In the

Supreme Court of the United States

JOHN A GEDERS,

Petitioner

vs.

UNITED STATES

No. 74-5968

Washington, D. C.
December 1, 1975

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v.

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Docket 74-5968

Washington, D. C.

Monday, December 1, 1975

The above-entitled matter came on for argument at 10:57 o'clock a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

SEYMOUR L. HONIG, ESQ., Suite 311, First National Bank Building, 215 Madison Street, Tampa, Florida 33602
CoCounsel for Petitioner

SIDNEY GLAZER, ESQ., Criminal Division, Department of Justice, Washington, D.C. 20530
For Respondent

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 74-5968, Geders against United States.

Mr. Honig, you may proceed when you are ready.

ORAL ARGUMENT OF SEYMOUR L. HONIG, ESQ.

ON BEHALF OF PETITIONER

MR. HONIG: Mr. Chief Justice and may it Please the Court:

My name is Seymour L. Honig. I am an attorney from Tampa, Florida.

Seated at counsel table is Richard H. McInnis, also an attorney from Tampa, Florida. Mr. McInnis and I represent the Petitioner, John Geddes.

Your Honors, the Petitioner is here pursuant to issuance of writ of certiorari for the Fifth Circuit to review what appears to be a conflict between two circuits regarding the question presented for review before this Honorable Court.

The matter on review arises out of certain trial proceedings in the United States District Court, Middle District of Florida, Tampa Division, in which the Petitioner, John Geders, was on trial as a Defendant charged with particular offenses.

During the trial the court issued an across-the-board incommunicado order prohibiting the defendant from

communicating or having any access to and with his attorney during a 16-hour overnight recess period between the conclusion of direct examination and the conclusion of cross-examination of the defendant himself.

The relevant factual situation, your Honors, as it relates to the question presented for review, commenced on the next-to-the-last day of trial.

At that time, the Petitioner Geders took the witness stand on his own behalf and his attorney, Mr. Rinehart, who was the defense counsel at the time of the trial completed direct examination at approximately 4:55 p.m. in the afternoon, a usual time for recess in the United States District Court, the Middle District in Tampa.

However, in response to a motion of the prosecutor, Mr. Blasingame, his Honor, Judge Krentzman, decided to recess the particular trial until the following day. Apparently Mr. Blasingame wanted to prepare, as is not unusual, for cross-examination because there was an extensive direct examination of the defendant in that particular matter.

But recess was not ordered, your Honors, before the prosecutor, Blasingame, questioned the Court with respect to certain instructions that he desired that the Court issue to the accused and his counsel and with the permission of the Court I would like to refer to page 17 of

the Appendix at which time Mr. Blasingame stated, "Has this witness been instructed now that he is not to talk to anyone whatsoever, including his attorneys -- or anyone -- about this case at all?"

And this is the prosecutor, your Honors, addressing the Court at the time that recess was going to be ordered by the District Judge.

Just below that Mr. Rinehart, in response thereto, stated, "If he were instructed not to talk to his attorney, I feel that it would be improper. I think I always have the right to talk to my client." Of course the emphasis is mine but the words were Mr. Rinehart's.

QUESTION: Mr. Honig, at this point, let's follow through on that. Suppose this were a noon recess -- the same answer?

MR. HONIG: The same answer? Well, your Honor, Mr. Justice, this was a situation when he was denied 16 hours with his counsel.

QUESTION: I know, but suppose it were a noon recess of one hour. Would your answer be the same?

MR. HONIG: Yes, it would be, your Honor, but the reason --

QUESTION: Supposing it were a rest and relaxation period to allow the jury to go to the bathroom, five minutes. Same answer?

MR. HONIG: It would be essentially the same answer, your Honor, because it would be a violation of a basic constitutional safeguard.

QUESTION: In logic, you have to give that answer, don't you?

MR. HONIG: In logic and in practice and in defense of the Constitution as I see it, your Honor, yes.

QUESTION: And then suppose the judge here had said,"We'll finish with this witness tonight" and declared no recess. Would you be here?

MR. HONIG: If he declared no recess and cross-examination was continued immediately subsequent to direct examination, no, not at all, your Honor, I would not be here.

QUESTION: Even though it continued well past your closing time in the Middle District Court?

MR. HONIG: That is correct and I would not object to the fact that counsel for the defense would have not the opportunity to discuss anything with his client during the process of cross-examination, which I well understand, Mr. Justice.

QUESTION: So that your right to discuss is not absolute. It depends on the accident of a recess.

MR. HONIG: No, not completely, your Honor.

My point is this, that the recess did occur, but

at the instance of the government, who moved for it, not the defense.

If the recess -- and it was -- granted, then certainly I would submit respectfully that defense counsel should not be denied the right to consult with his client and this would be most consistent with the right to assistance of counsel for one's defense, pursuant to the Sixth Amendment, sir.

QUESTION: You have the right to insist on a recess between direct and cross-examination at all times?

MR. HONIG: No, your Honor. One does not have the right. I would say this would be discretionary with the Court and I would say that in this particular situation the Court accommodated the Government.

As matter of fact, the judge, the trial judge, was well-prepared to continue with the proceedings and go with the cross-examination but the government moved for a recess because of its reason to prepare.

QUESTION: Would it make a difference if you had requested the recess?

MR. HONIG: No, it would not, your Honor, I submit. If the government -- if his Honor at that time assented to a recess, then I would submit that certainly counsel and client would have a right to consult with one another.

QUESTION: Well, suppose the judge had you making the application, granted provided --

MR. HONIG: Defense was making the application, Mr. Justice Brennan?

QUESTION: And the judge said, "Granted, provided you do not talk to your client during the recess."

MR. HONIG: I would be here for that, your Honor.

QUESTION: You would?

MR. HONIG: Yes. Yes, your Honor, I would be.

QUESTION: You are saying that a trial judge has no discretion whatever to limit the conversations of the witness who is --

MR. HONIG: Defense witness, Mr. Justice, Mr. Chief Justice.

QUESTION: -- who is under cross-examination.

MR. HONIG: Yes, your Honor.

QUESTION: Defense witness or defendant?

MR. HONIG: This is defendant, your Honor.

QUESTION: Defendant. I thought you were confining it to --

MR. HONIG: Defendant. This is not a defense witness. A defendant.

QUESTION: -- confining your claim to access and communication between him and his counsel at a time when

he is not on the witness stand.

MR. HONIG: Precisely. That is exactly my point.

QUESTION: And that is the answer to Mr. Justice Blackmun's question.

MR. HONIG: Excuse me. I misunderstood you.

QUESTION: Why go so far as to say that if there is a five-minute recess, the judge can tell him, "You sit there and don't talk to anybody," that that is a violation of somebody's rights? Why do you go that far?

MR. HONIG: Because I would submit that this is inherent prejudice, that there is inherent prejudice that flows from the violation of that basic constitutional safeguard.

QUESTION: Say the judge said, "For the next five minutes, nobody talks to anybody." Then you get reversible error. Why do you have to go that far? You have got 16 hours in this case.

Why do you have to cut it to five minutes?

QUESTION: Well, he had to answer our colleague's questions.

MR. HONIG: Yes, I cut it -- this was in response to your colleague's questions, Mr. Justice Marshall. If it would be five minutes to 16 hours, my answer would be much the same.

QUESTION: It is your case.

MR. HONIG: Sir?

QUESTION: It is your case.

MR. HONIG: Yes, sir.

QUESTION: Yet you concede that the defense counsel doesn't have a right to insist that cross be interrupted, cross of his client on the stand, in order that he may confer with him for a few minutes.

MR. HONIG: Not during the trial proceedings itself in the midst of a courtroom, unless some undue occurrence happened to take place.

QUESTION: So that the right of consultation between the defendant and his counsel is not an absolute one. It can't be demanded at any time during the proceedings.

MR. HONIG: I would submit that a 16-hour recess, subsequent to a recess, is a critical stage of the proceedings at which time the guiding hand of counsel has to be present, Mr. Justice Rehnquist, in meaningful defense.

QUESTION: The guiding hand of counsel to coach the man what to say on cross?

MR. HONIG: No, your Honor, no. Excuse me, your Honor, that is not what I meant to say at all. Coaching is not what defense counsel in this case wanted to do. He wanted to discuss with his counsel -- this is the next-to-the-last day of trial -- witnesses who might be

called and trial strategy. This is always something to be discussed between attorney and client.

QUESTION: Well, didn't Judge Krentzman allow that sort of a consultation?

MR. HONIG: I beg your pardon, your Honor.

QUESTION: Didn't Judge Krentzman, in his order, allow that sort of consultation?

MR. HONIG: Not actually. With all due respect to Judge Krentzman, who I have great respect for, his statement was, really, in effect a sham because what he stated to counsel was that he was to discuss before the bench what witnesses he was going to, planning to call. In other words, consult with his client with respect to what witnesses they were going to decide to call -- really, rather a privileged revelation mother of privilege matter before the bench and then Judge Krentzman said, well, I am not going to sacrifice this whole matter for your strategy, in effect this is what he said. This is what is revealed in the Appendix. "And if we need a month after this, I'll give it to you to prepare your case or to continue with strategy but you are not going to be able to talk to your client at this particular stage for 16 hours or whatever time it was until the conclusion of cross-examination the following day, Mr. Justice Rehnquist.

QUESTION: You mean that Judge Krentzman would

not permit Mr. Rinehart and the Defendant to confer about order of witnesses, even for five minutes outside of the judge's presence?

MR. HONIG: There is no evidence in the record as to that. The record reflects --

QUESTION: What page are you referring to?

MR. HONIG: Yes, may I refer you to -- Mr. Justice Rehnquist and other Honorable Members of this Court, to page 19 of the Appendix and it is the fourth time that the Court speaks and the third paragraph.

"I think you might ask him right now -- right here while we are here -- what witnesses he thinks you ought to call in the morning."

Now, I would respectfully submit, Mr. Justice Rehnquist, that the trial judge is treating this situation as a fishbowl situation. He has the defense counsel before him with his client, with the defendant and says, "If you want to call witnesses in the morning, discuss it right here and we will get on with it but you are not going to talk with each other and have any communication with each other until the termination of cross-examination the following day."

QUESTION: See, that is a pretty ambiguous colloquy to ask us to reverse a judgment after a completed trial. If you concede that had it been out of the court's

presence, it would have been all right.

MR. HONIG: Well, I submit, your Honor, that this is a basic constitutional safeguard, the right of assistance of counsel and this is the basis and the graviment of our argument, the right of assistance of counsel for one's defense and it does not only, we respectfully submit, prevail in a courtroom but outside of a courtroom as well.

The eve of the last day of trial is the critical stage of the proceedings with defense counsel and, we respectfully submit, sir, and his client have every right to discuss trial strategy and the calling of witnesses or whatever in preparing for the following day's trial.

I think that every trial lawyer has done this. I find that the evenings are most critical in any stage of trial, sir.

QUESTION: What if the trial judge had said, in taking your short recess hypothetical case, if the judge had said --

MR. HONIG: Begging the Court's pardon, that was not my hypothetical. I believe that --

QUESTION: Well, the hypothetical you were addressing.

MR. HONIG: Yes, sir.

QUESTION: And that is not an uncommon thing, to have a great range of hypotheticals --

MR. HONIG: Yes, your Honor.

QUESTION: -- by which to test, by analogy, the argument being made.

MR. HONIG: Yes, your Honor, Mr. Chief Justice.

QUESTION: Now, suppose the judge had said, "The jury may be excused but everyone else, both counsel will remain in the courtroom and the witness will remain on the stand,"as was suggested before. Do you think you have then been deprived of an opportunity to consult with him?

MR. HONIG: If the defendant were told to remain on the stand and the jury was removed and what have I? I don't quite follow, Mr. Chief Justice.

QUESTION: The judge says, "We are going to take it -- The jury is excused for 10 minutes but the witness who is now under examination will remain on the witness stand."

MR. HONIG: And that -- well, your Honor --

QUESTION: That is the defendant, the defendant witness.

MR. HONIG: The defendant witness is there and there is a 10-minute recess in effect because the jury is out and the judge is not out of the courtroom. He is there.

QUESTION: Yes. Well, let's say the judge leaves the courtroom but says, let's pursue that, "You remain in the witness stand and counsel, you will not consult with him

during this recess."

MR. HONIG: He is technically -- I would say that that would be a correct ruling on the trial judge. It would be questionable but I would tend to say that would be a correct ruling, in view of the fact that the defendant has not left the witness stand between direct and cross-examination, he is still in the midst of the proceedings.

QUESTION: The purpose of all this is, of course, very clear, is it not? The discretion vested in trial judges to see that witnesses are not coached before they are going to be subjected to cross-examination by the opposing counsel.

MR. HONIG: This is quite correct, your Honor but I must respectfully submit that no trial judge in the United States has any discretion with which to violate a basic constitutional safeguard.

QUESTION: Well, we would all agree on that fine generality, I am sure.

MR. HONIG: Yes, sir.

Thank you, your Honor.

Your Honors, at the conclusion of the -- oh, yes, the Government in its appeal, in its brief to the Fifth Circuit, I feel -- and I submit has mislead the Court to some measure in that they confused the issue, your Honors, by indicating that the prohibition between counsel and the defendant was a limited prohibition only relating to the

prohibition with respect to discussing testimony when, in fact, of course, this was an across-the-board incommunicado or a total incommunicado order -- no reason, no consulting whatsoever about anything and the next day when the Court did resit, the Court stated to Mr. Rinehart, as appears on page 20 -- questioned him, I should say -- "You have not talked with him, of course, have you?"

And Mr. Rinehart says, "No, I haven't." And this would clear up any doubt as to the limitation or the narrow prohibition regarding the incommunicado order. It was, in fact, total and complete.

Counsel was not permitted to talk to his client, the defendant, at all for a period of what appeared to be 16 hours.

We would respectfully submit, your Honors, that there are certain matters which are self-evident and basic in dealing with the question presented for review and they are:

One -- and I submit that self-evident and basic is that error was commited by the trial judge.

Secondly, that the error was a constitutional error.

Thirdly and self-evident and basic, we would urge, is that the Federal constitutional error was one in violation of the Sixth Amendment to the Constitution of the United States and that the portion of the Sixth Amendment which was

violated was that part which pertains to the right of assistance of counsel for one's defense.

And lastly we would urge that this violation, this Federal Constitutional violation, occurred during the critical stage of the proceedings, namely during the trial itself between the termination of direct examination of the defendant and the termination or conclusion of cross-examination of the defendant the following day by the government prosecutor.

We would further submit that the denial of right to consult with counsel for a 16-hour period of time is in contravention to a basic constitutional safeguard and as such is inherently prejudicial and is per se reversible error.

In support of this position, the Petitioner relies upon Glasser versus United States, Powell v. Alabama, Hamilton v. Alabama, Gideon versus Wainwright, and Argersinger versus Hamlin and these cases, we submit, all pertain to the denial of assistance of counsel for one's defense and we would further submit, as we have before, the denial of assistance of counsel for one's defense in each of the above cases, from Powell v. Alabama through Argersinger v. Hamlin was deemed inherently prejudicial and was, per se, reversible error.

In the Glasser case, without going into any

quotations, the Court considered that the right to have the assistance of counsel was so fundamental and absolute a right that the courts could not indulge in nice calculations as to amount of prejudice arising from the denial and we would submit that that is correct.

We further contend, your Honors, that the rule of harmless error as promulgated in Chapman v. California is irrelevant and inappropriate to the question presented for review.

We would submit, your Honors, that the harmless error rule applies to the evaluation and measurement of the prejudicial quality and quantity, if any, of tainted evidence admitted in the trial of an accused.

But the harmless error rule, we would submit, is not applied in measuring prejudice which inherently flows from the violation or from the denial of a basic constitutional safeguard.

We urge that the harmless error rule, as promulgaged in Chapman v. California does not apply nor can it realistically apply to a violation of a basic constitutional safeguard.

This Court has recently dealt with harmless error cases in Harrington v. State of California and Milton v. Wainright.

I would submit, two very typical cases where

harmless error has been applied and in both cases the court was dealing with the admission of tainted evidence, if you would, or testimony but in the face of which there was overwhelming evidence to convict and so this was deemed by the court to be harmless constitutional error but the Chapman v. California doctrine puts the burden of proof above and beyond the exclusion of all/reasonable doubt, as you have in any criminal proceeding, upon the government to establish the absence of prejudice or harmless error.

It would be impossible, we submit, for the government to at all put forth such proof in this particular case, nor have they, and not having done so it certainly could not be considered harmless -- they certainly have not met their burden with respect to the harmless error doctrine.

The Fifth Circuit, we submit, was in error.

One, they not only misapplied the Chapman case, we submit they should not have applied the Chapman case to the particular ruling that they made in this case, but they misinterpreted it as well.

Chapman is very clear, I would submit, your Honors, that the burden is upon the government to prove above any reasonable doubt that there was an absence of prejudice or harmless error and this is to protect them.

QUESTION: In Chapman you are talking about evidence which ultimately got into the trial which should

have been excluded so you have something factual that the government can at least go ahead and start evaluating and say it could not have made any difference.

Here all you have is the absence for a period of time of the right to consult between the defendant and his counsel. Now, supposing in that sort of a case this Court were to say at least the burden of going forward with some sort of a showing that it might have been prejudicial is up to you. What showing would you make here?

MR. HONIG: I would submit that -- if I was asked to do that, that we would be flying in the face of Chapman, your Honor.

QUESTION: So you say, in effect, you couldn't make any such showing.

MR. HONIG: For this reason, your Honor --

QUESTION: Or do you say that you couldn't make any such showing?

MR. HONIG: Oh, I say that we couls make such a showing, your Honor but to make such a showing it would be a privileged matter.

QUESTION: So you, at any rate, you --

MR. HONIG: It would cause it to be a privileged matter.

QUESTION: At any rate, you are unwilling to do so now.

MR. HONIG: Well, if I --

QUESTION: If he asked --

MR. HONIG: -- am ordered to do something which I consider to be unconstitutional, then I , if I am ordered to do so, I would protest doing so.

QUESTION: No individual justice of the court has power to order you to do anything. All I am asking is, is there anything you would wish to disclose to the Court as to why this might in any way have hurt your case?

MR. HONIG: Well, yes, your Honor. May I make it on three points?

One -- and I don't want to sing the old song again. I say it is inherently prejudicial pursuant to the Glasser versus United States decision.

QUESTION: Which is no showing at all.

MR. HONIG: That's right, there is no showing at all because the prejudicing here is in the act.

QUESTION: Well, Mr. Honig, if you think there is a Sixth Amendment right to assistance of counsel that has been violated, there is simply no room for the application of the harmless error rule. Is that correct?

MR. HONIG: That is correct, Mr. Justice Brennan.

QUESTION: Well, then, why are you fencing about whether you could or could not show it?

MR. HONIG: Oh, I am not fencing. I believe that

I can show it right now. I suggest to Mr. Justice Rehnquist because he --

QUESTION: You are fencing because I asked you.

MR. HONIG: Yes, and I'll be very happy to answer.

The defense counsel at this trial stated very specifically -- and I could refer the Court to the particular quotation here -- where he states that he wants to discuss with a client the calling of witnesses and also the discussion. He wants to have a discussion of trial strategy with his client.

I would say this is per se reversible error in view of the fact that he has been prejudiced. I think that I would submit that he has this inviolable right, to have a discussion of trial strategy and the calling of witnesses with his client.

QUESTION: Well, Mr. Honig, on that score, suppose the judge, Krentzman, had said, when the objections came from defense counsel, that "If you need time for this final round-up before the close of the trial, the order will stand but I will give you a recess of as long as you want, one day, two days, whatever you need after the cross-examination is completed."

Would that take care of the problem?

MR. HONIG: No, your Honor, I would submit that it would not.

QUESTION: Well, then, does that narrow it down that the only thing that the defense counsel wanted to talk to him about that night was his cross-examination the following day?

MR. HONIG: The only thing that is revealed on the record is that the defense counsel did want to discuss with him matters of witnesses and trial strategy, which takes in the whole spectrum of things in that respect, we submit.

QUESTION: Well, couldn't all that be done in this hypothetical recess that I have suggested?

MR. HONIG: It would depend upon the trial strategy in the recess and the witnesses that they would want to call.

QUESTION: Well, mind you, you are at the end of the day, the end of the court day. The judge says, "You can't talk to this many about his cross-examination tomorrow but if you need 24 hours after that to plan the closing stages of the trial, the Court will give it to you."

That would not cure the error that you see.

MR. HONIG: No, your Honor and --

QUESTION: Well, then, does that not narrow the proposition down that you are really arguing for a constitutional right for a defense counsel to coach his witness?

MR. HONIG: Not to coach his witness, never to coach his witness, your Honor. That would be possibly supporting perjury. No, no.

QUESTION: Is that a consequence of your position?

MR. HONIG: No, not to coach a witness, your Honor, but to discuss with him, to have the assistance of one's client and counsel.

QUESTION: Well, go back to the hypothetical, then.

MR. HONIG: Yes, sir.

QUESTION: If the judge said he had given the 24-hours' recess after the cross-examination, would that not give you everything that you say was going to be the purpose of the consultation?

MR. HONIG: I would say that not necessarily, your Honor because things can happen that particular time. I would not conceive of what would happen but there are things that could conceivably occur that might be vital to that trial and it would be a critical stage of the trial.

QUESTION: Could you just give a hint as to what one of them might be?

MR. HONIG: Between direct and cross-examination providing there would be a 24-hour period of recess given after that?

QUESTION: For the purpose of doing all the things

that you said --

MR. HONIG: Yes.

QUESTION: -- were imperative to be done during the 16 hours.

MR. HONIG: Yes. There might be a witness who would be leaving town or witnesses who would be leaving the city and it would be necessary to have them called immediately and have them subponaed so they would be there tomorrow on the court order.

QUESTION: The court's powers are pretty broad about subpoenas, aren't they?

MR. HONIG: Well, it just may be that these people may not be locateable the following day and so that particular time it might be necessary --

QUESTION: Well, you are not suggesting that that is something beyond the remedy?

MR. HONIG: I --

QUESTION: Subpoena them and bring them into the courtroom and have them sitting there as long -- or an anteroom as long as you want them.

MR. HONIG: Well, your Honor, may I -- without being evasive to your hypothetical, may I just raise this hypothetical, with due respect.

If the Court, looking at the defense counsel, said, "I don't like the way you part your hair, so

consequently thereof you are not to discuss this case with your client until the termination of cross-examination and then after that I'll let you have 24 hours to discuss the case with him."

QUESTION: Well, I have --

MR. HONIG: Would there be any difference there, your Honor? I doubt it.

QUESTION: I have difficulty seeing what that has to do with the hypothetical question I put to you.

MR. HONIG: This, your Honor. I believe that if the Court affirms the ruling of the lower court here, it would lay a potential ground for the opening of a floodgate of possible judicial wrongdoing.

I consider this judicial wrongdoing.

The Court has asked me what could possibly happen between the conclusion of direct examination and the conclusion of cross-examination providing counsel and his attorney are not allowed to consult and providing that there be a 24-hour recess period after that.

I have mentioned just one item. It could be that he -- without coaching him he might review what questions he thinks the government might propound to him on cross-examination without giving him the answers.

He could say, "Well, perhaps the government may ask you A, B, C, D and E be ause this would be logical for

them to do so,so you should be ready and on your guard with respect to proper and honest answers in response to those questions"and I think that that might be quite necessary at that point to discuss, sir.

QUESTION: But it comes down to consultation relating to the cross-examination. Now, I do not suggest by that question that there is anything unethical about consultations.

MR. HONIG: No, sir.

QUESTION: I am simply putting it to you, are you saying that there is a constitutional right to consult with the defendant before the cross-examination begins relating to the scope of the cross-examination?

MR. HONIG: Providing --

QUESTION: Just the scope.

MR. HONIG: Yes, your Honor, providing that there be a recess, yes; not if there was a continuum from direct to cross-examination. I would admit that certainly he would not have a right to consult with his client at that particular time but if there is a recess and especially one that is called or moved by the instance of the government, then, certainly, he would have this right, Mr. Chief Justice.

QUESTION: Then the constitutional right that you are urging is one that depends on the fortuity of the time of the day, the point in the trial when the direct

examination ends.

MR. HONIG: When -- only because it happened in this case that way. But it would apply in any other situation I would respectfully submit, Mr. Chief Justice, that if the trial judge prohibited counsel from discussing any matter or discussing matters across the board with his client during the course of a trial, whether the defendant took the stand or not, my position would be the same, Mr. Chief Justice.

QUESTION: Mr. Honig, before you step down --

MR. HONIG: Mr. Justice Powell.

QUESTION: -- you have referred several times in your argument and in your brief to this event having occurred at a critical stage in the trial.

MR. HONIG: Let's assume --

QUESTION: Yes, let's assume for the moment that the recess had taken place 10 or 15 minutes or half an hour after the commencement of the direct examination of defendant.

MR. HONIG: What, after the direct examination of the defendant?

QUESTION: You had just started the direct examination and you planned to examine him for a day or two. The recess occurs shortly after you have commenced.

MR. HONIG: Yes, sir.

QUESTION: Overnight recess. What is your position on that?

MR. HONIG: Oh, of course I would have a full right to discuss and to consult with my client during the process of direct examination and in the overnight recess, of course.

QUESTION: Well, how would you limit your use of the phrase, "critical stage in the trial"?

MR. HONIG: I would say, your Honor, that a critical stage of the proceedings is any stage wherein if there is not assistance of counsel, accused may well be denied or will not receive a fair trial and due process of law.

QUESTION: Aren't you really saying that any time the court is in recess that defense counsel has the right to confer with his client?

MR. HONIG: Yes, I am, your Honor.

QUESTION: So there is no significance, really, to your talking about a critical stage.

MR. HONIG: I would say that even if it is for five minutes --

QUESTION: Any stage of --

MR. HONIG: Any stage of the trial is a critical stage and that is a stage where a meaningful defense --

QUESTION: So whenever you have a recess and the

defendant is involved in a criminal case, the stage is critical, in your view.

MR. HONIG: I would submit that it is, Mr. Justice Powell.

QUESTION: And yet, certainly the end of direct for a defendant on the stand and the shift to cross, is, you know, in the contemplation of most trial lawyers, a very critical stage.

All of a sudden you stop getting questions from the attorney that is friendly to you and you are getting the questions from an attorney hostile to you and by your definition if there is no recess at that point, that isn't a critical stage of the trial.

MR. HONIG: Well, every stage is a critical stage of the proceedings.

QUESTION: But you are not entitled to consult with counsel at that stage, by your --

MR. HONIG: Not at that stage, but if the trial judge ordered the attorney out of the courtroom and said, "Now, he'll be cross-examined without you being there," that certainly would be the denial of the right of assistance of counsel.

QUESTION: If the trial judge simply says, "We had a recess an hour and a half ago, no need for a recess now. We'll go into cross," it is a critical stage but the

defendant has no right to consult with his counsel.

MR. HONIG: Not if he is being tendered forthwith for cross-examination. No, Mr. Justice Rehnquist.

QUESTION: Mr. Honig?

MR. HONIG: Sir?

QUESTION: I understand why you feel this is a very critical case. It is critical for your client.

MR. HONIG: I think it is critical for justice, Mr. Justice Blackmun.

QUESTION: But suppose that you prevail here and we reverse. Isn't the ultimate result going to be what I suggested in my first question, namely, that federal judges will just not call a recess until the cross is complete?

Either that or they won't start with a defendant who chooses to take the stand unless they can finish him up in one go-around.

Now, what is going to happen if it is a long session for two or three days? That is something else again maybe. Isn't this the ulitmate of what you are driving federal judges to do if you prevail?

MR. HONIG: No, not necessarily, your Honor. I don't see any wrongdoing and certainly we have had this in the state courts for years and this is the first time I have ever heard of it as a matter of fact. I must confess my ignorance. Wherein there was a prohibition on the part of

counsel and his client from discussing any matters between the conclusion of direct and the conclusion of cross-examination.

However, if any federal judges feel this way about it, then certainly they can commence direct the following day or they can choose just to allow, as I would submit is correct, defense counsel and defendant to consult with one another overnight. I say this is quite consistent with our Federal Constitution.

QUESTION: One last question. Neither you nor the Government has cited the Maness case of last term. Are you familiar with that?

MR. HONIG: No, I am not, your Honor.

QUESTION: Very well.

MR. HONIG: Thank you very much, Mr. Justice and Honorable Members of the Court.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Honig.

Mr. Glazer.

ORAL ARGUMENT OF SIDNEY GLAZER, ESQ.

ON BEHALF OF RESPONDENT

MR. GLAZER: Mr. Chief Justice and may it Please the Court:

The issue here is a narrow one, whether the instruction that the District Judge gave without more requires reversal.

Petitioner's position is that this is error and is error that can't be harmless.

I think the place to start is on page 18 of the Appendix just to look at exactly how this issue arose. On the bottom of page 18, defense counsel told the Court, "I feel that I do not have the right to confer with him, my client -- I do have the right to confer with him but not to coach him as to what he may say on cross-examination or how to answer questions."

Thereafter, a little further down, the Court says, "I think you might ask him right now -- right here while we are here -- what witnesses he thinks you ought to call in the morning.

"Let's put it this way. You ask him right now if he thinks that there are any witnesses you ought to call during the evening. If anything comes up after he has been cross-examined and after you have had an opportunity for redirect, we would have a recess and you can have as much time as you want to talk over trial strategy."

So this case really arises under circumstances where counsel who is best familiar with the defendant has said to the Court, "I really don't want to talk to him about his testimony at all. All I want to talk to him about are other matters," and the Court says, "Okay, if you want to talk about other matters, that is fine. You can talk to him

about other matters now and if you need extra time at the conclusion of the direct examination -- of the cross-examination, I'll give you additional time."

QUESTION: Mr. Glazer, while you were on page 18. I was on page 17, where it looked as the judge was really going ahead without the recess.

MR. GLAZER: Well, I'll --

QUESTION: So the question about the judge's carrying the thing through, that is what he was getting ready to do, wasn't it?

MR. GLAZER: The judge was getting ready to do what?

QUESTION: Continue with the cross-examination, without the recess.

MR. GLAZER: The judge had originally said --

QUESTION: On the top of page 17.

MR. GLAZER: Right. On the bottom of page 16, however, your Honor, the judge says, "Does the Government wish to proceed with its cross-examination now? There are reasons why you may or may not -- except for the time factor -- I don't know."

And one reason why the prosecution did not want to proceed, it was already 4:55 and the normal time for adjourning was 5:30. If he had proceeded the result would have been a recess during the cross-examination. During the

next day, when the cross-examination commenced, it took the entire morning. I mean -- it took the entire afternoon, excuse me.

QUESTION: Now, will you come back to this?

MR. GLAZER: Pardon?

QUESTION: The record. He says, "We would prefer to recess."

The Court: "All right, you may."

"Ladies and gentlemen, I'm going to ask you to stay a reasonable time."

Which meant he was going to proceed.

And then the clerk said, "Oh, now, we don't want that."

And couldn't it all have been solved if they had gone along with it? Couldn't it?

MR. GLAZER: Yes, it could have been solved that way, right.

QUESTION: In other words, you don't have to saw the other way and get the whole log.

MR. GLAZER: Well, let me just put this case -- add some extra facts and put this in perspective, this whole incident.

This trial covered a two-week span. The government completed its case and what the case was, defendant was charged and convicted of conspiring to import

1,000 pounds of marijuana in the United States and his defense was entrapment.

Now, the Government completed its case during the first week of trial. In fact, it completed its case on a Thursday and the -- except for two witnesses who testified the following week that the substance imported was marijuana.

At this point, on Thursday, the Court recessed and so both the Government and defense counsel had Thursday night, Friday, Saturday and Sunday to discuss their cases with their witnesses.

Now, during the course of the presentation of the case, the Court had instructed all of the Government witnesses in the same fashion as it instructed the Defendant here not to talk to lawyers during the recess.

Indeed, when the case commenced on the second week, when there was a motion on behalf of Petitioner's attorney that the Government's case agent, who had been called as a defense witness should not be allowed to participate in a prosecutorial conference and the Court said, okay, if you don't want him to participate, I'll instruct him not to participate.

So, this was the way this case was handled. Both sides were treated equally. Both sides were not allowed to discuss their testimony with their witnesses while the witnesses were on the stand.

Now, the judge, even though he put this -- put counsel in a bind, so to speak, as to talking to the witnesses overnight, however was very free and liberal in granting recesses.

For example, during the afternoon before Defendant commenced testimony he granted two recesses for Defendant's counsel. One, to talk to a witness and, two, he granted a recess -- a recess which I think is essential -- the defense counsel said, "I'd like to talk to my client now that the Government's case is closed so that we can make the decision as to whether he is going to take the stand and testify."

So the judge said, "Fine, we'll grant you another recess to make that decision."

Now, subsequently, after the defense finished -- after the Government finished its redirect examination of the Defendant, there was another recess.

There was another recess and that is on page 22 of the Appendix which we think is significant to show that we don't have an arbitrary judge here.

Between -- when the Government completed its cross-examination it was time for a luncheon break. At that point the Court said to the defense counsel, "I am going to instruct your client not to talk to you during the luncheon break."

At this point, counsel said, "Your Honor, I know"-- this is on page 22 -- "I know of no way that I can properly examine my client on redirect examination unless I talk to him about the cross-examination and about other factors pertaining to the case."

So the Court says, "All right, you can go ahead and talk to him."

So what you really have here is a situation just, as far as we are concerned, like Leighton versus the United States, the Second Circuit case in which I think you could say that all counsel was doing here was trying to sow error into the record.

If he had pressed, if counsel had pressed at the conclusion between direct and cross and said, "I want to talk to my client. I want to talk to him about potential questions on cross-examination, there is every reason to believe that the trial judge would have done the same thing as he did between the cross and redirect.

Now, concededly, assistance of counsel requires consultation and preparation. Counsel normally prepares the case before trial and it is often necessary -- not only you can't complete the preparation of your case before trial because many things happen unexpectedly so you do have to prepare for -- make your case while your case is proceeding and this requires you to make use of recesses, no question

about that.

But when counsel -- and counsel as here says,"I don't want a recess. I don't want the recess to talk to my client about his testimony," I think the Court is entitled to take him at face value.

QUESTION: What is the Government's position, Mr. Glazer, if the client -- if the lawyer had said, "I do want the recess to talk to my client about his testimony"?

MR. GLAZER: Well, it is our position if he had said that, we would take the position he should have the right to talk to the client about his testimony.

The reason we do is illustrated by this case. What would occur if there was a denial would be a claim that there was a denial of effective assistance of counsel and it would be difficult for the Government to rebut whether or not the counsel had something that occurred which required a recess at that time.

After all, there is the lawyer-client privileged relationship and there would be no way to rebut something like that. That is why we don't say that this is a practice which should ordinarily follow because it does create these types of problems but when you have a situation where counsel says, like here, "I don't want to talk to my client about his testimony," that is a unique situation and we think there is no violation of his assistance to counsel in that situation

and there is no harm.

Now, of course, when a defendant testifies, he subjects himself to restrictions just like any other witness.

Under our adversary system, he is not entitled to a recess just because an embarassing question is asked. The jury is entitled to hear his testimony and decide on the basis of his personal responses and not the responses of his lawyer so the jury can determine his demeanor and make its own appraisal of whether or not he is a credible witness or not a credible witness. Now --

QUESTION: Now, sometimes a witness is being cross-examined, as is not unusual, for three, four, five, six days. Do you think the Court could say that during the time the cross-examination is continuing you may not consult?

MR. GLAZER: Oh, yes, we think that it is a reasonable restriction. The only reason we say that ordinarily it should not be done when you have a defendant is because you create these problems which sometimes could arise even in a post-conviction proceeding in which there could be a claim -- well, there was really something very essential that we had to talk about and you denied us a right to talk and so therefore the case should be reversed because the defendant has been denied the effective assistance of counsel.

That is why we don't think this is a -- this procedure should routinely be followed. It just happens in

this case uniquely that the lawyer -- most lawyers would not say this. Most lawyers would say, "Well, yes, your Honor," just like this lawyer here said on redirect, "I can't -- I want to talk to the client. I don't think he is ready for cross-examination. I think there are some areas which I have to refresh his --"

QUESTION: Do you think that -- the judge did not agree with that position here, did he?

MR. GLAZER: No --

QUESTION: So you are not really defending --

MR. GLAZER: I am defending the judge's --

QUESTION: -- the district judge's decision.

MR. GLAZER: I am defending the judge's decision in this sense.

QUESTION: Well, not the way he put it, though, are you?

MR. GLAZER: Well, let me just say this. Let me backtrack a little.

QUESTION: Can you answer yes or no, or not?

MR. GLAZER: Well, I am -- in the circumstances of this case I am defending the judge's decision.

QUESTION: You are not defending the decision he made, but what he said.

MR. GLAZER: I am not defending the practice. I am not defending the practice. I don't think that this

practice is a desirable one because --

QUESTION: You are not defending the district judge if he said, "Well, you can confer, but you cannot confer about cross-examination."

MR. GLAZER: I am -- and if defense counsel --

QUESTION: You just said that you were not defending that.

MR. GLAZER: If the defense counsel said, I --"I want to talk to him about cross-examination," I would concede that defense counsel has a right to talk to him about cross-examination.

QUESTION: The district judge had a wholly different view in this case.

MR. GLAZER: Yes. Yes.

QUESTION: Umn hmn.

MR. GLAZER: Now, let me just go --

QUESTION: On that same line, Mr. Glazer --

MR. GLAZER: Right.

QUESTION: I don't read Judge Moore's opinion for the Court of Appeals as limited, as you suggest it might be limited, had he made a request, as he had earlier at the noon recess, because he wanted to talk with his client about cross-examination. I don't read the Court of Appeals as saying that to deny him that would have been error.

As I understand your argument, you do say to deny

him that would have been error.

MR. GLAZER: Well, the denial -- maybe I should back up --

QUESTION: No. How about the Court of Appeals' opinion?

MR. GLAZER: The Court of Appeals concluded that in the circumstances of this case there was no prejudice. That is the Court of Appeals opinion.

QUESTION: And you don't think it can be read as saying you weren't entitled -- that the order, if it had gone so far as to forbid you to talk with your client about his cross-examination, as saying that that would be all right?

MR. GLAZER: Well, the order may be constitutionally all right -- let me just back up. The order may be constitutionally all right. I just don't think it is appropriate procedure.

The reason why it may be constitutionally all right is because you certainly could have gone forward. You could have gone forward and tried the entire case without any recesses and that is what occurs in many short cases. The defendant gets on and testifies and right after he testifies on direct, he goes ahead with his cross and if he asks for recess, the judge can say, "Oh, you don't need a recess. Let's finish it."

So I don't say there is anything constitutionally

wrong with -- maybe I just misunderstood Justice White's question -- I don't see that there is anything constitutionally wrong with that. What I am saying is, I don't think it is a good practice. It is not a good practice because afterwards, afterwards, in the event there is a conviction, you are going to get the claim that, oh, you didn't let me talk to my client about his cross-examination and there was really something I should have talked to him about and this something occurred because of some sort of surprise.

But apart from -- in addition to that --

QUESTION: You couldn't raise that kind of a claim unless you could show a constitutional violation, I would think.

MR. GLAZER: Well, you could show it. Well, maybe you could come up with something. He may be able to come up with --

QUESTION: But if you can come up with something on the habeas, you can come up with something in the direct, I would think.

MR. GLAZER: Well, you -- yes, you could. But usually if you came up with something during the course of the trial the chances are the trial court would try to right it at that particular point. So usually nothing would occur until the conclusion of the trial.

At that point there would be some second-guessing

and then defense counsel or there would be a new lawyer would enter the case and then the claim would be made.

QUESTION: Well, is it not common, if a judge, a trial judge has or thinks he has reason to doubt whether a witness is going to be improperly coached that he will say that we will not begin the direct examination until the beginning of the court session in some way that he can plan it out. Isn't that a common thing for judges to do?

MR. GLAZER: I am sure that occurs, your Honor. I don't know how common it is.

QUESTION: Just as it is probably quite common for defense counsel putting a witness on the stand to try to have it fall so that he will have a recess to talk to the client.

MR. GLAZER: Oh, I am sure, there is no question -- on the latter statement there is no question in my mind that when counsel put witnesses on to testify they certainly are cognizant and they consider when the recesses are going to occur because some of them want to --

QUESTION: Isn't it also true that if he has a suspicion he won't get a recess he'll let you go through till 9:00, 10:00 o'clock at night?

MR. GLAZER: Well, the only trouble with that is, the country judges do it but the city judges don't. I have never seen a city judge --

QUESTION: Well, this judge was getting ready to go.

MR. GLAZER: Right. Right, but he was --

QUESTION: He was a city judge, wasn't he?

MR. GLAZER: Right. Right. He was willing to do it.

QUESTION: He was willing to go ahead.

MR. GLAZER: But apparently neither counsel wanted to because the defense counsel didn't protest about the recess. The defense counsel didn't say to him --

QUESTION: No, he protested about the terms of the recess.

MR. GLAZER: Well, he protested --

QUESTION: Right.

MR. GLAZER: -- about the terms of the recess but he didn't say to the judge, "Look, this is going to let the government think about cross-examination overnight and we are not going to be able to think about it."

He doesn't -- he didn't -- if he had protested that way, I think the judge would have gone forward.

QUESTION: How in the world can you assume that?

MR. GLAZER: Well, I just -- from reading the record, your Honor -- from reading the record it seems to me that the judge was trying to be evenhanded but when counsel said to the judge, "Look, I do not want to talk to him about

his testimony, all I want to talk to him about is what witnesses to call," and the Court said, "Okay. You can talk to him about what witnesses you can call. You can talk to him right now and in addition, if you need additional time, you can talk to him later."

So I think we have a judge who was trying to be evenhanded, both to the prosecution and to the defense.

Now, we think that if this is error, that this is not the type of error which is in subject to the harmless error rule and we think that in this case, if you examine all the circumstances -- and I'll recite them briefly -- if they were there, the error was harmless beyond a reasonable doubt.

In the first place, the limitation here, the restriction here, is not akin to the denial of somebody the right of a lawyer at all.

Certainly, in those cases where a defendant hasn't waived his right to a lawyer, the court will not look and decide whether he has been prejudiced or not.

Here, the limitation that the court placed on the overnight recess is not significantly different from the short trial where the defendant's testimony may go forward from commencement to conclusion covering direct and cross without any recess.

To the extent that a recess might have significance or make a difference, then it may be used in

trial preparation.

There was no harm here because counsel said he didn't need the recess for, to talk to his client about his cross-examination and as far as other matters are concerned, the Court gave defense counsel opportunity at the beginning of the recess and later on to discuss trial strategy.

QUESTION: Mr. Glazer, actually, on page 18 of the appendix, as I read what counsel said, at the bottom of page 18, "I feel that I do have the right to confer with him but not to coach him as to what he may say on cross-examination or how to answer questions."

Now, that is a little bit different, I would think, than you put it.

MR. GLAZER: Yes, but I thought the import of the remark was -- but then, when the -- but then, the reason we took this, we interpreted it slightly different is -- is when the counsel says to the Court he has some questions about trial, he has some matters of trial strategy, he only -- so the Court says to counsel, "What matters are those?" and he says, "Well, I might want to talk to him about what witnesses to call" and from that I think you can infer that he didn't want to talk to him about his trial testimony and otherwise that would have been foremost in his mind.

In addition, we think the Court should, in

deciding that if it was error, it was harmless error, look to the fact that here we have -- we don't have a situation where we have a reluctant counsel who is impressing things for the -- on behalf of his client.

Here, when counsel was not reluctant to express his needs, when he thought he had to talk to the defendant about his testimony, as he did before redirect examination and if he had a need, Justice Rehnquist, to discuss any testimony as to what his testimony would be in cross, I think he would have done the same thing at this recess as he did in the subsequent recess which occurred the following day at the luncheon time.

Finally, we have a case where we have a Court which had concern that the defendant have a fair trial.

The Court freely granted recess just before the defendant testified. He gave a recess to the defense to talk to a defense witness.

Thereafter, shortly thereafter, counsel said, "I would like time to talk to my defendant to decide whether the defendant should testify."

At that point the counsel was given another recess.

Finally, the restrictions imposed were not one-sided. They were imposed on Government witnesses and including the case agent and these circumstances,

especially since there is the evidence of guilt, as the Court below found, was overwhelming.

We think that this Court should affirm this conviction.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 11:56 o'clock a.m., the case was submitted.]