

# SUPREME COURT OF THE UNITED STATES

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IN THE SUPREME COURT OF THE UNITED STATES

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DAVID ASA VILLARREAL, )  
                                Petitioner, )  
                                v. ) No. 24-557  
TEXAS, )  
                                Respondent. )  
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Pages: 1 through 97

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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 is going to  
16 be given the next day. These are basic  
17 discussions that any competent lawyer would  
18 have with the client. This is the assistance  
19 of 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  
8 the defendant from committing perjury, but that  
9 would be impossible without discussing the  
10 defendant's testimony. Our brief has many more  
11 examples, but the point is that the defendant  
12 and counsel often must discuss the defendant's  
13 testimony during an overnight recess.

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

25 The only conceivable rationale for

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

8 I invite the Court's questions.

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

13 What's wrong with that?

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

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

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

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

24 MR. BANNER: Okay. Well, the --  
25 the -- the trial court, if you read -- if you

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

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

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

25           MR. BANNER: You mean during an



1       overnight recess to talk?

2                   JUSTICE THOMAS:  No.  During trial.

3                   MR. BANNER:  Oh, during trial.  No.

4       During trial --

5                   JUSTICE THOMAS:  What's the  
6       difference?

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

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

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

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

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

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

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

24           MR. BANNER: But it couldn't have  
25 happened, it didn't happen, because the trial

1 court barred the defense counsel from  
2 discussing Mr. Villarreal's testimony with him  
3 during the overnight recess.

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

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

9 MR. BANNER: Yes.

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

14 MR. BANNER: Right.

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

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

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

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

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

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

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

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

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

25           MR. BANNER: Right.

1 JUSTICE JACKSON: All that's fine.

2 MR. BANNER: Right.

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

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

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

13 MR. BANNER: It --

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

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

1 contact between the defendant and counsel.

2 JUSTICE JACKSON: I understand.

3 MR. BANNER: Yeah.

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

6 MR. BANNER: Yeah, no, I understand.  
7 I understand.

8 JUSTICE JACKSON: Right.

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

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

13 MR. BANNER: No, yes, it does. I'm  
14 get -- I'm getting to that, right?

15 JUSTICE JACKSON: Yeah.

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

22 The Court says: Admittedly, the line  
23 between the facts of Geders -- that's an  
24 overnight recess -- and the facts of this case  
25 is a thin one. It is, however, a line of

1 constitutional dimension.

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

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

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

14           MR. BANNER: Yeah.

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

17           MR. BANNER: Yeah.

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

23           MR. BANNER: Right.

24           JUSTICE JACKSON: -- or prepping --

25           MR. BANNER: Right.



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

4 MR. BANNER: Right.

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

7 MR. BANNER: Right.

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

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

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

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

24 JUSTICE KAGAN: But that's the line  
25 that Perry drew. I mean, if you go up a few

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

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

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

25 JUSTICE KAGAN: But that's Perry's

1 line. I mean --

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

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

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

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

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

19 MR. BANNER: Yeah.

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

22 MR. BANNER: Okay.

23 JUSTICE KAGAN: -- on page 284.

24 (Laughter.)

25 MR. BANNER: Yeah.

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

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

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

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

21 During the -- the -- the -- the  
22 overnight recess, defense counsel needs to say  
23 to the defendant: Look, you nearly mentioned  
24 this -- this -- this evidence. Look, when we  
25 resume again tomorrow, you better remember not

1 to mention that because we're -- we're going to  
2 be in big trouble if you -- if you -- if you --  
3 if you mention that tomorrow.

4 Okay. Is that -- is that --

5 JUSTICE GORSUCH: See, I --

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

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

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

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

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

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

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

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

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

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

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

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

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

20 JUSTICE GORSUCH: Okay.

21 MR. BANNER: Yeah.

22 JUSTICE GORSUCH: Why -- why -- what  
23 in the Constitution, what in history suggests  
24 that you have a right to manage a witness's  
25 testimony during a break --

1 MR. BANNER: Okay.

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

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

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

16 MR. BANNER: Okay.

17 JUSTICE GORSUCH: Whatever the length  
18 of time.

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

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

25 JUSTICE GORSUCH: Obviously.

1           MR. BANNER:  -- 19th century.  Right.  
2   And so the question is, what's the appropriate  
3   inference to be drawn from historical practice,  
4   right?

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

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

16          JUSTICE GORSUCH:  Please.

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



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

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

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

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

19           JUSTICE GORSUCH: Well --

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

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

25           MR. BANNER: During a criminal -- a

1 right to counsel during --

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

4 MR. BANNER: No. No, no, no, no.

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

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

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

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

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

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

23 JUSTICE GORSUCH: Yeah.

24 JUSTICE BARRETT: So, Mr. Banner, can  
25 I just clarify?

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

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

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

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

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

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

1 That is, if -- if -- where the trial court can  
2 cut off access to counsel, the trial court  
3 could allow selective access to counsel.

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

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

10 JUSTICE ALITO: Mr. --

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

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

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

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

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

23 Daytime recesses are usually pretty  
24 short. Overnight recesses are much, much  
25 longer. It's very easy to tell -- to -- to --

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

7 JUSTICE BARRETT: Okay. So --

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

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

18 MR. BANNER: Again, because --

19 JUSTICE BARRETT: During the day?

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

22 JUSTICE BARRETT: Right.

23 MR. BANNER: Quite right.

24 JUSTICE BARRETT: And you can't -- but  
25 you can't do that at night?

1                   MR. BANNER: Right. Correct, because,  
2     at night, during --

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

5                   MR. BANNER: Well --

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

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

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

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

19                  Let me, if I could --

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

22                  MR. BANNER: Yeah.

23                  JUSTICE ALITO: -- a concrete  
24    question? I can read Geders and Perry, but I'd  
25    like a con -- an answer to a concrete question.

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

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

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

25                  JUSTICE ALITO: Right.

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

8           JUSTICE ALITO: Okay. The next day --

9           MR. BANNER: Yeah.

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

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

22          MR. BANNER: Well --

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

25          MR. BANNER: -- I don't -- I don't



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

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

14 But you think that --

15 MR. BANNER: Yeah.

16 JUSTICE ALITO: -- the prosecutor --

17 MR. BANNER: Well --

18 JUSTICE ALITO: -- can go into that?

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

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

25 All right. Suppose we've got a lunch

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

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

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

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

24 JUSTICE ALITO: Well, my question -- I  
25 want to get to that. But --

1 MR. BANNER: Yeah.

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

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

7 JUSTICE ALITO: Same rule --

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

10 JUSTICE ALITO: Different rule. Why?

11 MR. BANNER: Different results.

12 JUSTICE ALITO: Why?

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

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

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

5 MR. BANNER: Very beneficial.

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

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

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

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

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

14 CHIEF JUSTICE ROBERTS: We'll be back.

15 Justice Thomas, anything further?

16 Justice Alito?

17 JUSTICE ALITO: Okay. Once again.

18 Two --

19 (Laughter.)

20 JUSTICE ALITO: Two absolutely  
21 identical defendants, two trials. Five  
22 o'clock -- the defendant is on the ropes in  
23 cross-examination. Five o'clock rolls around.  
24 It would be really helpful for this defendant  
25 to have a break, you know, and regroup.

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

10           What happens then?

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

16           JUSTICE ALITO: So a different result  
17    in those two situations?

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

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

24           MR. BANNER: Yes.

25           JUSTICE ALITO: Coaching is what's not

1     allowed.  You said it's -- you can't suborn  
2     perjury.

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

11                In fact, the Court discussed this --  
12    excuse me -- the Court --

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

16                MR. BANNER:  Right.  Right.  But --

17                JUSTICE ALITO:  But you think -- but  
18    you know --

19                MR. BANNER:  But --

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

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

25                JUSTICE ALITO:  That's allowed.

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

12           JUSTICE ALITO: All right. Thank you  
13    very much.

14           MR. BANNER: Okay.

15           CHIEF JUSTICE ROBERTS: Justice  
16    Sotomayor?

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

24           MR. BANNER: Well, I mean, I would  
25    say -- I would say --

1 JUSTICE SOTOMAYOR: Counsel, just  
2 answer yes or no.

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

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

22 What else -- what is missing from that  
23 list, assuming the first bucket?

24 MR. BANNER: Yeah. So what --  
25 what's --



1 JUSTICE SOTOMAYOR: You can't coach.

2 You can't give --

3 MR. BANNER: Right.

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

8 MR. BANNER: Okay.

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

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

14 JUSTICE SOTOMAYOR: I just said --

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

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

23 MR. BANNER: You know, off the top of  
24 my head, I -- I'm sure there are others. I  
25 mean, the -- the -- a -- a defendant and

1 counsel have a million --

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

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

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

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

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

24 MR. BANNER: That's -- that's --  
25 that's correct. But the reason is that defense

1 counsel understood the court to be barring all  
2 discussion of testimony, period, and the court  
3 confirmed that.

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

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

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

21 Right? So the -- the -- the -- the  
22 reason why there's no --

23 JUSTICE SOTOMAYOR: We can read the  
24 transcript. Thank you, counsel.

25 MR. BANNER: Okay, okay.

1 CHIEF JUSTICE ROBERTS: Justice Kagan?

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

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

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

24 MR. BANNER: Yeah. Well --

25 JUSTICE KAGAN: -- thing that stands

1 as a difference between you and Texas right  
2 now?

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

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

18 At the very least, it's --

19 JUSTICE KAGAN: Okay. But that's  
20 covered by Texas's --

21 MR. BANNER: Well, but that -- but  
22 that was what -- what I understood your  
23 question to exclude, right? You need to be  
24 able to talk about the substance of his  
25 testimony.

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

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

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

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

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

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

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

11          MR. BANNER: Okay.

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

14          MR. BANNER: Yeah.

15          JUSTICE KAGAN: Okay.

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

19          JUSTICE KAGAN: Thank you.

20          CHIEF JUSTICE ROBERTS: Justice  
21    Gorsuch?

22          Justice Kavanaugh?

23          JUSTICE KAVANAUGH: I'm trying to  
24    figure out the logic of a line based on a  
25    15-minute recess versus a lunchtime recess

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

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. So there has to  
8   be some -- I think this is the -- the holding  
9   of Perry -- there has to be some -- some line  
10  where a recess is -- is -- is -- is just too  
11  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 a  
7 recess, you're -- you're golden or at least a  
8 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, the government needs a

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

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 --

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

12          JUSTICE JACKSON:  Why?

13          MR. BANNER:  Perry --

14          JUSTICE JACKSON:  What difference does  
15     time make if he has the right to coach him, to  
16     -- in that way?  What difference does the --  
17     does the 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 of daytime and an  
3 overnight recess.

4                   JUSTICE JACKSON: Yeah.

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

9                   JUSTICE JACKSON: Yeah.

10                  MR. BANNER: -- it's -- I think it's  
11 -- 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 the 15-minute recess, you can  
15 see 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 recess  
18 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 the defendant's testimony is  
6 paused for a long break, the trial court may  
7 tell 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 -- there was no -- you  
16 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 -- I think that's  
25 right. That would be the only reason why we'd

1 have to reach the government's position. You  
2 agree with that?

3 MR. WARTHEN: Yes.

4 JUSTICE GORSUCH: Okay. And --

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

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

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

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

23 JUSTICE GORSUCH: Okay.

24 MR. WARTHEN: If you believe it was  
25 just a -- a -- if -- if this is a -- a small,

1     like, I guess you -- I guess you can  
2     conceptualize this, if this is broad, this is a  
3     narrower kind of order.

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

6             MR. WARTHEN:  That this is a narrow  
7     order?

8             JUSTICE GORSUCH:  Yeah.

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

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

1 Here are the questions I'm going to ask you  
2 next. That's all managing in the way we define  
3 it.

4 And then he tells him just ask  
5 yourself when you're talking to him tonight,  
6 and you can talk to him about something -- and  
7 even gives him an example of potentially if  
8 they go into a punishment phase -- you can talk  
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, or 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, let's  
3 say the defendant and the lawyer go into  
4 their -- you know, wherever, for the evening  
5 recess, and the defendant says something like:  
6 Counsel, you remember when we were preparing  
7 for this, we both agreed we should try to get  
8 the jury to focus on Fred, and whenever it's  
9 reasonable, I should mention Fred, and I've  
10 been doing that. And I notice every time I do  
11 that, you know, juror number 8 gets a big frown  
12 and shakes his head. He doesn't look to me  
13 like he likes the idea of talking about Fred at  
14 all. So I think that's a bad idea. Now,  
15 talking about Fred was your idea. Do you still  
16 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 -- the  
23 -- the line that you're drawing -- and you draw  
24 this on page 14, and I just want to make sure  
25 that -- that you're still saying what you're

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

4 MR. WARTHEN: Mm-hmm.

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

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

14 MR. WARTHEN: Yes.

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

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

1 But as far as the -- how the testimony is  
2 ongoing that would not be allowed as well.

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

5 MR. WARTHEN: Mm-hmm.

6 JUSTICE KAGAN: -- what's your  
7 response to that?

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

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

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



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

7 The same logic would apply the other  
8 way.

9 JUSTICE KAGAN: Thank you.

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

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

14 MR. WARTHEN: Mm-hmm.

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

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

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

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

4           I would --

5           JUSTICE KAVANAUGH: Yeah.

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

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

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

25           MR. WARTHEN: They -- they might have

1 some differences of opinion, but we do trust  
2 lawyers to use their judgment whenever they are  
3 complying with any kind of court order.

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

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

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

22 MR. WARTHEN: That's right.

23 JUSTICE JACKSON: Counsel, let me ask  
24 you about the government's -- the -- the  
25 Solicitor General's position, which we've now

1 established is much broader. It's a  
2 no-testimony order.

3 MR. WARTHEN: Mm-hmm.

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

13 Do you have an opinion about that?

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

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

24 But, at the same time, it -- it  
25 excises as much as possible to protect the

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

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

11 MR. WARTHEN: Mm-hmm.

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

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

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

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

23 MR. WARTHEN: Mm-hmm.

24 JUSTICE SOTOMAYOR: If a client is  
25 suborning -- is perjuring him or herself --

1 MR. WARTHEN: Mm-hmm.

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

5 MR. WARTHEN: Mm-hmm.

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

8 MR. WARTHEN: Mm-hmm.

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

13 MR. WARTHEN: Yes.

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

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

19 MR. WARTHEN: Mm-hmm.

20 JUSTICE SOTOMAYOR: You should  
21 reconsider taking this.

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

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

3           JUSTICE SOTOMAYOR: Excuse the ethical  
4       obligation?

5           MR. WARTHEN: Well, to -- yes, to a  
6       certain extent. I -- I would be --

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

14          MR. WARTHEN: That's correct. And  
15      that -- that -- that --

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

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

25          JUSTICE SOTOMAYOR: Right. But we

1       said -- we said in Geders you can't do it  
2       overnight.

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

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

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

12              MR. WARTHEN:  Yeah.  Yes.

13              JUSTICE SOTOMAYOR:  Thank you.

14              MR. WARTHEN:  I'm sorry.

15              JUSTICE GORSUCH:  Mr. --

16              JUSTICE BARRETT:  Counsel --

17              JUSTICE GORSUCH:  Oh, I'm sorry,  
18       please.

19              JUSTICE BARRETT:  I want to just read  
20       you a potential instruction, and tell me if  
21       you agree with it or if you see any kind of  
22       difference between your position and what I'm  
23       going to say and what the SG says.

24              What if the court says -- or what if  
25       we were to say that qualified conferral orders



1 are okay if they tell the lawyer: Listen, you  
2 can't talk about the content of the testimony  
3 or the manner of its delivery, but you can  
4 discuss any strategic consequences of the  
5 defendant's testimony, such as whether to  
6 take a plea, whether to call another witness,  
7 et cetera?

8 Are you okay with that?

9 MR. WARTHEN: Yes.

10 JUSTICE BARRETT: Okay. And I'll ask  
11 the SG whether the SG thinks that's consistent  
12 too. Okay.

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

22 MR. WARTHEN: Mm-hmm.

23 JUSTICE GORSUCH: -- if I can't tell  
24 you about the consequences of perjury, you  
25 know, maybe -- maybe I'm excused as an ethical

1 matter because I'm under a court order perhaps,  
2 but I would have thought that our  
3 unconstitutional conditions doctrine would have  
4 something to say about unnecessarily chilling  
5 the Sixth Amendment right that's at stake here.

6 MR. WARTHEN: No. Are you asking from  
7 the no-management perspective or the SG's?

8 JUSTICE GORSUCH: The SG's  
9 perspective. I wonder whether that implicates  
10 unconstitutional conditions doctrine.

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

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

20 Another option would be the defendant  
21 finishes his testimony, you tell the trial  
22 court: Something very important came up during  
23 his testimony, if we could just have a moment  
24 to -- to talk, if we can just have a little bit  
25 of time.

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

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

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

24           JUSTICE ALITO: Let me ask you  
25   about your -- your perjury exception. So

1     you -- you say that the -- the defense counsel  
2     could advise the defendant when there's a break  
3     during cross-examination, an overnight break  
4     during cross-examination, to avoid perjury.

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

10            MR. WARTHEN:  So could you phrase it  
11     one more time, Your Honor, just to make sure I  
12     understand?

13            JUSTICE ALITO:  Yeah.  On -- on  
14     direct, the defendant testifies the way it  
15     was -- it was anticipated before trial and says  
16     A.

17            MR. WARTHEN:  Mm-hmm.

18            JUSTICE ALITO:  And then, on cross,  
19     the defendant messes up and says B, something  
20     that's completely inconsistent.

21            Doesn't that allow the defense  
22     attorney to say:  Look, you know, you're under  
23     oath.  You can't commit perjury.

24            MR. WARTHEN:  Mm-hmm.

25            JUSTICE ALITO:  Clean up what you said

1 on cross-examination.

2 MR. WARTHEN: Mm-hmm.

3 JUSTICE ALITO: That would be allowed?

4 MR. WARTHEN: I would say this: You  
5 would want to investigate with them to see if  
6 there actually was perjury, and then you need  
7 to remonstrate with them, and then you would  
8 tell them: Okay, tomorrow what we're going to  
9 do is we're going to clean this up.

10 I'm not going to tell you how because  
11 I'm under court order, but just know -- be  
12 expecting that tomorrow this is going to be  
13 fixed. You don't need to tell them, okay,  
14 here's the best thing to say or, you know,  
15 like, what -- true or false, this is the best  
16 thing to say. I'm going to ask you these  
17 particular questions, so be expecting these  
18 questions. That's all strategizing. You  
19 couldn't do those things.

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

24 JUSTICE ALITO: And how about the same  
25 thing with the -- with the question of plea

1 bargaining? Could defense counsel say, wow,  
2 that was not good because you were mumbling,  
3 because you were scowling, you better correct  
4 all the -- you know, you better correct all  
5 that stuff?

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

19 JUSTICE KAGAN: Now, why -- why is  
20 that, Mr. Warthen? I mean, if you had said, as  
21 you do on page 14, that you can talk to the  
22 defendant about trial testimony, when it's  
23 incidental to a big trial strategy decision  
24 like whether to take a plea bargain, and the  
25 person says to you I don't understand, like,

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

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

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

16             CHIEF JUSTICE ROBERTS: Sure.

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

1     won't have to take that plea bargain. It would  
2     be too easy of a work-around.

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

12            CHIEF JUSTICE ROBERTS: Thank you,  
13    counsel.

14            Justice Thomas?

15            Justice Alito?

16            Justice Sotomayor?

17            Justice Kagan?

18            Justice Gorsuch?

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

25            MR. WARTHEN: The plea bargaining is



1 incidental. Like, to -- discussing a plea  
2 bargain is a general matter. But the main  
3 thing about our rule, at least, is that you not  
4 then turn that into an opportunity to manage  
5 the upcoming testimony.

6 CHIEF JUSTICE ROBERTS: Justice  
7 Kavanaugh?

8 Justice Barrett?

9 Justice Jackson?

10 Thank you, counsel.

11 MR. WARTHEN: Thank you.

12 CHIEF JUSTICE ROBERTS: Mr. Barber.

13 ORAL ARGUMENT OF KEVIN J. BARBER

14 FOR THE UNITED STATES, AS AMICUS CURIAE,

15 SUPPORTING THE RESPONDENT

16 MR. BARBER: Mr. Chief Justice, and  
17 may it please the Court:

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

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

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

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

20           I welcome the Court's questions.

21           JUSTICE THOMAS: Under your approach,  
22 what can counsel discuss with the Petitioner?

23           MR. BARBER: So there are many other  
24 trial matters, Justice Thomas, that the defense  
25 may want to discuss from other witness's

1 testimony, to physical evidence, to strategies  
2 for the upcoming closing argument, to grounds  
3 for appeal, sentencing matters.

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

12 JUSTICE BARRETT: So is --

13 JUSTICE KAVANAUGH: Why is your line  
14 --

15 JUSTICE BARRETT: Sorry.

16 JUSTICE KAVANAUGH: Sorry. Why is  
17 your line better?

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

24 So, for example, we agree that there  
25 would be real concern to allowing the defense

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

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

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

23 And if the answer is yes, then he can  
24 have the conversation with the defendant. And  
25 if the answer is no, then he should abstain.

1 CHIEF JUSTICE ROBERTS: Is this --

2 JUSTICE BARRETT: So you --

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

15 I -- I find that a pretty hard line to  
16 get my hands around.

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

25 So, for example, if we went back to

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

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

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

22 MR. BARBER: I --

23 CHIEF JUSTICE ROBERTS: -- can  
24 testimony at least narrow the topic of  
25 conversation you're going to have?

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

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

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

16          MR. BARBER: Correct.

17          JUSTICE SOTOMAYOR: But --

18          JUSTICE BARRETT: I guess --

19          JUSTICE SOTOMAYOR: -- what if -- if  
20   --

21          JUSTICE BARRETT: -- I don't  
22   understand. You -- you really are objecting to  
23   discussing any kind of downstream effect or  
24   strategic consequence, including the need to  
25   call another witness, because the defendant on

1 the stand may have introduced a topic that now  
2 the lawyer wants to say do you know anyone  
3 who -- you know, you said X, so it would be  
4 good for us to call a witness to address that.  
5 Is there someone we can call?

6 Not protected?

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

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

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



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

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

15                JUSTICE SOTOMAYOR: Well, that's what  
16    we did. You may not like it, that fortuity,  
17    but we created a difference between Perry and  
18    Geders.

19                And I don't think the -- the  
20    difference was based, as you think, on the  
21    truth-seeking functions. That has a reason for  
22    the order, but Geders was very clear that there  
23    is an independent Sixth Amendment right for  
24    advice of counsel.

25                And what you're seeking to do is

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

8 And you're saying no.

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

12 JUSTICE SOTOMAYOR: Well, but that --  
13 you see, you're -- you're trying to cabin what  
14 is obviously not logical in your extreme  
15 position. The same thing with the plea  
16 bargaining situation.

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

24 You need to say something. The model  
25 rule says a lawyer shall explain a matter to

1 the extent reasonably necessary to make an  
2 informed decision.

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

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

16 JUSTICE SOTOMAYOR: Ah, that's the no.

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

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

23 MR. BARBER: About the testimony but  
24 you -- you --

25 JUSTICE SOTOMAYOR: Yeah.

1           MR. BARBER:  -- can leave that matter  
2     for another day.

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

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

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

25          CHIEF JUSTICE ROBERTS:  Briefly.

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

7           CHIEF JUSTICE ROBERTS: Thank you.  
8 Justice Thomas?

9           Justice Kagan?

10          Justice Barrett?

11          Justice Kavanaugh?

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

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

23          One of the things that we think is  
24 very important in this case is that even the  
25 root meaning of the right to counsel, which is

1 the right to counsel of choice, is subject to  
2 broad limitations.

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

12 CHIEF JUSTICE ROBERTS: Justice  
13 Jackson?

14 JUSTICE JACKSON: I guess I'm still  
15 just confused as to why a narrow tailoring  
16 requirement. Can you say more in response to  
17 Justice Kavanaugh?

18 I mean, we have a -- we have a Sixth  
19 Amendment right, I think you agree, to have  
20 counsel have access to his client about trial  
21 strategy, about matters that he's allowed to  
22 talk to him about. And so in a world in which  
23 you're prophylactic rule potentially encroaches  
24 on that because some of those trial strategies  
25 are intertwined with his testimony, I don't

1 understand why we would give the court the  
2 ability to preclude discussion of any  
3 testimony.

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

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

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

21 MR. BARBER: Well, the --

22 JUSTICE JACKSON: Not just testimony  
23 -- not strategy as a result of the testimony  
24 because we don't have time for that in 15  
25 minutes. The 15-minute window in Perry, when

1     it says you can only talk about testimony, what  
2     if we take that to mean you would be coaching  
3     your witness during that 15 minutes about what  
4     he just said or what he should say and that's  
5     off limits?

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

15            JUSTICE JACKSON: Thank you.

16            CHIEF JUSTICE ROBERTS: Thank you,  
17    counsel.

18            MR. BARBER: Thank you.

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

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

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



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

6           Second, the Court's questions to -- to  
7     my friends here suggest that the supposed line  
8     that Texas is drawing is no line at all. Lots  
9     of questions about what about this, what about  
10    that and so on.

11          Different trial courts are going to  
12    draw that line differently from the way my  
13    friend from Texas draws it. Defense lawyers  
14    will have no idea what they're allowed to  
15    discuss and what they're not allowed to  
16    discuss. And so of course they're going to err  
17    on the side as not discussing as -- as -- as  
18    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.

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

6                   Thank you.

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

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

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