SUPREME COURT
OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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DAVID ASA VILLARREAL,)

Petitioner,)

v.) No. 24-557

TEXAS,)

Respondent.)

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Washington, D.C.

Monday, October 6, 2025

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:04 a.m.

APPEARANCES:

STUART BANNER, ESQUIRE, Los Angeles, California; on behalf of the Petitioner.

ANDREW N. WARTHEN, Assistant Criminal District Attorney, San Antonio, Texas; on behalf of the Respondent.

KEVIN J. BARBER, Assistant to the Solicitor General, Department of Justice, Washington, D.C.; for the United States, as amicus curiae, supporting the Respondent.

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P R O C E E D I N G S

(10:04 a.m.)

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

Mr. Banner.

ORAL ARGUMENT OF STUART BANNER

ON BEHALF OF THE PETITIONER

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

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

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

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

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

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

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

I invite the Court's questions.

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

What's wrong with that?

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

JUSTICE THOMAS: No, he's saying --

MR. BANNER: -- in-court testimony.

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

MR. BANNER: Okay. Well, the --

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

So the -- the Court of Criminal Appeals -- the Court of Criminal Appeals interpreted the -- the -- let me -- I'm going to get the word -- exact wording exactly right from the -- from the court's opinion. The court -- the Court of Criminal Appeals said -- they described the question presented as: Does a trial judge's sua sponte order that defense counsel could confer with defendant on everything except his ongoing testimony violate the defendant's Sixth Amendment right to counsel?

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

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

JUSTICE THOMAS: No. During trial.

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

JUSTICE THOMAS: What's the difference?

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

JUSTICE THOMAS: No, what I'm talking about is why is the standard different between what a lawyer can coach or manage --

MR. BANNER: Oh --

JUSTICE THOMAS: -- with respect to testimony while he's on the stand, which is basically a concern, and what he can coach or manage during the recess.

MR. BANNER: No, no. It's -- it's the same. The -- the -- the -- the distinction -- let's be clear about the distinction between impermissible coaching and legitimate,

necessary counseling, right, because that's a sharp line. And in answer to your question, that line is the same at all times during the proceeding; that is, whatever is impermissible before trial begins is also impermissible during an overnight recess. It's impermissible at any time. And let's talk about what that difference is, right?

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

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

JUSTICE THOMAS: But did any of that happen here? Do we have evidence that any of

that happened?

MR. BANNER: But it couldn't have happened, it didn't happen, because the trial court barred the defense counsel from discussing Mr. Villarreal's testimony with him during the overnight recess.

JUSTICE JACKSON: Can I follow up on --

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

MR. BANNER: Yes.

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

MR. BANNER: Right.

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

Isn't that a real problem with respect to the attorney-client privilege? What is the prosecutor going to say? Okay, you had a break, you spent the evening with counsel, what did you talk about? Objection, Your Honor,

attorney-client -- you see how -- I don't see how that could a reasonable counterweight to the problems.

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

CHIEF JUSTICE ROBERTS: Well, what did --

MR. BANNER: -- or something like that.

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

MR. BANNER: The -- the Court in Geders said -- and we're -- we're merely following that -- that the way -- the way to

deter impermissible coaching is for the prosecutor to cross-examine the defendant about it.

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

JUSTICE JACKSON: But, counsel, I guess I don't understand why you're so focused on impermissible coaching as you have defined it. You say here and you say in your briefs that impermissible coaching is where the lawyer is trying to get the witness to change his

testimony or whatnot and that was impermissible both before and after and during --

MR. BANNER: Right.

JUSTICE JACKSON: All that's fine.

MR. BANNER: Right.

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

MR. BANNER: Right. That's right.

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

MR. BANNER: It --

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

MR. BANNER: This -- this is straight out of Perry, straight out of Perry. So the

Court -- the Court in Perry said that during a -- a brief daytime recess, the -- the -- the -- the court -- the -- the trial court can prevent all contact between the defendant and counsel.

JUSTICE JACKSON: I understand.

MR. BANNER: Yeah.

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

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

JUSTICE JACKSON: Right.

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

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

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

JUSTICE JACKSON: Yeah.

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

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

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

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

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

MR. BANNER: Yeah.

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

MR. BANNER: Yeah.

JUSTICE JACKSON: -- a difference between discussions that take into account the testimony, maybe even the fact of the

testimony, and something that one could call managing --

MR. BANNER: Right.

JUSTICE JACKSON: -- or prepping --

MR. BANNER: Right.

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

MR. BANNER: Right.

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

MR. BANNER: Right.

JUSTICE JACKSON: And what I understood the trial court here to be doing was just eliminating that very narrow category of conduct that a lawyer engages in to actually prepare his witness --

MR. BANNER: Right.

JUSTICE JACKSON: -- with respect to particular questions and answers on something.

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

contexts.

JUSTICE JACKSON: And why are they wrong about that?

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

JUSTICE KAGAN: But that's the line that Perry drew. I mean, if you go up a few sentences from the sentence that you read, the Court says, you know, an overnight witness -- an overnight recess is different. Why is it different? Because an overnight recess will go to matters that go beyond the content of the defendant's own testimony, matters that the defendant does have a constitutional right to discuss with his lawyer, suggesting that as to only the defendant's own testimony, the defendant does not have a constitutional right to discuss with his lawyer.

Now then it talks about how, of course, when you talk about the protected matters, there might be some incidental discussion of the testimony itself. So it concedes that perfectly willingly. But it

draws a pretty sharp line between matters going to trial strategy and matters going to trial testimony of the defendant itself and says that that's the reason why the recess -- the overnight recess versus 15-minute recess makes a difference.

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

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

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

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

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

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

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

MR. BANNER: Yeah.

JUSTICE KAGAN: -- says it right here --

MR. BANNER: Okay.

JUSTICE KAGAN: -- on page 284.

(Laughter.)

MR. BANNER: Yeah.

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

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

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

So -- so the -- before -- before the overnight recess, in his -- in his testimony,

the defendant has come very -- an unsophisticated defendant has come very close to mentioning excluded evidence that would be -- that would be absolutely devastating.

During the -- the -- the -- the overnight recess, defense counsel needs to say the defendant: Look, you nearly mentioned this -- this -- this evidence. Look, when we resume again tomorrow, you better remember not to mention that because we're -- we're going to be in big trouble if you -- if you -- if you -- if you mention that tomorrow.

Okay. Is that -- is that --

JUSTICE GORSUCH: See, I --

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

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

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

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

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

JUSTICE GORSUCH: I -- I -- I think what my colleagues are getting at and -- and what I kind of thought you even conceded in your brief is that coaching -- and -- and I -- maybe we're defining coaching differently, perhaps that's it -- but that there are some things that a district court can constitutionally prohibit counsel from doing and -- while -- while a witness is on the stand, even if there's a recess.

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

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

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

MR. BANNER: No. Well, but -- but -- but we --

JUSTICE GORSUCH: All right. If you

don't like that word, let's use management, okay, which is the word Texas used.

MR. BANNER: I like that word even less.

JUSTICE GORSUCH: Okay.

MR. BANNER: Yeah.

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

MR. BANNER: Okay.

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

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

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

MR. BANNER: Okay.

JUSTICE GORSUCH: Whatever the length of time.

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

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

JUSTICE GORSUCH: Obviously.

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

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

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

JUSTICE GORSUCH: Please.

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

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

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

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

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

JUSTICE GORSUCH: Well --

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

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

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

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

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

JUSTICE GORSUCH: -- to the defendant there?

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

JUSTICE GORSUCH: In civil -- in civil proceedings, where there's a right to counsel, presumably?

MR. BANNER: I --

JUSTICE GORSUCH: Yeah, it would apply

there, I think, your rule.

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

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

MR. BANNER: Not -- non -- non-defendant witnesses.

JUSTICE GORSUCH: Yeah.

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

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

MR. BANNER: No, no, no, no. No, no, no. So, again, this is -- this is Perry. Perry says that during a -- a -- a -- a daytime, brief daytime recess, the court can

cut off all contact.

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

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

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

MR. BANNER: No, no, no, because -- there's a footnote in Perry, maybe is what you're leading up to, that -- that -- that basically the greater includes the lesser; that is, if -- if -- where the trial court can cut off access to counsel, the trial court could allow selective access to counsel.

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

JUSTICE BARRETT: So it's all about time?

JUSTICE ALITO: Mr. --

MR. BANNER: It's all about time.

JUSTICE BARRETT: If it were three hours, if it were four hours, and it was

daytime --

MR. BANNER: Well, look, the --

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

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

Daytime recesses are usually pretty short. Overnight recesses are much, much longer. It's very easy to tell -- to -- to -- to draw that line. Now, in theory, you know, if a court were to say, look, we're going to have a recess from 9 a.m. to 5 p.m. and we're all going to -- we're going to be like a vampire court and just do it at night, you know, maybe --

JUSTICE BARRETT: Okay. So --

MR. BANNER: -- you get some hard questions.

JUSTICE BARRETT: -- your rule then is that anytime during the day when there is a recess, the district court could, subject to maybe some extreme case where it goes on for

too long and you have a vampire court, the court could say you can talk to your lawyer about everything, except the lawyer cannot manage your testimony during the day?

MR. BANNER: Again, because --

JUSTICE BARRETT: During the day?

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

JUSTICE BARRETT: Right.

MR. BANNER: Quite right.

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

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

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

MR. BANNER: Well --

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

MR. BANNER: Well, Geders says that --

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

MR. BANNER: Yeah, because Geders says that, but Geders -- Geders was correct in saying that, right? Geders -- Geders pointed

out correctly that overnight recesses are -- have always been times of intense strategizing, discussion, and so on and -- and whereas Perry said, well, not so for -- for -- for brief daytime recesses.

Let me, if I could --

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

MR. BANNER: Yeah.

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

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

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

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

JUSTICE ALITO: Right.

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

JUSTICE ALITO: Okay. The next day --

MR. BANNER: Yeah.

JUSTICE ALITO: -- the next day, when the defendant takes the stand, everything is cleared up. Now he's back to -- you know, it's a sea change back to what was rehearsed, your

word, in your words, before trial.

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

MR. BANNER: Well --

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

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

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

But you think that --

MR. BANNER: Yeah.

JUSTICE ALITO: -- the prosecutor --

MR. BANNER: Well --

JUSTICE ALITO: -- can go into that?

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

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

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

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

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

MR. BANNER: Because -- because --

you're right. Let me -- I was about to do that. You're right to suggest that there are -- there are times when a -- a well-timed overnight recess can be an advantage to a defendant that another defendant who doesn't get an overnight recess wouldn't have. That's absolutely right. But that is a result that is required by the Sixth Amendment because the alternative would be much, much worse. The --

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

MR. BANNER: Yeah.

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

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

JUSTICE ALITO: Same rule in the --

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

JUSTICE ALITO: Different rule. Why?

MR. BANNER: Different results.

JUSTICE ALITO: Why?

MR. BANNER: Well, two reasons, right? One is that that's what Perry said. We're

just -- we're just repeating the holding of Perry. You want to overrule Perry, I'm not going to complain, but that was the -- that was the -- the holding of Perry.

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

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

MR. BANNER: Very beneficial.

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

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

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

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

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

MR. BANNER: All right.

CHIEF JUSTICE ROBERTS: We'll be back.

Justice Thomas, anything further?

Justice Alito?

JUSTICE ALITO: Okay. Once again. Two --

(Laughter.)

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

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

What happens then?

MR. BANNER: Well, your -- your latter alternative would violate the Sixth Amendment.

During an overnight recess, you have a right to talk about your testimony with -- with counsel. It's very -- that's super -- super-important.

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

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

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

MR. BANNER: Yes.

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

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

In fact, the Court discussed this --

excuse me -- the Court --

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

MR. BANNER: Right. Right. But --

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

MR. BANNER: But --

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

MR. BANNER: Well, look, the --

JUSTICE ALITO: That's allowed.

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

JUSTICE ALITO: All right. Thank you very much.

MR. BANNER: Okay.

CHIEF JUSTICE ROBERTS: Justice Sotomayor?

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

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

JUSTICE SOTOMAYOR: Counsel, just answer yes or no.

MR. BANNER: Well, okay. Mostly yes.

JUSTICE SOTOMAYOR: Okay. So assume, please, and don't fight me, that I think that Texas's position is more nuanced, and I accept that improper coaching that could be prohibited included working through -- walking through potential questions and answers, telling a defendant to use one word and not another word, what generally is thought of coaching, but

Texas, and I think Justice Kagan defined their position, they can discuss incidental effects of testimony, and that would include -- and pay attention to the list-- plea bargaining, including telling a defendant that they did lousy and they should take the plea; perjury, you lied and you shouldn't; excluded evidence, the one that you were worried about; other witnesses and where they might be located, contact information.

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

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

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

MR. BANNER: Right.

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

MR. BANNER: Okay.

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

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

JUSTICE SOTOMAYOR: I just said --

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

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

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

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

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

JUSTICE SOTOMAYOR: All right. Assuming I believe there is the workability issue, there's no other topic you can think of?

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

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

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

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

MR. BANNER: No, no. There's -- there -- there -- there's more. So -- so the colloquy here is at pages 4 and 5 of the blue brief, right? So the -- the -- the court says, I don't -- don't -- what you can't discuss

is -- this is the -- the -- the second-to-last paragraph on page 4 -- the court says the thing that the -- that you can't discuss is -- the very start of that paragraph -- his testimony.

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

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

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

MR. BANNER: Okay, okay.

CHIEF JUSTICE ROBERTS: Justice Kagan?

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

And -- and it seems to me, like,

unless you can tell me what other things there are like that, that, you know, Texas is basically saying anything that's relevant to larger matters of trial strategy, that should go in one bucket.

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

MR. BANNER: Yeah. Well --

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

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

Overnight, they need to be able to

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

At the very least, it's --

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

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

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

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

Texas's view as I understand it is

that the Sixth Amendment protects this list of 11 things you can talk about but not this other list of seven things that you can't talk about.

JUSTICE KAGAN: I don't think that that's fair. I think what Texas is saying, and Texas can correct me if I'm wrong, but it's pretty clear, which is that if the -- if the trial testimony comes up because it's relevant to trial strategy decisions, like whether to take a plea bargain, like whether to go find another alibi witness, like what to do about a piece of excluded evidence, et cetera, et cetera, then you're allowed to talk about it. But it has to be incidental in that way to trial strategy decisions. It can't just be: Oh, my gosh, you didn't do that very well, could we try to do it better, thanks.

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

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

MR. BANNER: Okay.

JUSTICE KAGAN: But I -- I take that

to be the difference.

MR. BANNER: Yeah.

JUSTICE KAGAN: Okay.

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

JUSTICE KAGAN: Thank you.

CHIEF JUSTICE ROBERTS: Justice Gorsuch?

Justice Kavanaugh?

JUSTICE KAVANAUGH: I'm trying to figure out the logic of a line based on a 15-minute recess versus a lunchtime recess versus a lunchtime plus I have another matter I have to handle, so it's going to be a two-hour break recess versus an overnight recess.

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

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

MR. BANNER: Well, yeah. So --

JUSTICE KAVANAUGH: -- where -- two things. Where does it come from? And what's

the logic?

MR. BANNER: Okay.

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

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

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

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

JUSTICE KAVANAUGH: And what -- I mean --

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

JUSTICE KAVANAUGH: Where does it come from?

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

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

MR. BANNER: Right.

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

MR. BANNER: An overnight recess.

JUSTICE KAVANAUGH: Overnight recess.

MR. BANNER: Yeah, yeah -- yeah.

JUSTICE KAVANAUGH: A long enough recess overnight. But, if not, Perry says no.

And so those defendants are going to be treated much differently, and -- and does that make a lot of sense?

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

And the shorter you go in a recess, the less true that is, until you get to 15 minutes, and -- and -- and it's probably not true. But I -- I understand Perry as really the -- the -- again, you -- the government needs a very strong reason to -- to -- to override the right to the assistance of counsel. And -- and -- and I read Perry as basically being that reason being just the logistics of trial management.

JUSTICE KAVANAUGH: Thank you.

CHIEF JUSTICE ROBERTS: Justice Barrett?

Justice Jackson?

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

trial.

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

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

JUSTICE JACKSON: So why not? Why not?

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

JUSTICE JACKSON: So just pure logistics is what --

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

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

time?

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

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

JUSTICE JACKSON: Okay.

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

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

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

JUSTICE JACKSON: Why?

MR. BANNER: That's Perry.

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

MR. BANNER: Well --

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

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

JUSTICE JACKSON: Yeah.

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

JUSTICE JACKSON: Yeah.

MR. BANNER: -- it's -- I think it's -- it's mostly just a matter of trial management because you think about -- if you say you have a right to counsel, to confer with

counsel during a 15-minute recess, you can see the obvious questions, five-minute recess, one-minute recess, and so on. And so I think the Court just said, look, at some point, a recess is just too short.

JUSTICE JACKSON: Thank you.

MR. BANNER: Thank you.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Mr. Warthen.

ORAL ARGUMENT OF ANDREW N. WARTHEN

ON BEHALF OF THE RESPONDENT

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

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

Both rules are supported by this Court's precedents. In Geders versus United States, this Court barred absolute no conferral orders during long breaks, but it never opined on qualified orders. Indeed, Geders himself

would have been fine with such an order. In Perry versus Leeke, this Court allowed both absolute and qualified orders during short breaks, emphasizing the importance of untainted cross-examination to uncovering the truth.

Perry reconciled its holding with Geders by noting that there is a constitutional difference between discussing ongoing testimony, which is not protected, and discussing other trial-related matters, which is protected. And as long as protected matters can be discussed, the right to counsel is preserved.

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

I welcome the Court's questions.

JUSTICE THOMAS: After the night passed and -- and the -- the -- there was no --

you had testimony by Petitioner, was there some objection to the judge's order in -- in the sense that Petitioner said or his lawyer said that they were not allowed to discuss the matters other than testimony?

MR. WARTHEN: Not at all, Your Honor. When they came back the next day, the trial court asked them if there was anything to bring up. They never -- they said nothing from the defense, Your -- Your Honor. And they never filed a motion for a new trial.

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

JUSTICE THOMAS: Thanks.

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

MR. WARTHEN: Yes, Your Honor.

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

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

JUSTICE GORSUCH: I think that's right. That would be the only reason why we'd have to reach the government's position.

MR. WARTHEN: Mm-hmm.

JUSTICE GORSUCH: You agree with that?

MR. WARTHEN: Yes.

JUSTICE GORSUCH: Okay. And then, when --

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

JUSTICE GORSUCH: And when we come to that, you've got, I think, the relevant language at page 23 in your brief, where the court says that -- well, actually, where we

said in Perry that "an overnight recess that would encompass matters that go beyond the content of defendant's own testimony, matters that the defendant does have a constitutional right," those are protected.

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

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

JUSTICE GORSUCH: Okay.

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

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

MR. WARTHEN: That this is a narrow order?

JUSTICE GORSUCH: Yeah.

MR. WARTHEN: Well, so, if you look at page 7A of the appendix, he says: "I don't want you discussing what you couldn't discuss with him if he was on the stand in front of the

jury...". His testimony. I'm not sure whatever else you would like to talk to him about when he's on the stand, but ask yourself before you talk to him about something, is this something that manages testimony in front of the jury?

And I think what he's saying here is the only thing you'd want to do while he's on the stand testifying is go up there and say you need to slow down, you need to stop shifting, you need to look at the jury in the eye, you need to remember the things that we talked about as far as the things you should say, here are the questions I'm going to ask you next. That's all managing in the way we define it.

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

JUSTICE GORSUCH: And, as Justice Thomas pointed out, there were no questions or

follow-up clarification --

MR. WARTHEN: Exactly.

JUSTICE GORSUCH: -- requests from counsel on that.

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

JUSTICE GORSUCH: Thank you, Mr. Warthen.

JUSTICE SOTOMAYOR: Counsel --

CHIEF JUSTICE ROBERTS: Counsel, let -- let -- let's say the defendant and the lawyer go into their, you know, wherever for the evening recess, and the defendant says something like: Counsel, you remember when we were preparing for this, we both agreed we should try to get the jury to focus on Fred, and whenever it's reasonable, I should mention Fred, and I've been doing that, and I notice every time I do that, you know, Juror Number 8 gets a big frown and shakes his head. He doesn't look to me like he likes the idea of

talking about Fred at all. So I think that's a bad idea. Now talking about Fred was your idea. Do you still think it's a good idea?

Can the lawyer respond to that question?

MR. WARTHEN: No. They would have to tell them I'm under a court order not to -- not to answer that.

CHIEF JUSTICE ROBERTS: So, at that point, he tells the defendant, who's facing a capital sentence, I'm not going to tell you? It's a very simple thing. Don't talk about -- he's not saying particular things, but let's -- let's stop talking about Fred whenever we can.

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

JUSTICE SOTOMAYOR: Counsel --

JUSTICE KAGAN: Do you think that the --

JUSTICE SOTOMAYOR: No, go ahead.

JUSTICE KAGAN: Do you think that counsel can say, listen, I've been noticing that you've been mumbling and you're also not making eye contact with --

MR. WARTHEN: Mm-hmm.

JUSTICE KAGAN: -- the questioner, and it would just be a good idea if you'd stop mumbling and made eye contact? Can the lawyer do that in an overnight recess?

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

JUSTICE KAGAN: Yeah. So the -- the -- the line that you're drawing -- and you draw this on page 14, and I just want to make sure that -- that you're still saying what you're saying on page 14, where you say "direct discussion, i.e., testimonial management," that is, direct discussion of the testimony, right --

MR. WARTHEN: Mm-hmm.

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

But counsel can still discuss a range of issues related to the testimony, including

calling additional witnesses, plea bargains, legal objections, court orders, excluded evidence, and the implications of perjury, among others.

MR. WARTHEN: Yes.

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

MR. WARTHEN: Yes. The touchstone is always the lawyer should contemplate for a moment and ask themselves is this going to cause me to manage their testimony. That -- the way we define that is coaching, regrouping, strategizing about the testimony itself, not about other things related to the -- the -- you could strategize all you want about should we still bring in the expert witness, things like that. But, as far as the -- how the testimony is ongoing, that would not be allowed.

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

MR. WARTHEN: Mm-hmm.

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

MR. WARTHEN: No, I think that's a very real line because, I mean, one, the case

law draws that line. And I think the logic of Perry is very strong.

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

And I think there's a lot of logic to that because, if it wasn't logical, then we would have to get rid of this rule for all witnesses. I mean, all witnesses would have to be -- oh, let's say this -- we flip it around. Let's just say it's the state's star witness. Let's say the victim had lived in this case and it was an aggravated assault case. Why wouldn't the state be able to talk to the witness overnight and coach their testimony if -- if the -- if the -- if the victim is not doing very well on the stand?

The same logic would apply the other way.

JUSTICE KAGAN: Thank you.

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

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

MR. WARTHEN: Mm-hmm.

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

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

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

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

I would --

JUSTICE KAVANAUGH: Yeah.

MR. WARTHEN: If I were the judge, I would say: Okay, I'm not going to go through an entire list of everything you can talk

about, but whenever you're sitting there talking to your client, I want you to ask yourself, is this directly talking about the testimony or is this talking -- is -- conceptually, is this something that's a derivative matter from it, and, in any event, regardless of what you're talking about, does this require you to coach, regroup, or strategize about the testimony itself?

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

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

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

And our rule also allows any lawyer, if they're just not sure and they -- they really don't want to run afoul the -- the court's order, to come back and ask the trial court and to say: Your Honor, I wasn't sure

about this, can I get some clarification or even maybe some reconsideration?

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

JUSTICE KAVANAUGH: So that's -- that's important. That's your solution to ambiguity --

MR. WARTHEN: Mm-hmm.

JUSTICE KAVANAUGH: -- for the lawyers, is just come back and ask if there's something you want to talk about?

MR. WARTHEN: That's right.

JUSTICE JACKSON: Counsel, let me ask you about the government's -- the -- the Solicitor General's position, which we've now established is much broader. It's a no-testimony order.

MR. WARTHEN: Mm-hmm.

JUSTICE JACKSON: What are your thoughts on the workability of that? I mean, the -- the -- the counsel on the other side

suggests that there are all kinds of discussions that involve trial strategy that are going to be related to the defendant's testimony --

MR. WARTHEN: Mm-hmm.

JUSTICE JACKSON: -- so a no-testimony order might be sweeping too broadly, or at least that's the argument.

Do you have an opinion about that?

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

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

But, at the same time, it -- it excises as much as possible to protect the integrity of trial the things that they don't have the right to talk about, which is the ongoing -- the substance of the ongoing testimony.

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

MR. WARTHEN: Mm-hmm.

JUSTICE SOTOMAYOR: Do you agree with that rule?

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

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

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

MR. WARTHEN: Mm-hmm.

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

MR. WARTHEN: Mm-hmm.

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

MR. WARTHEN: Mm-hmm.
JUSTICE SOTOMAYOR: So that's the close case here, what can they do.
MR. WARTHEN: Mm-hmm.
JUSTICE SOTOMAYOR: You would say they can say to the -- to the defendant: If you commit perjury, these are the consequences. Correct?
MR. WARTHEN: Yes.
JUSTICE SOTOMAYOR: If the government says no, that's really dangerous.
How about plea bargain? The government said no in its brief to saying: Your testimony is really bad.
MR. WARTHEN: Mm-hmm.
JUSTICE SOTOMAYOR: You should reconsider taking this.
If the lawyer doesn't do that, he or she is not supporting their ethical obligation to give the defendant information, adequate information, to consider a plea, correct?
MR. WARTHEN: Well, I think, in order to comply with court orders, you are able to --
JUSTICE SOTOMAYOR: Excuse the ethical obligation?

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

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

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

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

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

JUSTICE SOTOMAYOR: Right.

MR. WARTHEN: Yeah.

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

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

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

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

MR. WARTHEN: Yeah. Yes.

JUSTICE SOTOMAYOR: All right. Thank you.

MR. WARTHEN: I'm sorry.

JUSTICE GORSUCH: Mr. --

JUSTICE BARRETT: Counsel --

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

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

What if the court says -- or what if -- if we were to say that qualified conferral orders are okay if they tell the

lawyer: Listen, you can't talk about the content of the testimony or the manner of its delivery, but you can discuss any strategic consequences of the defendant's testimony, such as whether to take a plea, whether to call another witness, et cetera?

Are you okay with that?

MR. WARTHEN: Yes.

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

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

MR. WARTHEN: Mm-hmm.

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

MR. WARTHEN: Mm-hmm.

JUSTICE GORSUCH: -- because I'm under a court order perhaps, but I would have thought that our unconstitutional conditions doctrine would have something to say about unnecessarily chilling the Sixth Amendment right that's at stake here.

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

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

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

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

Another option would be the defendant finishes his testimony, you tell the trial court: Something very important came up during his testimony, if we could just have a moment

to -- to talk, if we can just have a little bit of time.

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

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

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

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

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

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

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

MR. WARTHEN: Mm-hmm.

JUSTICE ALITO: And then, on cross, the defendant messes up --

MR. WARTHEN: Changes --

JUSTICE ALITO: -- and says B, something that's completely inconsistent.

Doesn't that allow the defense

attorney to say: Look, you know, you're under oath. You can't commit perjury.

MR. WARTHEN: Mm-hmm.

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

MR. WARTHEN: Mm-hmm.

JUSTICE ALITO: That would be allowed?

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

But what you could do is just establish that perjury was committed and let the defendant know this is going to be dealt

with tomorrow.

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

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

JUSTICE KAGAN: Now why -- why is that, Mr. Warthen? I mean, if you had said, as you do on page 14, that you can talk to the

defendant about trial testimony when it's incidental to a big --

MR. WARTHEN: Mm-hmm.

JUSTICE KAGAN: -- trial strategy decision like whether to take a plea bargain, and the person says to you, I don't understand, like, what do you think went wrong, like, what -- why was it so serious that I now have to tell this? And you say I -- I can't tell you, just trust me that you have to take a plea bargain.

MR. WARTHEN: Mm-hmm.

JUSTICE KAGAN: And the person says, what do you mean, trust me? I mean, I want this -- I want to understand, like, why this went so wrong --

MR. WARTHEN: Mm-hmm.

JUSTICE KAGAN: -- now I have to completely alter my understanding of what I'm supposed to do here.

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

MR. WARTHEN: My time is up, but would

I be able to answer, Your Honor?

CHIEF JUSTICE ROBERTS: Sure.

MR. WARTHEN: So the reason is because you're going to be managing their testimony and that the whole -- the whole point of the order, the -- all the logic behind Perry is that you should not be able to do that because you're basically telling the -- the -- the defendant, well, if you start -- if you stop mumbling, if you start looking the jury in the eye, and you start giving clearer answers, well, then you won't have to take that plea bargain. It would be too easy of a work-around.

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

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Justice Thomas?

Justice Alito?

Justice Sotomayor?

Justice Kagan?

Justice Gorsuch?

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

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

CHIEF JUSTICE ROBERTS: Justice Kavanaugh?

Justice Barrett?

Justice Jackson?

Thank you, counsel.

MR. WARTHEN: Thank you.

CHIEF JUSTICE ROBERTS: Mr. Barber.

ORAL ARGUMENT OF KEVIN J. BARBER
FOR THE UNITED STATES, AS AMICUS CURIAE,
SUPPORTING THE RESPONDENT

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

In Perry, this Court held that a criminal defendant, like any other trial witness, has no right to discuss his testimony with counsel after that testimony has begun. That principle is consistent with Geders and with the long history of sequestering witnesses in order to safeguard the truth-seeking function of trial. Because a defendant has no right to discuss his testimony midstream, an order barring discussion of only that testimony and nothing else is constitutional, just as a defendant has no right to a time-out in the middle of testimony to confer with counsel.

Petitioner's claim reduces to the assertions that qualified conferral orders are unworkable because testimony can't be distinguished from other matters and unnecessary because courts can just prohibit coaching. But Perry squarely rejects both of those propositions, and it explicitly endorses

qualified orders of the kind that was issued here.

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

I welcome the Court's questions.

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

MR. BARBER: So there are many other trial matters, Justice Thomas, that the defense may want to discuss, from other witnesses' testimony, to physical evidence, to strategies for the upcoming closing argument, to grounds for appeal, sentencing matters.

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

JUSTICE BARRETT: So is really your --

JUSTICE KAVANAUGH: Why is your line --

JUSTICE BARRETT: Sorry.

JUSTICE KAVANAUGH: Sorry. Why is your line better?

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

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

So our rule accounts for that. We think it's a reasonably clear rule because, first of all, it's drawn straight from this Court's decision in Perry. This is exactly how

the Court phrased the scope of permissible qualified orders in Footnote 8 of that decision.

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

And if the answer is yes, then he can have the conversation with the defendant. And if the answer's no, then he should abstain.

CHIEF JUSTICE ROBERTS: Is this --

JUSTICE BARRETT: So you --

CHIEF JUSTICE ROBERTS: I had trouble getting my hands around what you meant by this on page 28 to 29 of your brief. You list a variety of matters that are pertinent to the trial, and then you said, "Those and other matters may be related to the defendant's testimony in the tangential sense that they bear on the trial context in which the testimony is taking place... A defendant and his counsel can conceptually discuss such

matters without veering into the problematic ground of the ongoing testimony as such."

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

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

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

That doesn't mean that you're discussing the testimony itself, and that

doesn't mean that the kind of dangers to the truth-seeking function of trial are presented by that kind of discussion.

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

MR. BARBER: I --

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

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

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

not on the table.

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

MR. BARBER: Correct.

JUSTICE JACKSON: But --

JUSTICE BARRETT: So I guess --

JUSTICE JACKSON: -- what if -- what if --

JUSTICE BARRETT: -- I don't understand. You -- you really are objecting to discussing any kind of downstream effect or strategic consequence, including the need to call another witness, because the defendant on the stand may have introduced a topic that now the lawyer wants to say do you know anyone who -- you know, you said X, so it would be good for us to call a witness to address that. Is there someone we can call? Not protected?

MR. BARBER: Correct. I think a couple points on that, Justice Barrett. So, first of all, we are acknowledging the fact that our rule is partly prophylactic in nature. So we're not saying that the Sixth Amendment rule needs to be tailored specifically to

communications that directly impede the truth-finding function of trial.

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

The other -- the other important point I think I need to make is that, you know, we can all readily imagine and we've been discussing this morning important conversations that we have the intuition the defense should be able to have, but if Petitioner got his wish and if all defense testimony or defendant's testimony were conducted continuously, without a break, then, by definition, this kind of opportunity for those discussions would not arise.

So the opportunity to discuss potential perjury wouldn't come up because there wouldn't be a recess fortuitously intervening. So the notion that the Sixth Amendment rights of a defendant should turn on

the fortuity of that recess strikes us as far-fetched and that's what drove us to adopt the position.

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

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

And you're saying no.

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

JUSTICE SOTOMAYOR: Well, but that --

you see, you're -- you're trying to cabin what is obviously not logical in your extreme position.

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

You need to say something. The model rule says a lawyer shall explain a matter to the extent reasonably necessary to make an informed decision.

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

MR. BARBER: So I -- I certainly want to repeat, Justice Sotomayor, that we don't disagree with Texas's rule. And if you wanted to say that because this order in this case was narrow enough to just prohibit management of the testimony, we're going to say that's

permitted by the Sixth Amendment. That's fine with us as long as you don't suggest that that's all that courts can do.

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

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

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

MR. BARBER: About the testimony, but you -- you --

JUSTICE SOTOMAYOR: Yeah.

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

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

court could do more?

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

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

CHIEF JUSTICE ROBERTS: Briefly.

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

CHIEF JUSTICE ROBERTS: Thank you.

Justice Thomas?

Justice Kagan?

Justice Barrett?

Justice Kavanaugh?

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

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

One of the things that we think is very important in this case is that even the root meaning of the right to counsel, which is the right to counsel of choice, is subject to broad limitations.

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

CHIEF JUSTICE ROBERTS: Justice Jackson?

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

I mean, we have a -- we have a Sixth Amendment right, I think you agree, to have counsel have access to his client about trial strategy, about matters that he's allowed to talk to him about. And so, in a world in which your prophylactic rule potentially encroaches on that because some of those trial strategies are intertwined with his testimony, I don't understand why we would give the court the ability to preclude discussion of any testimony.

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

The Court in Perry drew the line at discussion of testimony versus discussion of other matters. And that's the line that undergirds the basic holding of Perry. The

idea is that because, during the 15-minute recess at issue, which is taken sort of in the heat of the testimony when it's top of mind, the only thing likely to be discussed during that kind of recess is the testimony, that's the way the Court phrased it. And that --

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

MR. BARBER: Well, the --

JUSTICE JACKSON: Not just test -- not strategy as a result of the testimony because we don't have time for that in 15 minutes. The -- the 15-minute window in Perry, when it says you can only talk about testimony, what if we take that to mean you would be coaching your witness during that 15 minutes about what he just said or what he should say and that's off limits?

MR. BARBER: Right. So, if you agree with Texas and with us that the order here is reasonably read as just prohibiting management of the testimony, then this case is a very easy case because Perry clearly says that that is constitutional under the Sixth Amendment.

Leave -- leave for another day whether the SG is right about this potential broader rule. That's all you need to do.

JUSTICE JACKSON: Thank you.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

MR. BARBER: Thank you.

CHIEF JUSTICE ROBERTS: Rebuttal, Mr. Banner?

REBUTTAL ARGUMENT OF STUART BANNER
ON BEHALF OF THE PETITIONER

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

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

Second, the Court's questions to -- to my friends here suggest that the supposed line that Texas is drawing is no line at all. Lots of questions about what about this, what about that and so on. Different trial courts are going to draw that line differently from the

way my friend from Texas draws it. Defense lawyers will have no idea what they're allowed to discuss and what they're not allowed to discuss, and so, of course, they're going to err on the side of not discussing, as -- as -- as trial counsel did here.

Finally, for decades now, the majority rule in the United States has been that the defendant has a right to the complete discussion of testimony during overnight recesses. It's been a very clean rule, unlike the rule that Texas and even the United States advocates. And it's the right rule because strategizing about testimony is one of the most important things that defense lawyers do. It's one of the most important kinds of assistance that defense counsel provides.

Thank you.

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

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

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