination say, well, you said this
18 yesterday, now you say this today, did you talk
19 to your lawyer last night? Yes, I did. How
20 long did you talk to your lawyer? Did you talk
21 about this? Can he ask whether they talked
22 about that issue?

23 MR. BANNER: Well --

24 JUSTICE ALITO: Is that a violation of
25 the attorney-client privilege?

1 MR. BANNER: -- I don't -- I don't
2 think so. I don't think so because the -- as
3 the Court -- as the Court's held several times,
4 the -- the -- the -- the proper way to ferret
5 out any impermissible coaching is
6 cross-examination and then the prosecutor
7 arguing to the jury, look, this -- this witness
8 is not credible because this witness was --
9 was -- was told what to say.

10 JUSTICE ALITO: I mean, that's very
11 interesting because I thought the core of the
12 attorney-client privilege had to do with
13 communications between the attorney and the
14 client about important matters.

15 But you think that --

16 MR. BANNER: Yeah.

17 JUSTICE ALITO: -- the prosecutor --

18 MR. BANNER: Well --

19 JUSTICE ALITO: -- can go into that?

20 MR. BANNER: Well, I mean, if --
21 honestly, I'm honestly not sure. And maybe --
22 maybe you're right. I honestly don't know.

23 JUSTICE ALITO: Well, it matters a lot
24 because you're saying cross-examination is the
25 corrective.

1 All right. Suppose we've got a lunch
2 break, a one-hour break for lunch in two
3 things. Absolutely identical defendants,
4 both -- Exhibit A is important for both. In
5 one, there's a lunch break. In one, there's an
6 overnight break. Can they both -- can -- does
7 the same rule apply in those two situations?

8 MR. BANNER: So -- so you're right to
9 suggest --

10 JUSTICE ALITO: Well, don't tell me
11 what the cases say. Just tell me why it would
12 make sense to have a different rule in those
13 two instances.

14 MR. BANNER: Because -- because --
15 you're right. Let me -- I was about to do
16 that. You're right to suggest that there
17 are -- there are times when a well-timed
18 overnight recess can be an advantage to a
19 defendant that another defendant who doesn't
20 get an overnight recess wouldn't have. That's
21 absolutely right. But that is a result that is
22 required by the Sixth Amendment because the
23 alternative would be much, much worse. The
24 alt --

25 JUSTICE ALITO: Well, my question -- I

1 want to get to that. But --

2 MR. BANNER: Yeah.

3 JUSTICE ALITO: -- my question has to
4 do with a lunch break or a 15-minute break
5 during the trial versus an overnight break.

6 MR. BANNER: Right. That's what
7 I'm -- that's what I'm saying.

8 JUSTICE ALITO: Same rule in the --

9 MR. BANNER: Different -- no,
10 different -- different result.

11 JUSTICE ALITO: Different rule. Why?

12 MR. BANNER: Different results.

13 JUSTICE ALITO: Why?

14 MR. BANNER: Well, two reasons, right?
15 One is that that's what Perry said. We're
16 just -- we're just repeating the holding of
17 Perry. You want to overrule Perry, I'm not
18 going to complain, but that was the -- that was
19 the -- the holding of Perry.

20 And -- but, second, it makes -- it
21 makes sense because, as the Court said in
22 Geders, overnight recesses have always been
23 times of strategizing, discussions. This is --
24 this is the time when this -- I mean, this is
25 like prime time for -- in the middle of a

1 trial, is an overnight recess.

2 JUSTICE ALITO: Yeah. If the
3 defendant is on the ropes during
4 cross-examination, an overnight recess can be
5 very beneficial.

6 MR. BANNER: Very beneficial.

7 JUSTICE ALITO: So, once again, two --
8 I'll continue this.

9 MR. BANNER: Well, can I -- can I just
10 finish the answer?

11 JUSTICE ALITO: Well, I didn't
12 finish -- I didn't get the question out.

13 MR. BANNER: You didn't get -- okay.

14 JUSTICE ALITO: I -- I'll get to it.

15 MR. BANNER: All right.

16 CHIEF JUSTICE ROBERTS: We'll be back.

17 Justice Thomas, anything further?

18 Justice Alito?

19 JUSTICE ALITO: Okay. Once again.

20 Two --

21 (Laughter.)

22 JUSTICE ALITO: -- two absolutely
23 identical defendants, two trials. Five
24 o'clock -- the defendant is on the ropes in
25 cross-examination. Five o'clock rolls around.

1 It would be really helpful for this defendant
2 to have a break, you know, and regroup.

3 So the judge says: Well, you know
4 what, I -- how much longer is cross-examination
5 going to be? And the prosecutor says three
6 hours. So the judge says to the defendant:
7 Well, you know what, we can go on until 8:00,
8 or we can take a -- we can take an overnight
9 break, subject to the restriction that you
10 can't talk about the substance of the
11 testimony.

12 What happens then?

13 MR. BANNER: Well, your latter
14 alternative would violate the Sixth Amendment.
15 During an overnight recess, you have a right to
16 talk about your testimony with -- with counsel.
17 It's very -- that's super -- super-important.

18 JUSTICE ALITO: So a different result
19 in those two situations?

20 MR. BANNER: Different -- it's the
21 distinction between a daytime recess and an
22 overnight recess.

23 JUSTICE ALITO: Okay. One last thing.
24 Can you give a -- a succinct definition of
25 coaching?

1 MR. BANNER: Yes.

2 JUSTICE ALITO: Coaching is what's not
3 allowed. You said it's -- you can't suborn
4 perjury.

5 MR. BANNER: Impermissible coaching is
6 where the lawyer tries to change the substance
7 of the witness's testimony. So you -- you --
8 you -- you said before that the -- in our --
9 just talking ahead of time, you said that the
10 light was green. No, you should say that it
11 was red because that's more helpful to your
12 case. That's impermissible coaching.

13 In fact, the Court discussed this --
14 excuse me -- the Court --

15 JUSTICE ALITO: Yeah, you can't -- the
16 lawyer can't say, okay, well, this is what you
17 should say.

18 MR. BANNER: Right. Right. But --

19 JUSTICE ALITO: But you think -- but
20 you know --

21 MR. BANNER: But --

22 JUSTICE ALITO: -- when you're
23 preparing a witness, I mean, you could do the
24 same thing overnight to get the witness to
25 remember what the witness had said before.

1 MR. BANNER: Well, look, the --

2 JUSTICE ALITO: That's allowed.

3 MR. BANNER: -- the -- the -- the
4 other side -- so this -- what I just said was
5 impermissible coaching. Conventional
6 counseling is -- is where the lawyer says,
7 okay, I'm going to ask you this question,
8 what's your answer going to be? Client -- the
9 witness, rather, gives the -- gives the answer.
10 Lawyer says, look, that's a big jumble, you
11 know? Why don't you -- why don't you say it
12 like this, without suggest -- suggesting words,
13 without -- without changing --

14 JUSTICE ALITO: All right. Thank you
15 very much.

16 MR. BANNER: Okay.

17 CHIEF JUSTICE ROBERTS: Justice
18 Sotomayor?

19 JUSTICE SOTOMAYOR: Am I correct to
20 say that you say the only order a district
21 court can give overnight is some -- basically,
22 the ABA rule, that a lawyer can only be
23 prohibited from telling the defendant to give
24 false testimony, correct? That's your
25 definition?

1 MR. BANNER: Well, I mean, I would
2 say -- I would say --

3 JUSTICE SOTOMAYOR: Counsel, just
4 answer yes or no.

5 MR. BANNER: Well, okay. Mostly yes.

6 JUSTICE SOTOMAYOR: Okay. So assume,
7 please, and don't fight me, that I think that
8 Texas's position is more nuanced, and I accept
9 that improper coaching that could be prohibited
10 included working through -- walking through
11 potential questions and answers, telling a
12 defendant to use one word and not another word,
13 what generally is thought of coaching, but
14 Texas, and I think Justice Kagan defined their
15 position, they can discuss incidental effects
16 of testimony, and that would include -- and pay
17 attention to the list-- plea bargaining,
18 including telling a defendant that they did
19 lousy and they should take the plea; perjury,
20 you lied and you shouldn't; excluded evidence,
21 the one that you were worried about; other
22 witnesses and where they might be located,
23 contact information.

24 What else -- what is missing from that
25 list, assuming the first bucket?

1 MR. BANNER: Yeah. So what --
2 what's --

3 JUSTICE SOTOMAYOR: You can't coach.
4 You can't give --

5 MR. BANNER: Right.

6 JUSTICE SOTOMAYOR: -- questions and
7 answers. You can't do -- tell them to use a
8 particular word or change a word, even if it's
9 not perjury.

10 MR. BANNER: Okay.

11 JUSTICE SOTOMAYOR: Assume all of
12 that. What's missing from that list? What
13 other thing is missing?

14 MR. BANNER: Well, that -- that list
15 covers many of the most important things.

16 JUSTICE SOTOMAYOR: I just said --

17 MR. BANNER: But -- but what it
18 doesn't include is what you specifically
19 excluded at the start, which is going over
20 questions and answers.

21 JUSTICE SOTOMAYOR: All right. So, if
22 I say no to that but say yes to the incidental
23 effect, there's no other topic that you can
24 imagine?

25 MR. BANNER: You know, off the top of

1 my head, I -- I'm sure there are others. I
2 mean, the -- the -- a -- a defendant and
3 counsel have a million --

4 JUSTICE SOTOMAYOR: So wouldn't the
5 definition -- wouldn't the definition that
6 Texas provides, which is the incidental effects
7 of testimony, is okay?

8 MR. BANNER: I -- that's no line at
9 all. How -- how -- that's -- how is anyone
10 supposed to --

11 JUSTICE SOTOMAYOR: Assuming I believe
12 there is the workability issue, there's no
13 other topic you can think of?

14 MR. BANNER: Well, if you gave me --
15 if you gave me a little time, I could probably
16 think of more because there's an infinite
17 number of things.

18 JUSTICE SOTOMAYOR: Now, going back to
19 Justice Thomas's question, there's no facts in
20 this record that would suggest that the
21 defendant wanted to talk about plea bargaining
22 or the counsel wanted to talk about a missing
23 witness, wanted to talk about perjury. There's
24 nothing in this record to suggest any of that,
25 correct?

1 MR. BANNER: That's -- that's --
2 that's correct. But the reason is that defense
3 counsel understood the court to be barring all
4 discussion of testimony, period, and the court
5 confirmed that.

6 JUSTICE SOTOMAYOR: Well, counsel
7 said -- counsel said, Judge, I understand what
8 you're saying, I won't manage the testimony.

9 MR. BANNER: No, no. There's --
10 there -- there -- there's more. So -- so the
11 colloquy here is at pages 4 and 5 of the blue
12 brief, right? So the -- the -- the court says,
13 I don't -- don't -- what you can't discuss
14 is -- this is the -- the -- the second-to-last
15 paragraph on page 4 -- the court says the thing
16 that the -- that you can't discuss is -- the
17 very start of that paragraph -- his testimony.

18 And if you look at the -- the -- the
19 top of page 5, defense counsel says: We aren't
20 going to talk to him about the facts that he
21 testified about. Court says: All right. Fair
22 enough.

23 Right? So the -- the -- the -- the
24 reason why there's no --

25 JUSTICE SOTOMAYOR: We can read the

1 transcript. Thank you, counsel.

2 MR. BANNER: Okay, okay.

3 CHIEF JUSTICE ROBERTS: Justice Kagan?

4 JUSTICE KAGAN: Mr. Banner, with
5 respect, you have had a little bit of time
6 since Texas's brief, and Texas, as I think you
7 say in your reply brief, you say: Well, Texas
8 has narrowed the con- -- the conflict a great
9 deal and does come up with this set of examples
10 of how discussion of trial testimony would be
11 relevant to matters of trial strategy and so
12 could proceed during a recess.

13 And -- and it seems to me, like,
14 unless you can tell me what other things there
15 are like that, that, you know, Texas is
16 basically saying anything that's relevant to
17 larger matters of trial strategy, that should
18 go in one bucket.

19 But, if all you're doing is going over
20 the testimony, he said this, you said this, you
21 might sort of think about adding this, he said
22 this, but you explained it to me a little bit
23 better when we rehearsed this, if -- if -- you
24 know, is that what you're holding out for, to
25 include that as well? Is that the only --

1 MR. BANNER: Yeah. Well --

2 JUSTICE KAGAN: -- thing that stands
3 as a difference between you and Texas right
4 now?

5 MR. BANNER: I'm not -- honestly not
6 sure if it's the only thing, but it's a more
7 important thing than you're suggesting
8 because -- because, you know, it's a common
9 situation. So -- so a defendant says something
10 completely surprising, something different from
11 what counsel thought that the defendant was
12 going to say.

13 Overnight, they need to be able to
14 say, oh, wait a second, when we talked before,
15 you said A, B, and C, but now you're -- now
16 you're saying D, E, and F. Why is that? What
17 do -- what do -- that's -- that -- that is
18 crucial for the assistance of counsel. It
19 could be necessary to prevent perjury.

20 At the very least, it's --

21 JUSTICE KAGAN: Okay. But that's
22 covered by Texas's --

23 MR. BANNER: Well, but that -- but
24 that was what -- what I understood your
25 question to exclude, right? You need to be

1 able to talk about the substance of his
2 testimony.

3 JUSTICE KAGAN: I think what I'm
4 suggesting is -- is that the only difference
5 between you and Texas right now is, like, let's
6 go over the trial testimony and see if we can
7 do it a little bit better.

8 MR. BANNER: Yeah. So -- so -- so --
9 well, let -- let me put it this way. So -- so
10 our -- our view is that you just have a right
11 to talk -- talk about your testimony, period,
12 right?

13 Texas's view as I understand it is
14 that the Sixth Amendment protects this list of
15 11 things you can talk about but not this other
16 list of seven things that you can't talk about.

17 JUSTICE KAGAN: Yeah, I don't think
18 that that's fair. I think what Texas is
19 saying, and Texas can correct me if I'm wrong,
20 but it's pretty clear, which is that if the --
21 if the trial testimony comes up because it's
22 relevant to trial strategy decisions, like
23 whether to take a plea bargain, like whether to
24 go find another alibi witness, like what to do
25 about a piece of excluded evidence, et cetera,

1 et cetera, then you're allowed to talk about
2 it. But it has to be incidental in that way to
3 trial strategy decisions. It can't just be:
4 Oh, my gosh, you didn't do that very well,
5 could we try to do it better, thanks.

6 MR. BANNER: But that -- that is a
7 trial strategy decision; that -- that is,
8 how -- how we're going to present our evidence
9 is a fundamental trial strategy decision.

10 JUSTICE KAGAN: Okay. That's a fair
11 response.

12 MR. BANNER: Okay.

13 JUSTICE KAGAN: But I -- I take that
14 to be the difference.

15 MR. BANNER: Yeah.

16 JUSTICE KAGAN: Okay.

17 MR. BANNER: I think that's right. I
18 think it's a smaller difference than it used to
19 be. That's right.

20 JUSTICE KAGAN: All right. Thank you.

21 CHIEF JUSTICE ROBERTS: Justice
22 Gorsuch?

23 Justice Kavanaugh?

24 JUSTICE KAVANAUGH: I'm trying to
25 figure out the logic of a line based on a

1 15-minute recess versus a lunchtime recess
2 versus a lunchtime plus I have another matter I
3 have to handle, so it's going to be a two-hour
4 break recess versus an overnight recess.

5 MR. BANNER: Well, you know, the Court
6 in Perry said it's a thin line, but it's a line
7 of constitutional dimension. If you're asking
8 me to describe --

9 JUSTICE KAVANAUGH: Where does that
10 come from? And let me --

11 MR. BANNER: Well, yeah. So --

12 JUSTICE KAVANAUGH: -- where -- two
13 things. Where does it come from? And what's
14 the logic?

15 MR. BANNER: Okay.

16 JUSTICE KAVANAUGH: Because it strikes
17 me as not especially logical.

18 MR. BANNER: Okay. Let's cover --
19 let's talk about the logic first, right? So
20 the -- the Sixth Amendment guarantees a
21 defendant a right to the assistance of counsel,
22 right, which should mean at the very least that
23 if the government wants to limit the assistance
24 of counsel, the government better have a very
25 good reason for doing so, okay?

1 And as I understand the -- the logic
2 of Perry, it's -- it's -- it's -- it's in large
3 part a concern with trial management. If
4 defendants had the right to confer with counsel
5 during every tiny little recess, you know, one
6 minute, 10 seconds, or whatever, it would just
7 be impossible to run a trial.

8 So there has to be some -- I think
9 this is the -- the holding of Perry -- there
10 has to be some -- some line where a recess
11 is -- is -- is -- is just too short.

12 JUSTICE KAVANAUGH: And what -- I
13 mean --

14 MR. BANNER: And where does -- and
15 where does that -- I mean, the opposite part of
16 that rule --

17 JUSTICE KAVANAUGH: Where does it come
18 from?

19 MR. BANNER: -- where does it come
20 from? The opposite --

21 JUSTICE KAVANAUGH: And it all depends
22 on the -- as a question Justice Blackmun asked
23 in the argument in Geders, it depends on the
24 accident of a recess, which is a very -- and
25 then, you know, the next page said you can't

1 force a recess.

2 MR. BANNER: Right.

3 JUSTICE KAVANAUGH: So the whole thing
4 is treating two classes of defendants very
5 differently. And this might be critical to the
6 outcome of the trial. If the trial judge does
7 a recess, you're -- you're golden, or at least
8 a long enough recess.

9 MR. BANNER: An overnight recess.

10 JUSTICE KAVANAUGH: Overnight recess.

11 MR. BANNER: Yeah, yeah.

12 JUSTICE KAVANAUGH: A long enough
13 recess overnight. But, if not, Perry says no.
14 And so those defendants are going to be treated
15 much differently, and -- and does that make a
16 lot of sense?

17 MR. BANNER: I think -- I think it
18 does because, as the Court said in Geders, an
19 overnight recess is -- has traditionally been a
20 time of intense discussion and strategizing.

21 And the shorter you go in a recess,
22 the less true that is, until you get to 15
23 minutes, and -- and -- and it's probably not
24 true. But I -- I understand Perry as really
25 the -- the -- again, you -- the government

1 needs a very strong reason to -- to -- to
2 override the right to the assistance of
3 counsel. And -- and -- and I read Perry as
4 basically being that reason being just the
5 logistics of trial management.

6 JUSTICE KAVANAUGH: Thank you.

7 CHIEF JUSTICE ROBERTS: Justice
8 Barrett?

9 Justice Jackson?

10 JUSTICE JACKSON: So I guess I don't
11 understand your Sixth Amendment argument with
12 respect to the defendant's ability to get that
13 kind of management from his counsel during
14 trial.

15 So is it your position that a
16 defendant has a constitutional right to consult
17 with his attorney about the answers that he's
18 given, you know, turn to the judge and say:
19 I'd like to -- to have a moment to talk to my
20 counsel while he's testifying?

21 MR. BANNER: No, of course not.
22 There's no right to call a timeout during --
23 during your testimony. Of course not.

24 JUSTICE JACKSON: So why not? Why
25 not?

1 MR. BANNER: Well, a trial -- a trial
2 could barely go on if -- if a --

3 JUSTICE JACKSON: So just pure
4 logistics is what --

5 MR. BANNER: Trial logistics. I think
6 so, right? Whereas the concern with trial
7 logistics is it vanishes during an overnight
8 recess when everyone's got plenty of time.

9 JUSTICE JACKSON: Right. But, when
10 we -- but Perry suggests that when we have a
11 15-minute recess already planned and it's
12 there, why couldn't the lawyer talk about this
13 kind of management with his client during that
14 time?

15 In fact, Perry says that's all that
16 would be expected during that time and that's
17 precisely why we don't allow it. So I -- I
18 just don't understand -- I don't understand
19 your thought that the lawyer has the right when
20 his client is testifying to talk to him about
21 his questions and answers and coach him as to
22 how to better answer the question.

23 MR. BANNER: Okay. I'm going to --
24 I'm going to quarrel twice with the --

25 JUSTICE JACKSON: Okay.

1 MR. BANNER: -- the framing of your
2 question. First, he -- he never -- doesn't
3 have a right to coach him in the sense of
4 impermissible coaching. He has a right to give
5 advice about the wording of his testimony, not
6 the -- not the right to coach him.

7 JUSTICE JACKSON: But just not during
8 the trial while he's on the stand, but he can
9 do that in a 15-minute recess and --

10 MR. BANNER: So he can't do it in a
11 15- --

12 JUSTICE JACKSON: Why?

13 MR. BANNER: That's Perry.

14 JUSTICE JACKSON: What difference does
15 time make if he has the right to coach him in
16 that way? What difference does the -- does the
17 fact --

18 MR. BANNER: Well --

19 JUSTICE JACKSON: -- that it's 15
20 minutes versus overnight? If the Constitution
21 says that a defendant has a right to be
22 counseled with respect to his answers while
23 he's testifying, I don't understand what
24 difference it makes that we have a recess or
25 not or whatever.

1 MR. BANNER: Well, okay. So the --
2 but it's a distinction between the daytime and
3 an overnight recess.

4 JUSTICE JACKSON: Yeah.

5 MR. BANNER: That's the distinction
6 the Court drew in Perry. And -- and, like I
7 said, if you want to ask me to justify that
8 distinction --

9 JUSTICE JACKSON: Yeah.

10 MR. BANNER: -- it's -- I think
11 it's -- it's mostly just a matter of trial
12 management because you think about -- if you
13 say you have a right to counsel, to confer with
14 counsel during a 15-minute recess, you can see
15 the obvious questions, five-minute recess,
16 one-minute recess, and so on. And so I think
17 the Court just said, look, at some point, a
18 recess is just too short.

19 JUSTICE JACKSON: Thank you.

20 MR. BANNER: Thank you.

21 CHIEF JUSTICE ROBERTS: Thank you,
22 counsel.

23 Mr. Warthen.

24

25

1 ORAL ARGUMENT OF ANDREW N. WARTHEN

2 ON BEHALF OF THE RESPONDENT

3 MR. WARTHEN: Mr. Chief Justice, and
4 may it please the Court:

5 When a defendant's testimony is paused
6 for a long break, the trial court may tell
7 defense counsel not to either manage the
8 ongoing testimony, as we propose, or not to
9 discuss the testimony altogether, as the United
10 States proposes.

11 Both rules are supported by this
12 Court's precedents. In Geders versus United
13 States, this Court barred absolute no conferral
14 orders during long breaks, but it never opined
15 on qualified orders. Indeed, Geders himself
16 would have been fine with such an order. In
17 Perry versus Leeke, this Court allowed both
18 absolute and qualified orders during short
19 breaks, emphasizing the importance of untainted
20 cross-examination to uncovering the truth.

21 Perry reconciled its holding with
22 Geders by noting that there is a constitutional
23 difference between discussing ongoing
24 testimony, which is not protected, and
25 discussing other trial-related matters, which

1 is protected. And as long as protected matters
2 can be discussed, the right to counsel is
3 preserved.

4 Moreover, by allowing qualified
5 orders, Perry necessarily recognized that
6 counsel can indeed navigate such orders during
7 short breaks, and there is no logical reason
8 why they could not do so during long breaks as
9 well. Accordingly, qualified orders allow
10 trial courts to balance what the Constitution
11 actually protects with the integrity of trial,
12 and that's exactly what happened here.

13 I welcome the Court's questions.

14 JUSTICE THOMAS: After the night
15 passed and -- and the -- the -- there was no --
16 you had testimony by Petitioner, was there some
17 objection to the judge's order in -- in the
18 sense that Petitioner said or his lawyer said
19 that they were not allowed to discuss the
20 matters other than testimony?

21 MR. WARTHEN: Not at all, Your Honor.
22 When they came back the next day, the trial
23 court asked them if there was anything to bring
24 up. They never -- they said nothing from the
25 defense, Your -- Your Honor. And they never

1 filed a motion for a new trial.

2 And, in fact, not only that, on top of
3 that, my friends on the other side, they say
4 the only way to enforce these orders is to say,
5 well, what did you talk about last night. But
6 that didn't even happen. The trial court --
7 the trial court just started his testimony up
8 the next day and everybody went on. It was
9 assumed that they followed the court's order.

10 JUSTICE GORSUCH: Mr. Warthen, I
11 appreciate the subtlety of Texas's position as
12 compared to the Solicitor General's more
13 absolute rule, and I just have a couple of
14 questions about that distinction.

15 MR. WARTHEN: Yes, Your Honor.

16 JUSTICE GORSUCH: First, is there any
17 reason why the Court needs to reach the
18 Solicitor General's more absolute rule in this
19 case?

20 MR. WARTHEN: The only reason you
21 would have to do that, Your Honor, is if you
22 read the order actually given in this case more
23 broadly.

24 JUSTICE GORSUCH: I think that's
25 right. That would be the only reason why we'd

1 have to reach the government's position.

2 MR. WARTHEN: Mm-hmm.

3 JUSTICE GORSUCH: You agree with that?

4 MR. WARTHEN: Yes.

5 JUSTICE GORSUCH: Okay. And then,
6 when --

7 MR. WARTHEN: If you read it the way
8 we read it, it would only be a managing
9 order -- no managing order and not a -- not a
10 no-testimony order.

11 JUSTICE GORSUCH: And when we come to
12 that, you've got, I think, the relevant
13 language at page 23 in your brief, where the
14 court says that -- well, actually, where we
15 said in Perry that an overnight recess that
16 would encompass matters that go beyond the
17 content of defendant's own testimony, matters
18 that the defendant does have a constitutional
19 right, those are protected.

20 If we understand the trial court's
21 order in this case to be consistent with that
22 standard, is there any reason why we need to
23 address the Solicitor General's proposal?

24 MR. WARTHEN: No, I don't believe so.

25 JUSTICE GORSUCH: Okay.

1 MR. WARTHEN: If you believe it was
2 just a -- if this is a -- a small, like, I
3 guess you can conceptualize like this, if
4 the -- if this is broad, this is a -- a
5 narrower kind of order.

6 JUSTICE GORSUCH: And give me your
7 best reason why that's the case here.

8 MR. WARTHEN: That this is a narrow
9 order?

10 JUSTICE GORSUCH: Yeah.

11 MR. WARTHEN: Well, so, if you look at
12 page 7A of the appendix, he says: I don't want
13 you discussing what you couldn't discuss with
14 him if he was on the stand in front of the
15 jury, his testimony. I'm not sure whatever
16 else you would like to talk to him about when
17 he's on the stand, but ask yourself before you
18 talk to him about something, is this something
19 that manages testimony in front of the jury?

20 And I think what he's saying here is
21 the only thing you'd want to do while he's on
22 the stand testifying is go up there and say you
23 need to slow down, you need to stop shifting,
24 you need to look at the jury in the eye, you
25 need to remember the things that we talked

1 about as far as the things you should say, here
2 are the questions I'm going to ask you next.
3 That's all managing in the way we define it.

4 And then he tells him: Just ask
5 yourself when you're talking to him tonight,
6 you can talk to him about something -- and even
7 gives him an example of potentially if they go
8 into a punishment phase -- you can talk to him
9 about something, but, if -- if -- if you're
10 going to be managing his testimony, that's a --
11 you can't do that.

12 JUSTICE GORSUCH: And, as Justice
13 Thomas pointed out, there were no questions or
14 follow-up clarification --

15 MR. WARTHEN: Exactly.

16 JUSTICE GORSUCH: -- requests from
17 counsel on that.

18 MR. WARTHEN: Exactly. He gave a
19 little bit more clarification on his own after
20 that, but there was no question about, well,
21 can we talk about perjury if that -- if that's
22 maybe a thing, can we talk about a potential
23 plea bargain? They didn't ask any of that.

24 JUSTICE GORSUCH: Thank you,
25 Mr. Warthen.

1 JUSTICE SOTOMAYOR: Counsel --
2 CHIEF JUSTICE ROBERTS: Counsel,
3 let -- let -- let's say the defendant and the
4 lawyer go into their, you know, wherever for
5 the evening recess, and the defendant says
6 something like: Counsel, you remember when we
7 were preparing for this, we both agreed we
8 should try to get the jury to focus on Fred,
9 and whenever it's reasonable, I should mention
10 Fred, and I've been doing that, and I notice
11 every time I do that, you know, Juror Number 8
12 gets a big frown and shakes his head. He
13 doesn't look to me like he likes the idea of
14 talking about Fred at all. So I think that's a
15 bad idea. Now talking about Fred was your
16 idea. Do you still think it's a good idea?
17 Can the lawyer respond to that
18 question?
19 MR. WARTHEN: No. They would have to
20 tell them I'm under a court order not to -- not
21 to answer that.
22 CHIEF JUSTICE ROBERTS: So, at that
23 point, he tells the defendant, who's facing a
24 capital sentence, I'm not going to tell you?
25 It's a very simple thing. Don't talk about --

1 he's not saying particular things, but let's --
2 let's stop talking about Fred whenever we can.

3 MR. WARTHEN: Yes, that would be
4 managing his testimony. That would be coaching
5 and strategizing with him.

6 JUSTICE SOTOMAYOR: Counsel --

7 JUSTICE KAGAN: Do you think that
8 the --

9 JUSTICE SOTOMAYOR: No, go ahead.

10 JUSTICE KAGAN: Do you think that
11 counsel can say, listen, I've been noticing
12 that you've been mumbling and you're also not
13 making eye contact with the questioner, and it
14 would just be a good idea if you'd stop
15 mumbling and made eye contact? Can the lawyer
16 do that in an overnight recess?

17 MR. WARTHEN: No. I would consider
18 that to be coaching their testimony. As far as
19 how you present yourself to the jury, I would
20 say that's also the same as the substance of
21 what -- what you're saying.

22 JUSTICE KAGAN: Yeah. So the --
23 the -- the line that you're drawing -- and you
24 draw this on page 14, and I just want to make
25 sure that -- that you're still saying what

1 you're saying on page 14, where you say direct
2 discussion, i.e., testimonial management, that
3 is, direct discussion of the testimony,
4 right --

5 MR. WARTHEN: Mm-hmm.

6 JUSTICE KAGAN: -- can be prohibited.
7 So whether it's the Chief Justice's question or
8 my mumbling question, that's direct discussion.

9 But counsel can still discuss a range
10 of issues related to the testimony, including
11 calling additional witnesses, plea bargains,
12 legal objections, court orders, excluded
13 evidence, and the implications of perjury,
14 among others.

15 MR. WARTHEN: Yes.

16 JUSTICE KAGAN: So that's still the
17 line that you're drawing?

18 MR. WARTHEN: Yes. The touchstone is
19 always the lawyer should contemplate for a
20 moment and ask themselves is this going to
21 cause me to manage their testimony. That --
22 the way we define that is coaching, regrouping,
23 strategizing about the testimony itself, not
24 about other things related to the -- the -- you
25 could strategize all you want about should we

1 still bring in the expert witness, things like
2 that. But, as far as the -- how the testimony
3 is ongoing, that would not be allowed.

4 JUSTICE KAGAN: And when Mr. Banner
5 says that's not a line at all --

6 MR. WARTHEN: Mm-hmm.

7 JUSTICE KAGAN: -- what is your
8 response to that?

9 MR. WARTHEN: I think that's a very
10 real line because, I mean, one, the case law
11 draws that line. And I think the logic of
12 Perry is very strong.

13 They say it's an empirical predicate
14 of our system of justice that an uncounseled
15 witness is more likely to tell the truth than
16 one who has time to pause and consult with
17 their attorney. And they -- they say this --
18 this rule applies for both witnesses generally
19 and defense -- defendant witnesses. They don't
20 draw a distinction between the two.

21 And I think there's a lot of logic to
22 that because, if it wasn't logical, then we
23 would have to get rid of this rule for all
24 witnesses. I mean, all witnesses would have to
25 be -- let's say this -- we flip it around.

1 Let's just say it's the state's star witness.
2 Let's say the victim had lived in this case and
3 it was an aggravated assault case. Why
4 wouldn't the state be able to talk to the
5 witness overnight and coach their testimony
6 if -- if the -- if the -- if the victim is not
7 doing very well on the stand?

8 The same logic would apply the other
9 way.

10 JUSTICE KAGAN: Thank you.

11 CHIEF JUSTICE ROBERTS: Counsel, I --
12 I think I might have missed the -- the answer.

13 You -- the -- the question was like,
14 can you tell the witness to stop mumbling?

15 MR. WARTHEN: Mm-hmm.

16 CHIEF JUSTICE ROBERTS: You said he
17 can't say that?

18 MR. WARTHEN: No. I would consider --
19 how you present yourself to the -- the jury, I
20 consider that to be also coaching, a form of
21 coaching. Look him in the eye, stop mumbling,
22 don't talk as quickly, things of that nature.

23 JUSTICE KAVANAUGH: What's the exact
24 formulation, if you have one, of what the judge
25 should say to the counsel before an overnight

1 recess?

2 MR. WARTHEN: Well, I would say
3 something like this, if -- for a managing order
4 or testimony generally? A managing order?

5 I would --

6 JUSTICE KAVANAUGH: Yeah.

7 MR. WARTHEN: If I were the judge, I
8 would say: Okay, I'm not going to go through
9 an entire list of everything you can talk
10 about, but whenever you're sitting there
11 talking to your client, I want you to ask
12 yourself, is this directly talking about
13 the testimony or is this talking -- is --
14 conceptually, is this something that's a
15 derivative matter from it, and, in any event,
16 regardless of what you're talking about,
17 does this require you to coach, regroup, or
18 strategize about the testimony itself?

19 JUSTICE KAVANAUGH: Don't you think
20 lawyers are going to have very different
21 answers to that question when they ask
22 themselves that question?

23 I guess the point being, is that line
24 really able to be applied in a neutral and
25 equal manner?

1 MR. WARTHEN: They -- they might have
2 some differences of opinion, but we do trust
3 lawyers to use their judgment whenever they are
4 complying with any kind of court order.

5 And our rule also allows any lawyer,
6 if they're just not sure and they -- they
7 really don't want to run afoul of the court's
8 order, to come back and ask the trial court and
9 to say: Your Honor, I wasn't sure about this,
10 can I get some clarification or even maybe some
11 reconsideration?

12 And let's say it's, like, 5 in the
13 morning or something like that and they don't
14 want to bother the trial court judge at 5 in
15 the morning. They can wait to the morning and
16 they can explain the problem that they were
17 having and then they can ask for a continuance.

18 JUSTICE KAVANAUGH: So that's --
19 that's important. That's your solution to
20 ambiguity for the lawyers, is just come back
21 and ask if there's something you want to talk
22 about?

23 MR. WARTHEN: That's right.

24 JUSTICE JACKSON: Counsel, let me ask
25 you about the government's -- the -- the

1 Solicitor General's position, which we've now
2 established is much broader. It's a
3 no-testimony order.

4 MR. WARTHEN: Mm-hmm.

5 JUSTICE JACKSON: What are your
6 thoughts on the workability of that? I mean,
7 the -- the -- the counsel on the other side
8 suggests that there are all kinds of
9 discussions that involve trial strategy that
10 are going to be related to the defendant's
11 testimony, so a no-testimony order might be
12 sweeping too broadly, or at least that's the
13 argument.

14 Do you have an opinion about that?

15 MR. WARTHEN: I think that it fits
16 with the Court's case law. I do -- ours -- our
17 rule -- their rule is a much more bright-line
18 rule. So, in a way, it would be easier to
19 comply with. But it's not as flexible.

20 What our rule -- the -- the benefit of
21 our rule is it maximizes the amount of
22 conferral that an attorney could possibly have
23 about the matters they do have a constitutional
24 right to talk about.

25 But, at the same time, it -- it

1 excises as much as possible to protect the
2 integrity of trial the things that they don't
3 have the right to talk about, which is the
4 ongoing -- the substance of the ongoing
5 testimony.

6 JUSTICE SOTOMAYOR: Counsel, Justice
7 Gorsuch asked you the facts of this case are
8 really your position in this case, which is the
9 judge's order only limited management. But the
10 SG wants us to announce a greater -- a bigger
11 rule.

12 MR. WARTHEN: Mm-hmm.

13 JUSTICE SOTOMAYOR: Do you agree with
14 that rule?

15 MR. WARTHEN: Their rule would --
16 you're asking if I agree with it. I think
17 it would be supported by the case law, yes.

18 JUSTICE SOTOMAYOR: All right. How
19 would it be supported by logic?

20 Putting aside -- you agree that under
21 any circumstance a lawyer has an obligation,
22 even we've said it in Nix, to not suborn
23 perjury.

24 MR. WARTHEN: Mm-hmm.

25 JUSTICE SOTOMAYOR: If a client is

1 suborning -- is perjuring him or herself --

2 MR. WARTHEN: Mm-hmm.

3 JUSTICE SOTOMAYOR: -- the lawyer just
4 can't sit there and not do something about
5 that.

6 MR. WARTHEN: Mm-hmm.

7 JUSTICE SOTOMAYOR: So that's the
8 close case here, what can they do.

9 MR. WARTHEN: Mm-hmm.

10 JUSTICE SOTOMAYOR: You would say
11 they can say to the -- to the defendant: If
12 you commit perjury, these are the consequences.
13 Correct?

14 MR. WARTHEN: Yes.

15 JUSTICE SOTOMAYOR: If the government
16 says no, that's really dangerous.

17 How about plea bargain? The
18 government said no in its brief to saying:
19 Your testimony is really bad.

20 MR. WARTHEN: Mm-hmm.

21 JUSTICE SOTOMAYOR: You should
22 reconsider taking this.

23 If the lawyer doesn't do that, he or
24 she is not supporting their ethical obligation
25 to give the defendant information, adequate

1 information, to consider a plea, correct?

2 MR. WARTHEN: Well, I think, in order
3 to comply with court orders, you are able to --

4 JUSTICE SOTOMAYOR: Excuse the ethical
5 obligation?

6 MR. WARTHEN: Well, to -- yes, to a
7 certain extent. I -- I -- I would be surprised
8 about that.

9 JUSTICE SOTOMAYOR: All right. But
10 putting that aside, at what point do we accept
11 the SG's position? Because an order that says
12 don't talk to the person at all we said in
13 Geders -- in Perry was wrong. In -- I'm
14 sorry -- in Geders, we said: Don't talk to the
15 defendant at all.

16 MR. WARTHEN: That's correct. And
17 that -- that -- that --

18 JUSTICE SOTOMAYOR: So the question is
19 where to draw the line. Should we ignore that
20 line here?

21 MR. WARTHEN: Well, I think, in Perry,
22 they drew the line at -- between testimony and
23 not testimony. I mean, they even go so far in
24 Perry as to say: You can tell them not to talk
25 at all because we're so worried that you're

1 going to go talk to them about their testimony.

2 JUSTICE SOTOMAYOR: Right. But we
3 said -- we said in Geders you can't do it
4 overnight.

5 MR. WARTHEN: Not -- not -- they say
6 over -- that was the context, although I would
7 say they say a long break.

8 But the problem with -- as -- as was
9 brought up earlier, drawing the temporal line
10 between the two is a problem.

11 JUSTICE SOTOMAYOR: Makes no sense, so
12 I don't. I do between what you can talk about
13 and what you can't.

14 MR. WARTHEN: Yeah. Yes.

15 JUSTICE SOTOMAYOR: All right. Thank
16 you.

17 MR. WARTHEN: I'm sorry.

18 JUSTICE GORSUCH: Mr. --

19 JUSTICE BARRETT: Counsel --

20 JUSTICE GORSUCH: Oh, I'm sorry,
21 please.

22 JUSTICE BARRETT: I want to just read
23 you a potential instruction, and tell me if
24 you agree with it or if you see any kind of
25 difference between your position and what I'm

1 going to say and what the SG says.

2 What if the court says -- or what if
3 we were to say that qualified conferral orders
4 are okay if they tell the lawyer: Listen, you
5 can't talk about the content of the testimony
6 or the manner of its delivery, but you can
7 discuss any strategic consequences of the
8 defendant's testimony, such as whether to
9 take a plea, whether to call another witness,
10 et cetera?

11 Are you okay with that?

12 MR. WARTHEN: Yes.

13 JUSTICE BARRETT: Okay. And I'll ask
14 the SG whether the SG thinks that's consistent
15 too. Okay.

16 JUSTICE GORSUCH: Mr. Warthen, I
17 just want to quickly follow up on Justice
18 Sotomayor's line of questioning. And I wonder
19 whether unconstitutional conditions doctrine
20 might be in play if you were to -- if you were
21 to say that a lawyer couldn't advise a
22 defendant during a long break about collateral
23 consequences from his testimony, if I can't
24 advise you, boy, it's time to take that plea --

25 MR. WARTHEN: Mm-hmm.

1 JUSTICE GORSUCH: -- if I can't tell
2 you about the consequences of perjury, you
3 know, maybe -- maybe I'm excused as an ethical
4 matter because I'm under a court order perhaps,
5 but I would have thought that our
6 unconstitutional conditions doctrine would have
7 something to say about unnecessarily chilling
8 the Sixth Amendment right that's at stake here.

9 MR. WARTHEN: Now are you asking from
10 the no-management perspective or the SG's?

11 JUSTICE GORSUCH: The SG's
12 perspective. I wonder whether that implicates
13 unconstitutional conditions doctrine.

14 MR. WARTHEN: I don't want to put
15 words in her mouth, but I think the SG would
16 say that there's two ways to go about dealing
17 with, say, perjury.

18 One, if you -- if they are still on
19 direct, you can try to fix it up as you're
20 going on direct, or if it happens on
21 cross-examination, you can try to fix it up on
22 redirect.

23 Another option would be the defendant
24 finishes his testimony, you tell the trial
25 court: Something very important came up during

1 his testimony, if we could just have a moment
2 to -- to talk, if we can just have a little bit
3 of time.

4 Then, at that time, you talk to them,
5 you -- you investigate whether or not perjury
6 happened, you remonstrate with them about your
7 ethical obligations and his obligations, and
8 then you would call him back as a witness.

9 And then the -- if the trial court
10 were to be, like, well, why are you calling him
11 back as a witness, you could either say, it'll
12 become clear in just a moment, Your Honor, or
13 you can tell them -- you just have to tell them
14 straight out, perjury was committed and I have
15 to fix it before the end of this proceeding.

16 One other thing I just want to --
17 since I have a little bit of time, it's just
18 the rule that we're advancing, it does -- it is
19 the -- the rule that I believe supports
20 federalism. It's the rule that -- what they're
21 asking to do is put a rule that is virtually
22 unalterable because it would require a
23 constitutional amendment. And we very rarely
24 micromanage trial courts in that manner with
25 these -- with these kind of constitutional

1 rules.

2 JUSTICE ALITO: Let me ask you
3 about your -- your perjury exception. So
4 you -- you say that the -- the defense counsel
5 could advise the defendant when there's a break
6 during cross-examination, an overnight break
7 during cross-examination, to avoid perjury.

8 Doesn't that -- would that allow
9 defense counsel to help to clean up all
10 inconsistencies between what the defendant
11 said on direct and what the defendant admitted
12 under cross?

13 MR. WARTHEN: So could you phrase it
14 one more time, Your Honor, just to make sure I
15 understand?

16 JUSTICE ALITO: Yeah. On -- on
17 direct, the defendant testifies the way it
18 was -- it was anticipated before trial and says
19 A.

20 MR. WARTHEN: Mm-hmm.

21 JUSTICE ALITO: And then, on cross,
22 the defendant messes up and says B, something
23 that's completely inconsistent.

24 Doesn't that allow the defense
25 attorney to say: Look, you know, you're under

1 oath. You can't commit perjury.

2 MR. WARTHEN: Mm-hmm.

3 JUSTICE ALITO: Clean up what you said
4 on cross-examination.

5 MR. WARTHEN: Mm-hmm.

6 JUSTICE ALITO: That would be allowed?

7 MR. WARTHEN: I would say this. You
8 would want to investigate with them to see if
9 there actually was perjury, and then you need
10 to remonstrate with them, and then you would
11 tell them: Okay, tomorrow what we're going to
12 do is we're going to clean this up. I'm not
13 going to tell you how because I'm under court
14 order, but just know -- be expecting that
15 tomorrow this is going to be fixed. You don't
16 need to tell them, okay, here's the best thing
17 to say or, you know, like, what -- true or
18 false, this is the best thing to say. I'm
19 going to ask you these particular questions, so
20 be expecting these questions. That's all
21 strategizing. You couldn't do those things.

22 But what you could do is just
23 establish that perjury was committed and let
24 the defendant know this is going to be dealt
25 with tomorrow.

1 JUSTICE ALITO: And how about the same
2 thing with the -- with the question of -- of
3 plea bargaining? Could defense counsel say,
4 wow, that was not good because you were
5 mumbling, because you were scowling, you better
6 correct all the -- you know, you better correct
7 all that stuff?

8 MR. WARTHEN: I don't think that would
9 be allowed. What -- what we say in our brief
10 is that you can tell them -- you could say you
11 need to take the plea bargain. You could --
12 you might need to take the plea bargain because
13 the state's case was so strong but also if he
14 just did a terrible job. And if the defendant
15 says, well, how did I do a terrible job, you
16 would just have to tell them I'm under a court
17 order, I cannot tell you why that's true, but
18 you need to -- in my professional opinion, you
19 need to understand that the best course of
20 action for you now is to take a plea bargain.

21 JUSTICE KAGAN: Now why -- why is
22 that, Mr. Warthen? I mean, if you had said, as
23 you do on page 14, that you can talk to the
24 defendant about trial testimony when it's
25 incidental to a big trial strategy decision

1 like whether to take a plea bargain, and the
2 person says to you, I don't understand, like,
3 what do you think went wrong, like, why was it
4 so serious that I now have to tell this? And
5 you say I can't tell you, just trust me that
6 you have to take a plea bargain. And the
7 person says, what do you mean, trust me? I
8 mean, I want this -- I want to understand,
9 like, why this went so wrong that now I have to
10 completely alter my understanding of what I'm
11 supposed to do here.

12 Like, shouldn't the lawyer be able to
13 say, here's what went wrong, here's why it's
14 really consequential, here's why you should
15 take a plea bargain?

16 MR. WARTHEN: My time is up, but would
17 I be able to answer, Your Honor?

18 CHIEF JUSTICE ROBERTS: Sure.

19 MR. WARTHEN: So the reason is because
20 you're going to be managing their testimony and
21 that the whole -- the whole point of the order,
22 the -- all the logic behind Perry is that you
23 should not be able to do that because you're
24 basically telling the -- the -- the defendant,
25 well, if you start -- if you stop mumbling, if

1 you start looking the jury in the eye, and you
2 start giving clearer answers, well, then you
3 won't have to take that plea bargain. It would
4 be too easy of a work-around.

5 Now here's another thing you could do.
6 You could tell them, I think this is going
7 really badly, you probably need to take -- in
8 my professional judgment, you need to take this
9 plea bargain. If they ask why, you can say, I
10 can't tell you that right now, but let's talk
11 again whenever your testimony is over and see
12 how it goes from this point on out and see
13 where we are then.

14 CHIEF JUSTICE ROBERTS: Thank you,
15 counsel.

16 Justice Thomas?

17 Justice Alito?

18 Justice Sotomayor?

19 Justice Kagan?

20 Justice Gorsuch?

21 JUSTICE GORSUCH: I guess I would have
22 thought that discussion would be incidental to
23 the plea bargain. You -- you say that you can
24 discuss direct testimony as long as it's
25 incidental to some other purpose. Why wouldn't

1 it have been incidental in that case?

2 MR. WARTHEN: The plea bargaining is
3 incidental, like, discussing a plea bargain as
4 a general matter. But the main thing about our
5 rule at least is that you not then turn that
6 into an opportunity to manage the upcoming
7 testimony.

8 CHIEF JUSTICE ROBERTS: Justice
9 Kavanaugh?

10 Justice Barrett?

11 Justice Jackson?

12 Thank you, counsel.

13 MR. WARTHEN: Thank you.

14 CHIEF JUSTICE ROBERTS: Mr. Barber.

15 ORAL ARGUMENT OF KEVIN J. BARBER

16 FOR THE UNITED STATES, AS AMICUS CURIAE,

17 SUPPORTING THE RESPONDENT

18 MR. BARBER: Mr. Chief Justice, and
19 may it please the Court:

20 In Perry, this Court held that a
21 criminal defendant, like any other trial
22 witness, has no right to discuss his testimony
23 with counsel after that testimony has begun.
24 That principle is consistent with Geders and
25 with the long history of sequestering witnesses

1 in order to safeguard the truth-seeking
2 function of trial. Because a defendant has no
3 right to discuss his testimony midstream, an
4 order barring discussion of only that testimony
5 and nothing else is constitutional, just as a
6 defendant has no right to a time-out in the
7 middle of testimony to confer with counsel.

8 Petitioner's claim reduces to the
9 assertions that qualified conferral orders are
10 unworkable because testimony can't be
11 distinguished from other matters and
12 unnecessary because courts can just prohibit
13 coaching. But Perry squarely rejects both of
14 those propositions, and it explicitly endorses
15 qualified orders of the kind that was issued
16 here.

17 The Court should therefore reject
18 Petitioner's request to categorically foreclose
19 such orders as a matter of constitutional law
20 for not only the federal courts but all 50
21 states.

22 I welcome the Court's questions.

23 JUSTICE THOMAS: Under your approach,
24 what can counsel discuss with the Petitioner?

25 MR. BARBER: So there are many other

1 trial matters, Justice Thomas, that the defense
2 may want to discuss, from other witnesses'
3 testimony, to physical evidence, to strategies
4 for the upcoming closing argument, to grounds
5 for appeal, sentencing matters.

6 Under our line, they just couldn't
7 discuss the testimony itself. And we think
8 that's a clear and workable line. We don't
9 disagree with Texas's proposed narrower
10 approach to account for the -- the narrower
11 scope of the order here, but we think our line
12 is very clear and very workable and consistent
13 with the Sixth Amendment.

14 JUSTICE BARRETT: So is really your --

15 JUSTICE KAVANAUGH: Why is your
16 line --

17 JUSTICE BARRETT: Sorry.

18 JUSTICE KAVANAUGH: Sorry. Why is
19 your line better?

20 MR. BARBER: We think it's somewhat
21 clearer because we do think that there is some
22 ambiguity about what management would mean, as
23 Justice Gorsuch was getting at, how you account
24 for incidental discussion of the testimony
25 versus non-incidental.

1 So, for example, we agree that there
2 would be real concern to allowing the defense
3 to say or the defense counsel to say, you know,
4 your testimony about this specific issue didn't
5 go well today, and by virtue of those defects
6 in your testimony, you should now consider
7 pleading guilty. That does seem to us like, as
8 Mr. Warthen suggested, an obvious work-around,
9 and we do think that that would threaten the
10 truth-finding function of trial.

11 So our rule accounts for that. We
12 think it's a reasonably clear rule because,
13 first of all, it's drawn straight from this
14 Court's decision in Perry. This is exactly how
15 the Court phrased the scope of permissible
16 qualified orders in Footnote 8 of that
17 decision.

18 And defense lawyers could apply it, I
19 think, pretty easily. There are always going
20 to be edge cases under any rule, but the
21 defense lawyer can always ask himself under our
22 rule, is this a conversation that I would be
23 having with my client irrespective of whether
24 he was testifying in this case or not?

25 And if the answer is yes, then he can

1 have the conversation with the defendant. And
2 if the answer's no, then he should abstain.

3 CHIEF JUSTICE ROBERTS: Is this --

4 JUSTICE BARRETT: So you --

5 CHIEF JUSTICE ROBERTS: I had trouble
6 getting my hands around what you meant by this
7 on page 28 to 29 of your brief. You list a
8 variety of matters that are pertinent to the
9 trial, and then you said, "Those and other
10 matters may be related to the defendant's
11 testimony in the tangential sense that they
12 bear on the trial context in which the
13 testimony is taking place. A defendant and his
14 counsel can conceptually discuss such matters
15 without veering into the problematic ground of
16 the ongoing testimony as such."

17 I -- I find that a pretty hard line to
18 get my hands around.

19 MR. BARBER: I think, Mr. Chief
20 Justice, our point there was that just because
21 the testimony necessarily relates to other
22 matters that the defense may want to discuss,
23 the kind of matters that I was going through
24 with Justice Thomas, that doesn't mean that you
25 have a constitutional right to discuss the

1 testimony itself.

2 So, for example, if we went back to
3 the plea bargain example, if the defense lawyer
4 went into the recess and said to his client
5 after the testimony had begun, I now advise you
6 that you should pursue a plea bargain, we think
7 that would be permissible even if, in the
8 defense lawyer's head, part of the reason why
9 that advice was being given was because he was
10 aware, in the -- in the parlance of this
11 Court's decision in Perry, he was taking
12 consideration of the testimony.

13 That doesn't mean that you're
14 discussing the testimony itself, and that
15 doesn't mean that the kind of dangers to the
16 truth-seeking function of trial are presented
17 by that kind of discussion.

18 CHIEF JUSTICE ROBERTS: So he can ask
19 them about all sorts of things that bear on the
20 testimony, right, that might be pertinent in
21 any other context, that is to say are they the
22 sorts of things you would talk about with your
23 client without regard to the testimony or --

24 MR. BARBER: I --

25 CHIEF JUSTICE ROBERTS: -- can the

1 testimony at least narrow the topic of
2 conversation you're going to have?

3 MR. BARBER: I think that, again,
4 the -- the topics that you would discuss can
5 certainly relate to the testimony, we're not
6 disputing that, because the testimony is
7 necessarily related to the other issues that
8 are going on in the trial.

9 All we're saying is that even under
10 our rule, which is somewhat broader than
11 Texas's rule, it is not a rule that you can't
12 discuss, as Justice Jackson was suggesting,
13 anything that relates to the testimony. That's
14 not on the table.

15 CHIEF JUSTICE ROBERTS: So you can
16 talk about things that relate to the testimony,
17 but you can't discuss the testimony as such?

18 MR. BARBER: Correct.

19 JUSTICE JACKSON: But --

20 JUSTICE BARRETT: So I guess --

21 JUSTICE JACKSON: -- what if -- what
22 if --

23 JUSTICE BARRETT: -- I don't
24 understand. You -- you really are objecting to
25 discussing any kind of downstream effect or

1 strategic consequence, including the need to
2 call another witness, because the defendant on
3 the stand may have introduced a topic that now
4 the lawyer wants to say do you know anyone
5 who -- you know, you said X, so it would be
6 good for us to call a witness to address that.
7 Is there someone we can call? Not protected?

8 MR. BARBER: Correct. I think a
9 couple points on that, Justice Barrett. So,
10 first of all, we are acknowledging the fact
11 that our rule is partly prophylactic in nature.
12 So we're not saying that the Sixth Amendment
13 rule needs to be tailored specifically to
14 communications that directly impede the
15 truth-finding function of trial.

16 We think that there is some virtue to
17 having a clearer, more workable rule, even if
18 you can imagine discussions under that kind of
19 rule that would be prohibited that may not
20 directly affect the truth-seeking function of
21 trial. There's no, like, narrow tailoring
22 requirement here.

23 The other -- the other important point
24 I think I need to make is that, you know, we
25 can all readily imagine and we've been

1 discussing this morning important conversations
2 that we have the intuition the defense should
3 be able to have, but if Petitioner got his wish
4 and if all defense testimony or defendant's
5 testimony were conducted continuously, without
6 a break, then, by definition, this kind of
7 opportunity for those discussions would not
8 arise.

9 So the opportunity to discuss
10 potential perjury wouldn't come up because
11 there wouldn't be a recess fortuitously
12 intervening. So the notion that the Sixth
13 Amendment rights of a defendant should turn on
14 the fortuity of that recess strikes us as
15 far-fetched and that's what drove us to adopt
16 the position.

17 JUSTICE SOTOMAYOR: Well, that's what
18 we did. You may not like it, that fortuity,
19 but we created a difference between Perry and
20 Geders. And I don't think the -- the
21 difference was based, as you think, on the
22 truth-seeking functions. That has a reason for
23 the order. But Geders was very clear that
24 there is an independent Sixth Amendment right
25 for advice of counsel.

1 And what you're seeking to do is
2 truncate that right overnight so that if the
3 defendant mentions the name of a witness, he
4 says do you have the contact information for
5 it. He's not affecting the testimony, he's not
6 asking the witness to change it, he's not
7 talking or evaluating the testimony. He's
8 simply saying give me an address.

9 And you're saying no.

10 MR. BARBER: I -- I wouldn't say no if
11 you're just asking for the address because you
12 don't need to discuss --

13 JUSTICE SOTOMAYOR: Well, but that --
14 you see, you're -- you're trying to cabin what
15 is obviously not logical in your extreme
16 position.

17 The same thing with the plea
18 bargaining situation. I find it impossible for
19 a lawyer to say I think you should consider a
20 plea bargain now and that the defendant is not
21 going to say but why, and the why has to be my
22 considered judgment? That gets me from here to
23 the corner and back with nobody paying me,
24 okay?

25 You need to say something. The model

1 rule says a lawyer shall explain a matter to
2 the extent reasonably necessary to make an
3 informed decision.

4 Now, if you have a rule that says you
5 can't manage the testimony, but you can
6 evaluate the testimony and say it was pretty
7 bad for lots of reasons, that should be okay.

8 MR. BARBER: So I -- I certainly want
9 to repeat, Justice Sotomayor, that we don't
10 disagree with Texas's rule. And if you wanted
11 to say that because this order in this case was
12 narrow enough to just prohibit management of
13 the testimony, we're going to say that's
14 permitted by the Sixth Amendment. That's fine
15 with us as long as you don't suggest that
16 that's all that courts can do.

17 JUSTICE SOTOMAYOR: Ah, that's the no.
18 Okay.

19 MR. BARBER: Because I think that's an
20 important point. And if we got --

21 JUSTICE SOTOMAYOR: That is an
22 important point because what you're asking us
23 to do is to potentially say you can bar all
24 conversation here.

25 MR. BARBER: About the testimony, but

1 you -- you --

2 JUSTICE SOTOMAYOR: Yeah.

3 MR. BARBER: -- can leave that matter
4 for another day.

5 JUSTICE JACKSON: But why? Why would
6 we do that? I guess I just don't -- I don't
7 understand. If this order is narrow enough to
8 cover the concern about problems with
9 truth-telling in the trial because we are
10 keeping the defense counsel from managing the
11 way that it's been described, why would we go
12 further to ensure that there could be problems
13 with the Sixth Amendment by suggesting that a
14 court could do more?

15 MR. BARBER: I think that just because
16 this order satisfies the Sixth Amendment
17 doesn't mean that a somewhat broader order
18 could not, especially when we account for the
19 fact that trial judges can be trusted to tailor
20 these orders depending on the specific nature
21 of the case, the nature of the defendant, the
22 nature of defense counsel.

23 We do think that there is some virtue
24 to a somewhat broader rule, just in the same
25 way that -- and if I may continue, Mr. Chief

1 Justice?

2 CHIEF JUSTICE ROBERTS: Briefly.

3 MR. BARBER: Just as we ban defendants
4 regularly from having any contact with
5 witnesses in the trial, we don't ask, you know,
6 can they be banned just from having threatening
7 or detrimental contacts with witnesses. It's
8 the same kind of principle here.

9 CHIEF JUSTICE ROBERTS: Thank you.

10 Justice Thomas?

11 Justice Kagan?

12 Justice Barrett?

13 Justice Kavanaugh?

14 JUSTICE KAVANAUGH: What's your view
15 of what the original text and history would
16 tell us about the proper rule pre-Geders?

17 MR. BARBER: That's a very good
18 question, Justice Kavanaugh. So the -- the
19 root meaning of the Sixth Amendment counsel
20 clause is simply the right to retain counsel.
21 The amendment was adopted or that clause was
22 adopted to abrogate the common law rule that
23 felony defendants generally had no right to
24 counsel at all.

25 One of the things that we think is

1 very important in this case is that even the
2 root meaning of the right to counsel, which is
3 the right to counsel of choice, is subject to
4 broad limitations.

5 This Court has said many times that a
6 trial court has wide latitude to balance that
7 right, that core right, against countervailing
8 considerations like fairness, like the demands
9 of the court's calendar. And that's another
10 reason why it's appropriate to have a somewhat
11 broader prophylactic rule and to reject a kind
12 of narrow tailoring requirement in this
13 context.

14 CHIEF JUSTICE ROBERTS: Justice
15 Jackson?

16 JUSTICE JACKSON: I guess I'm still
17 just confused as to why a narrow tailoring
18 requirement, so can you just say more in
19 response to Justice Kavanaugh?

20 I mean, we have a -- we have a Sixth
21 Amendment right, I think you agree, to have
22 counsel have access to his client about trial
23 strategy, about matters that he's allowed to
24 talk to him about. And so, in a world in which
25 your prophylactic rule potentially encroaches

1 on that because some of those trial strategies
2 are intertwined with his testimony, I don't
3 understand why we would give the court the
4 ability to preclude discussion of any
5 testimony.

6 MR. BARBER: So, Justice Jackson,
7 we're just drawing the line that this Court
8 drew in Perry. And I think this is what
9 Justice Kagan was getting at earlier.

10 The Court in Perry drew the line at
11 discussion of testimony versus discussion of
12 other matters. And that's the line that
13 undergirds the basic holding of Perry. The
14 idea is that because, during the 15-minute
15 recess at issue, which was taken sort of in the
16 heat of the testimony when it's top of mind,
17 the only thing likely to be discussed during
18 that kind of recess is the testimony, that's
19 the way the Court phrased it. And that --

20 JUSTICE JACKSON: And if we read that
21 to mean testimonial management, what -- what
22 then?

23 MR. BARBER: Well, the --

24 JUSTICE JACKSON: Not just test -- not
25 strategy as a result of the testimony because

1 we don't have time for that in 15 minutes. The
2 15-minute window in Perry, when it says you can
3 only talk about testimony, what if we take that
4 to mean you would be coaching your witness
5 during that 15 minutes about what he just said
6 or what he should say and that's off limits?

7 MR. BARBER: Right. So, if you agree
8 with Texas and with us that the order here is
9 reasonably read as just prohibiting management
10 of the testimony, then this case is a very easy
11 case because Perry clearly says that that is
12 constitutional under the Sixth Amendment.
13 Leave -- leave for another day whether the SG
14 is right about this potential broader rule.
15 That's all you need to do.

16 JUSTICE JACKSON: Thank you.

17 CHIEF JUSTICE ROBERTS: Thank you,
18 counsel.

19 MR. BARBER: Thank you.

20 CHIEF JUSTICE ROBERTS: Rebuttal,
21 Mr. Banner?

22 REBUTTAL ARGUMENT OF STUART BANNER
23 ON BEHALF OF THE PETITIONER

24 MR. BANNER: I'd just like to make --
25 I'd like to make three quick points if that's

1 all right.

2 First, under the Texas standard, the
3 Court should reverse. The -- the -- the trial
4 court and the state appellate courts understood
5 the order to bar many of the kinds of
6 discussion that Texas now says is permitted.

7 Second, the Court's questions to -- to
8 my friends here suggest that the supposed line
9 that Texas is drawing is no line at all. Lots
10 of questions about what about this, what about
11 that and so on. Different trial courts are
12 going to draw that line differently from the
13 way my friend from Texas draws it. Defense
14 lawyers will have no idea what they're allowed
15 to discuss and what they're not allowed to
16 discuss, and so, of course, they're going to
17 err on the side of not discussing, as -- as --
18 as trial counsel did here.

19 Finally, for decades now, the majority
20 rule in the United States has been that the
21 defendant has a right to the complete
22 discussion of testimony during overnight
23 recesses. It's been a very clean rule, unlike
24 the rule that Texas and even the United States
25 advocates. And it's the right rule because

1 strategizing about testimony is one of the most
2 important things that defense lawyers do. It's
3 one of the most important kinds of assistance
4 that defense counsel provides.

5 Thank you.

6 CHIEF JUSTICE ROBERTS: Thank you,
7 counsel. The case is submitted.

8 (Whereupon, at 11:23 a.m., the case
9 was submitted.)

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