ORIGINAL

OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

CAPTION: DONALD RAY PERRY, Petitioner V. WILLIAM D. LEEKE, COMMISSIONER, SOUTH CAROLINA DEPARTMENT OF CORRECTIONS, ET AL.

CASE NO: 87-6325

PLACE: WASHINGTON, D.C.

DATE: November 8, 1988

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IN THE SUPREME COURT OF THE UNITED STATES

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DONALD RAY PERRY, :

Petitioner :

v. : No. 87-6325

WILLIAM D. LEEKE, COMMISSIONER, :

SOUTH CAROLINA DEPARTMENT OF :

CORRECTIONS, ET AL. :

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Washington, D.C.

Tuesday, November 8, 1988

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:52 o'clock a.m.

APPEARANCES:

W. GASTON FAIREY, ESQ., Columbia, South Carolina; on behalf of the Petitioner.

DONALD J. ZELENKA, ESQ., Chief Deputy Attorney General of South Carolina, Columbia, South Carolina; on behalf of Respondents.

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P R O C E E D I N G S

(11:52 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument now in Donald Ray Perry v. William D. Leeke.

Mr. Fairey, you may proceed whenever you're ready.

ORAL ARGUMENT OF W. GASTON FAIREY

ON BEHALF OF THE PETITIONER

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

The issue before this Court today deals with a Geders type deprivation of counsel during an afternoon, 15 minute recess in the middle of a defendant's -- at the end of his direct examination, prior to his cross examination.

The Petitioner's position is that this should be subjected to a per se prejudice test in circumstances where five basic criteria are met. This Court has traditionally recognized that denial of counsel during the course of a trial is an error that, because of its nature, deals with fundamental fairness in the criminal process of our country.

We think we have identified basically five criteria that should be used to determine whether or not basically the defendant has been prejudiced by an order

of the court. Those criteria are basically, first, that a trial judge issue an order depriving access of a criminal defendant and his attorney; second, that this happened during a critical stage of the criminal process; third, that it happened at a time when the defendant and his lawyer would normally consult, and that there is a need for the consultation; fourth, that but for the order of the court, the consultation would have taken place; and fifth, that the consultation does not interfere with the orderly process of the court.

Now, this Court in Geders, some time ago, found that it is a violation of the Sixth Amendment to deprive access to a criminal defendant his counsel during a break. Admittedly, that break was an overnight recess. The break at issue here is not an overnight recess. It is --

QUESTION: Mr. Fairey, you wouldn't go so far as to give the, give them a right to interrupt the testimony to say, by counsel, and say that I want to speak to my client and advise him?

MR. FAIREY: Not a per se right, no, Your Honor. I think that should be left to the discretion of the trial judge as to whether it interferes with the normal trial process, and also, depending upon the reason the interruption is necessary.

Again, if -- it goes back to these five factors. If there's something that has occurred during the course of the trial that a court would recognize as essential to the attorney-client relationship, let's say a witness, even a normal witness, not even a defendant, if they have a question as to whether or not an answer would incriminate them, would have the right to consult with an attorney before answering the question. If that situation came up with a criminal defendant, obviously they have no less of a Sixth Amendment right.

Again, it would be --

QUESTION: What if a defendant at the close of cross examine -- defendant takes the stand, cross examination by the state. At the close of that cross examination, before re-examination by the defense, the defense attorney says I want to consult with my client before I go into rebuttal?

MR. FAIREY: Again, there would be whether or not the trial court felt it was appropriate, and the reasons given by the defense counsel.

QUESTION: Well, supposing the trial court says in effect just what the trial court here said, that you're not entitled to discuss with your client anytime you want to during court proceedings these things. This is not a recess, and so you can't do it.

MR. FAIREY: Then I think probably we're not talking about a per se test, we're talking about an evaluation of the harm of that deprivation.

QUESTION: Okay. How do you evaluate that particular situation?

MR. FAIREY: Based upon the reason the defense attorney indicated --

QUESTION: Okay, I've given you the reason.

MR. FAIREY: The reason is because he wants to talk with him?

QUESTION: The reason he wants to talk it over and get something, make sure the guy knows what's going to be, he's examined about on rebuttal.

MR. FAIREY: Well, the essential difference in a situation such as that and the case here is there is no denial of right to counsel where the counsel and the defendant are in the same courtroom. They are available to each other. The court is there as an intermediary. This Court has recognized that there are occasions when the Sixth Amendment right may be subjected to the court's right to conduct the trial. That's the basic test for any case.

And so the issue, I think that, Mr. Chief Justice, you're bringing up, that is where the balancing test comes in. Where the balancing test does not come

MR. FAIREY: No, sir, not demand; can request.

QUESTION: Well, then supposing the request is turned down, what's the constitutional result of that?

MR. FAIREY: Depending upon how important his request was, whether it went to an area of constitutional law.

QUESTION: Well, how does one go to an area of constitutional law in such a request?

MR. FAIREY: If it deals with the Fifth Amendment, if it deals with the Fourth Amendment, if it dealt with some basic right that the defendant has.

QUESTION: Well, what if it deals with just what we're talking about here; the defense lawyer says something has come up on cross examination, and I want to redirect my client. I just want to talk to him before I do it.

MR. FAIREY: Yes, sir, I understand what your question is. My problem is I don't think that that is a constitutional deprivation. I think that is within the trial court's discretion, but that is an entirely different situation than what is present here.

I think also in this balance --

QUESTION: Well, could this, could this trial judge have just not taken a break between direct and cross examination?

MR. FAIREY: Yes, he could not --

QUESTION: And the same result would have obtained, there wouldn't have been an opportunity to consult.

MR. FAIREY: But there's a difference because time doesn't stand still when the court takes a break. We have a defendant, and I think maybe the facts of this case are particularly important here because we have a defendant that has been described by the state's doctors as childlike, who has low intelligence, who has been emotionally ill, who has been committed to a state hospital for a period of about two and a half months, who has suffered from amnesia and a hysterical reaction, who is being, after being treated and gotten to competency, taken to trial. His basic childlike nature has not changed. He is still a man in child's mind.

When he is faced with a situation of being taken out of the courtroom and placed in a very small room with no window and no other person, just one chair, enclosed in about a six by six room, with no one to talk to, it cannot help but affect his performance later on cross examination.

Additionally, the other side is not placed in this room. The other side is a trained advocate. They now have 15 minutes to prepare a cross examination based

upon what they have just heard on a very lengthy direct examination. It's not an even trade here. In effect, this fortuity of this break aids the state and penalizes the defendant.

And for this reason, as a trial lawyer, if you give me the opportunity before any witness to take 15 minutes after they've been on direct, I'm in a much better position to conduct my cross examination.

The test I am suggesting for this Court avoids this problem because basically when this Court tells trial judges the Sixth Amendment right is absolute, if you do it under these circumstances you will have trouble.

CHIEF JUSTICE REHNQUIST: Mr. Fairey, we will resume there at 1:00 o'clock.

MR. FAIREY: Thank you, Your Honor.

(Whereupon, at 12:00 o'clock noon, the Court recessed, to reconvene at 1:00 o'clock p.m., this same day.)

AFTERNOON SESSION

(1:00 p.m.)

CHIEF JUSTICE REHNQUIST: Mr. Fairey, you may resume.

ORAL ARGUMENT OF W. GASTON FAIREY

ON BEHALF OF THE PETITIONER -- Resumed

MR. FAIREY: Thank you, Your Honor.

The test that my client is advocating that should be applied as to whether or not per se analysis should apply to situations like this, primarily I think the fourth criteria is the one that should be determinative of whether the per se rule applies if the other four are present.

The other four are fairly easy to determine. If it's during a break, obviously it doesn't interfere with the trial day.. The trial judge obviously would have to make some type of order. Obviously the client and the attorney would have to at least attempt to confer or notify the court they wanted to confer, and obviously it would have to be during some critical stage of the trial process.

I think under this Court's prior rulings the trial itself is a critical stage, so I don't think that is a definite enough test for determining whether or not prejudice should apply to the denial. So we should then

turn to whether or not the defendant and his counsel would normally confer, and would the subject of that conference be something of importance in the attorney-client relationship.

To adopt a test which I think is being advocated by the state that time somehow has a difference in this sets a very arbitrary standard.

QUESTION: Excuse me. To say the trial is a critical stage, as we have -- that's self-evidence -- is not necessarily to say that a break in the trial is a critical stage, is it?

MR. FAIREY: A break in the trial where it would not be likely that a defendant and his counsel would discuss something of importance would not be critical. If it's a break in the trial where they would be likely to discuss something of importance is critical, and important.

QUESTION: But that takes a little more analysis than just saying it was the trial and therefore it's a critical stage.

MR. FAIREY: That's my point. The second element of our test is that it be during a critical stage of the trial process. That can be outside of the courtroom. That can be at arraignment, as it was in U.S. v. Hamilton.

So the criteria we are advocating is that you must look at this fourth point, that it is the time they would normally confer, and it's something of importance they would discuss. In this case, clearly, it was of importance. It was an upcoming cross examination in a capital murder case with a defendant who is of limited mental capabilities, who has just been through a lengthy direct examination.

This is not an unusual recess that occurred in this case. This is the normal afternoon recess.

QUESTION: Counsel, as one who has tried a few cases, I have yet to have had a case that any time was uncritical in a murder case.

MR. FAIREY: Justice Marshall, don't misunderstand what I'm saying. I agree. All parts are critical.

QUESTION: Evidently I do misunderstand. That's why I'm trying to get you to clear it up.

MR. FAIREY: Yes, sir. And I'm not saying that it is all right for a trial judge to deny access to a client at any point. My point is that I think the Court is searching for some guide or some point at which denial of counsel --

QUESTION: Well, Mr. Fairey, you don't really mean that last, that during the course of the direct

examination, or the cross examination, I suppose he could deny the lawyer access to the client.

MR. FAIREY: Yes, sir, I think you could.

QUESTION: So there are some points when he can interfere with communication between an attorney and a client.

MR. FAIREY: Yes, sir, but I think that goes back to that fifth point, and that is that it would, if it would interfere with the orderly process of the trial under Morris v. Slapee, then clearly the trial court has the discretion, as long as his motive is not to just interfere with that relationship.

QUESTION: Well, supposing at the end of the direct examination the judge called the lawyers to the bench and said I'm considering a brief recess to let people get a drink of water, or something like that, but I don't want to do it if you think you want to confer with your client because I think he should finish his testimony without consulting with his lawyer. Could the lawyer say, well, you -- would he have a right to insist on the recess?

MR. FAIREY: Your Honor, I think you have presented the issue which I think -- I think they would because I think the trial court, if its motive is to prevent a proper attorney-client conference that they

would normally have allowed --

QUESTION: Well, it's the motive to prevent the communication that cannot take place while the witness is on the stand.

MR. FAIREY: Yes, sir, and if that is the trial court's --

QUESTION: And if he says the only way I can do it is to keep him on the stand, you would say he cannot keep the witness on the stand?

MR. FAIREY: Well, Geders basically said that if the trial judge has reason to believe that something improper is going to take place, not proper advice --

QUESTION: It's just normal reassurance of clients to tell them to be sure and answer all the questions carefully, listen and tell the truth, that kind of statement.

MR. FAIREY: Yes, sir.

QUESTION: That's the all he -- there's nothing improper, but he thinks that the witness should finish his testimony before -- without interruption.

Do you think that's improper?

MR. FAIREY: Yes, sir, I do think that's improper because I think basically the trial judge is interfering with -- if the trial judge would have normally taken a break --

QUESTION: Prior to Geders, don't you think that was quite frequently the practice of trial judges?

MR. FAIREY: I'm sure it was. I'm not saying it was proper before.

QUESTION: You think Geders represented a marked change in the law, in the words.

MR. FAIREY: Yes, sir, because Geders recognized that the sequestration rule that was sort of embodied, let's say, in our system, which was when it was used, it was used to everybody, Geders changed that, and it clearly established that the Sixth Amendment right outweighed the purpose of the sequestration rule, and the sequestration rule made no sense when it was applied to a criminal defendant.

QUESTION: Well, what sequestration rule are you referring to?

MR. FAIREY: The common law sequestration rule for witnesses, Your Honor, that if at any trial, if one party or the other requests the trial judge to sequester all witnesses prior to their testimony so they wouldn't tailor their testimony --

QUESTION: But I don't think any court applied the sequestration rule prior to Geders to the defendant, though.

MR. FAIREY: No, sir. We talk about only the

break, during the break between -- it is not at all unusual in a lengthy criminal case for a criminal defendant's testimony to be lengthy on direct. It is not at all unusual for there to be a break, either the morning, the afternoon, the luncheon or the evening recess, between the direct and cross.

QUESTION: Well, what you're saying, though, is that a trial judge who in my opinion might rightfully believe that the best way to get at the truth of the matter is the art of cross examination, as Wigmore said, that it serves the judicial process to have the witness, if, you know, within feasible limits, get the direct, the cross, and perhaps the redirect out of the way.

You're saying he can't do that.

MR. FAIREY: No, sir, I'm not saying he can't do that. I'm saying if his motive is to prevent communication, proper communication between --

QUESTION: Well, but his -- the judge's view in my hypothesis is that it's not desirable to have communication between the lawyer and the witness right in the middle of the witness's examination, at either the end of direct or at the end of cross.

MR. FAIREY: Your Honor, I understand this Court's view. My --

QUESTION: Well, it was my view, not the

Court's view.

MR. FAIREY: Your view, I'm sorry.

My point is if the motive of the trial judge is simply to prevent a proper communication from taking place, it appears to me that would be in violation of the Sixth Amendment.

Whether that should be held to a per se error I think is a different issue.

QUESTION: But that's true even if you prevent him from whispering in his ear.

MR. FAIREY: Yes.

QUESTION: Question by question.

MR. FAIREY: I'm sorry, I'm not sure I follow the Court's question.

QUESTION: You are telling the Chief Justice that the trial judge may never prevent consultation if the purpose of the trial judge in doing so is to make it more difficult and more strenuous and more productive for the cross examination to proceed without that advice.

MR. FAIREY: If I understand your question, I think basically --

QUESTION: The trial judge in the Chief Justice's hypothetical --

MR. FAIREY: Yes, sir.

QUESTION: -- says I think justice is better

served, truth is better found if we have the cross examination. Right now, no consultation. That's the hypothetical.

MR. FAIREY: Yes, sir, I understand, and if --

QUESTION: And you -- and I understood your answer to be that that is always improper on the part of the judge.

MR. FAIREY: No, sir, I didn't say it was always improper. I said as long as --

QUESTION: Well, when is it proper and when isn't it?

MR. FAIREY: It is proper if it is within his Morris v. Slapee role of controlling the conduct of the trial.

QUESTION: No, but you're avoiding the hypothetical. The hypothetical is that the district judge wants to have the examination proceed because he thinks it's a better test of the defendant's credibility.

MR. FAIREY: Then I think under the analysis we have given, I think that it would be a question for the appellate court as to whether or not the motive of the judge was to deprive the client of a right he normally would have gotten in a trial of this nature. I agree --

QUESTION: But with Justice Kennedy's, you

know the motive of the trial judge.

So what is the answer that the appellate court gives?

MR. FAIREY: If they find that the motive was to not deny the defendant --

QUESTION: But is the motive of a trial judge who feels just what Justice Kennedy has stated to you, is that an improper motive?

MR. FAIREY: Your Honor, the Sixth Amendment --

QUESTION: Can you answer the question?

MR. FAIREY: Not simply, no, sir, because I think each situation must be judged on its own merits. The situation you have given me, you are assuming that the trial judge is acting with proper motives, and he, it is his belief or her belief that it is best in cross examination to continue straight through. If that is that trial judge's common practice and he hasn't chosen that one defendant to do that to, then clearly I think it would not be error. But if, on the other hand, in one case this trial judge decides on this defendant, I don't want him to talk to his lawyer --

QUESTION: So you can do it so long as you do it a lot? That doesn't violate the Constitution.

MR. FAIREY: As long as you do it uniformly.

QUESTION: It's only if you occasionally do it

that it's bad. That doesn't make a whole lot of sense, does it?

MR. FAIREY: This issue is admittedly outside the issue in this case, because clearly there was a break taken here, and I understand the Court's concern in this area. The Court clearly does not have to rule in this area to resolve this case. But I think if a trial -- the purpose of the Sixth --

QUESTION: But the one sheds some light on the other. If it's okay for a judge to say no, I insist, you know, it's the last scene of a Perry Mason trial, and the witness is just about to break down, and counsel says I'd like to confer with my client, and the judge says no way, this witness is about to break down; if that is okay, I don't know why it might not similarly be okay for a judge to say, well, all right, we'll take a brief recess but I don't want counsel's coaching, whatever counsel is going to do, to interfere with the process of this examination.

That might also be okay. If the one is, there's some possibility the other is.

MR. FAIREY: Well, that gets back to the issue that I have raised which is, I think, the test needs to be the importance of the conference. If -- in this case, clearly there was a break. Clearly there was no

interference with the Judge's ability to control what happened in the courtroom. There would have been no interference on anybody.

The only thing that happened was the client was isolated and he was denied access to his counsel. The same thing happened in Geders, the only difference being that it was an overnight recess rather than a 15 minute recess. And if we are going to start trying to set arbitrary lines in saying, okay, a lawyer's advice is not good if it's for 15 minutes but it is good if it's for overnight, or that it's more important to talk to a client about strategy overnight than it is to talk about an approaching cross examination when you're on trial for your life --

QUESTION: Well, but there's a difference because overnight it's necessarily assumed that the lawyer and the client will have many things to talk about in addition, perhaps, to the ongoing testimony.

MR. FAIREY: Yes, sir.

QUESTION: But if you have a 10 or 15 minute break in the course of the testimony, it's rather unrealistic to assume that the lawyer is going to say, well, do you think after you get through we ought to call witness X, Y and Z. You're going to only talk about the testimony. So you've got a break that is so

short that the judge presumably would have discretion either to grant it or not, just go ahead and get a drink of water later.

MR. FAIREY: Yes, sir, I agree.

QUESTION: Or if he grants it, to assume the only thing he's really preventing is the, is a brief comment about the ongoing testimony.

MR. FAIREY: Well, he's preventing communication between the client and the -- he is preventing communication of any type between a lawyer --

QUESTION: Yes, I know, but is it not fair to assume the only thing they're going to talk about in a ten minute break at the end of direct examination, before cross examination, is the ensuing cross examination?

MR. FAIREY: I think that is one, probably the most likely thing they would talk about, but it doesn't limit --

QUESTION: But that's not true of an overnight break. That's not true of an overnight break necessarily, at least.

MR. FAIREY: Well, the problem is they may not talk at all in an overnight break anyway.

QUESTION: Well, they may not, but it's customary to have at least some time where they could

talk about the things that might develop the next day.

MR. FAIREY: Yes, sir, but in my experience, generally it's not much more than 15 minutes. I mean, in a trial of this nature the lawyer has many things to prepare for, not the least of which is his client's testimony. He is going to spend or she is going to spend a lot of time preparing that client for that testimony.

Depending upon the client you're dealing with, and if you are dealing with a Donald Ray Perry, you have to spend more time, and if you --

QUESTION: What was it that the lawyer wanted to talk to the client about?

MR. FAIREY: I was that lawyer, Your Honor, and we wished --

QUESTION: Does the record show that?

MR. FAIREY: Well, I had -- what I had sent was my co-counsel, Ed Mullineaux, to talk with him, to go over again the principles we had earlier talked about because we knew Donald Ray. Donald Ray was childlike. You could tell him something and ten minutes later -- I think if you examine the cross examination you can tell this. He acts like a child. When he is attacked, he attacks back. He gives somewhat irrational answers to questions.

On the fifth question asked by the prosecutor he didn't even answer, and at about the tenth or twelfth question, the trial judge had to instruct him to properly answer the questions.

QUESTION: Well, your colleague was just going to repeat something that had already been said to the client?

MR. FAIREY: Go over with him again the importance of listening to the question on cross examination, answer the question, and whatever you do, don't argue with the prosecutor; also to find out did he have any questions, was there anything we didn't go over on direct examination he wanted to get before the court, so either we could do it by requesting the trial judge to let us reopen direct or get it in rebuttal; additionally, find out is there anything else that had happened during his direct examination that bothered him.

QUESTION: Well, this -- didn't the Court of Appeals hold that it was error to enter this bar order?

MR. FAIREY: Yes, sir, it did. Every court has held it was error.

QUESTION: On what ground is it that it was error?

MR. FAIREY: That it was a Sixth Amendment violation, that there was no interference --

QUESTION: Well, I thought it said it wasn't a Sixth Amendment violation unless there was prejudice.

MR. FAIREY: Well, what they held was that --

QUESTION: Isn't that right?

MR. FAIREY: No, they -- my reading of their opinion is they found clearly it was a Sixth Amendment violation because it violated the spirit of the rule in Geders, as every other Circuit Court other than the Second Circuit in the United States found, that have extended Geders to short recesses, but they then applied -- they said this Court's decisions in Strickland and Cronic somehow changed the law as it applied to routine recesses during the trial day.

QUESTION: Well, didn't Strickland hold that there's no violation unless there's prejudice?

MR. FAIREY: That is in the ineffective assistance of counsel area.

QUESTION: Yes. All right.

MR. FAIREY: Strickland and Cronic specifically recognized that the rule of Cronic and the rule in Chapman v. United States is inapplicable to three areas of law: a biased tribunal, a denial of counsel, and a coerced confession. It has been traditional --

QUESTION: Well, if this was an error, I don't

suppose any trial judge in this circuit is ever going to do this again.

MR. FAIREY: That's part of my point, Your Honor, that if you tell the trial judges, don't deprive -- if you take a break in the trial, don't deprive the client of access to his counsel, there's no reason to do it unless you feel that something improper is going to take place, and then put that reason on the record and continue the trial through direct examination. That's what this Court said to do in Geders.

But to draw a line and say arbitrarily, overnight is too long, 15 minutes is not long enough, it's like the Fourth Circuit said, the dissent said, in effect, we are creating a line and saying everything on this side of the line is per se error but everything on this side of the line is per se harmless.

QUESTION: And you think it will serve the interests of defendants like your client in the future who are childlike and easily confused to in effect compel the trial judge to continue with the examination instead of allowing a break in which at least the defendant can collect his own thoughts even if he can't confer with his counsel?

As between those two, which would you prefer?

MR. FAIREY: My experience is, if you are

going to deny him access during the break, don't take the break. Don't give them the opportunity to prepare and isolate my client. If you're going to let him have an equal right so he can better prepare for the upcoming cross examination, then give us the break.

I don't really -- one way or the other doesn't matter to me, but if you're going to take the break, at least give him an equal opportunity. Don't give them the advantage and then hold him in isolation where he has no ally. His only friend in the courtroom is his lawyer, and yet you're taking him and you're sticking him in this small room where there's a deputy outside and you're not letting anybody talk with him, and you're saying this somehow is helping him approaching cross examination.

I would much prefer to not have the break. At least he doesn't have that added agitation of being held incommunicado.

Imagine taking a small, a child, and placing them in a small room before the most important test in their life, and holding them there for 15 minutes and expecting them to do well on this test. I think that goes against reason, and yet that is what is happening in these cases.

The Court has traditionally -- 60 years the

Court has said denial of counsel is per se error. What we are suggesting is adopt a test similar to the Cutler v. Sullivan test which simply says once you have demonstrated -- the prejudice is demonstrated by the denial. The denial, once it is established, we don't go into prejudice. If it is a time when they would normally confer, and it is important that they confer at that time, and the trial court has taken the break, don't deny them access. There's no reason to. And it is much easier for the trial courts to follow a per se rule than to have to get into prejudice in every case.

The only --

QUESTION: [Inaudible] on whether there was error.

MR. FAIREY: Yes, sir.

QUESTION: And the only issue you brought up here is whether you have to prove prejudice.

MR. FAIREY: Yes, sir. The Court of Appeals found that it was subject to a prejudice test and found that pursuant to the Strickland test, we had not demonstrated any prejudice --

QUESTION: Well, so far I suppose the opposition can argue there wasn't any Sixth Amendment violation at all.

MR. FAIREY: They haven't made that argument

yet. The only argument in the court below was that since the defendant didn't make the request, there was no showing that he needed the request, but of course, in Geders the defendant didn't make the request either. The objection was entered by the attorney, as in every one of these cases that is the case, and that was rejected by both the Fourth Circuit and the district court.

QUESTION: Well, I suppose you would think it would be just out of bounds for us to say there wasn't any violation in the first place.

MR. FAIREY: I would hope you wouldn't take that position because clearly there was a situation where he was isolated and he was denied access to his counsel during what I consider the most critical period during this trial.

I would like to reserve whatever time I have left for rebuttal.

QUESTION: Thank you, Mr. Fairey.

We will hear now from you, Mr. Zelenka.

ORAL ARGUMENT OF DONALD J. ZELENKA

ON BEHALF OF THE RESPONDENT

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

It's the position of the State of South

Carolina that prejudice must be a consideration in determining whether a new trial should be granted based upon alleged constitutional error.

QUESTION: Well, is it your position that you have to prove prejudice in this situation to prove any constitutional violation at all?

MR. ZELENKA: That is generally the position because we see the Sixth Amendment as being whether he was denied the effective assistance of counsel at this trial.

QUESTION: Because the court below seemed to say there was a violation, a Sixth Amendment violation, did it, but that it -- but what, no new trial unless there's prejudice, or --

MR. ZELENKA: From our reading, they looked at the Sixth Amendment and said the Sixth Amendment essentially is to determine whether there is a fundamentally fair trial where the true adversarial testing had occurred. One of those prongs essentially was was there a denial of access to counsel. Concededly, there was a denial of access to counsel during this 15 minute break. The court then looked at the entire record --

QUESTION: Well, do you argue, do you argue here that that was proper in any event, or admit that

that was error?

MR. ZELENKA: We submit that that did not act as a situation where he was deprived of the effective assistance of counsel at his trial because generally you do not have a constitutional right to consult between direct and cross examination. And based upon that fundamental position that we assert, clearly, then, there could be no prejudice by a clear review of the record in this particular case.

The situation, the existence of prejudice he asserts should be based on a per se prejudicial standard. However, we submit that especially in a habeas corpus proceeding, where this Court's limited jurisdiction is to review whether there was fundamental fairness in the state judgment, that prejudice, per se prejudice should be a situation when it is only likely that --

QUESTION: Fundamental fairness is a due process inquiry. I just don't understand what you're talking about. A Sixth Amendment violation doesn't turn, does it, on fundamental fairness? That's a due process inquiry.

MR. ZELENKA: It turns on, we submit it turns on fundamental fairness when you look at Strickland v. Washington where the concern was whether in that

situation prejudice had been shown, whether the reliability in the verdict and the decision of the court by the guarantee of the right to counsel had been undermined by something that occurred within the trial. That is, that hook into the Sixth Amendment is essentially our position in this case, and since the prejudice or the possibility of prejudice in this case was so remote under the facts of this case, it's clear that a per se rule should not be applicable.

QUESTION: Mr. Zelenka, your position that it's okay here because there's generally no right to speak to your counsel between direct and cross examination or between cross and redirect, that position would apply even if the recess were overnight, wouldn't it?

MR. ZELENKA: If that was --

QUESTION: So you would say that even if he were deprived of access to counsel overnight, so long as that overnight break occurred between direct and cross, that would be all right.

MR. ZELENKA: No, we don't take that position because of what --

QUESTION: Well, then, you must be relying on something different from the principle you just expressed.

MR. ZELENKA: In Geders v. United States, that was a situation involving the overnight recess, and this Court looked at that situation and said that that is a time they normally confer to talk about the strategies of the day, what occurred during the trial, and to prepare for the next day and the succeeding days in the particular trial.

If we're looking at a brief recess during the day, a nonroutine recess, where counsel, we submit, had no expectation that there would be such a recess, no expectation after he placed him on the witness stand that he would have the right or the opportunity to discuss the testimony, to discuss further his right to cross examination, under those circumstances we submit that the Sixth Amendment clearly did not raise itself because the right to counsel under those situations was a right for Mr. Perry to meet with his counsel and make an informed decision as to whether in fact he was going to take the witness stand.

The right to counsel under those circumstances was counsel's right to interject and object, should the solicitor's questions be improper, and the right to counsel would also be based -- the right based upon those determinations, whether he wanted to ask redirect questions to clear up any misconceptions that might have

occurred during that particular trial.

QUESTION: Mr. Zelenka, you refer to this as a nonroutine recess, but don't courts in South Carolina generally take an afternoon recess?

MR. ZELENKA: That is, my experience is it does not always occur, and it certainly does not always occur when a defendant is on the witness stand.

QUESTION: No, I recognize that, but I don't know that you can necessarily distinguish the overnight recess in Geders from the much shorter recess here by whether one is routine and the other is not routine.

MR. ZELENKA: I think you might have an expectation for a lunch recess, but I don't think you would have an expectation generally of there being the, what we'll call the routine brief recess in the afternoon of the trial or in the morning of the trial.

In this case there were, admittedly, numerous recesses. There was a recess, in fact, during the direct examination of Mr. Perry when the access to his client was not restricted. There was also the luncheon recess that occurred just prior to Mr. Perry taking the witness stand, and at the conclusion of his testimony became the overnight recess, that he had the opportunity to consult, and he he did not chose to present Mr. Perry once again for examination before the court if he had an

adequate showing or an adequate need to do so.

We submit that since prejudice in this case was utterly remote based upon the facts of this case, this Court should affirm the judgment of the Fourth Circuit Court of Appeals and its conclusions that there have been no showing of prejudice; there was no reason to believe, based upon this record, that any communication which might have occurred during the brief recess at issue could have altered Mr. Perry's performance on cross examination.

At the conclusion of the trial, after the verdict was entered, a proffer was made through the court by Mr. Perry that the matters they wanted to discuss with him during that brief recess was his rights on cross examination. There was no contention, and there was no contention here that he had failed to previously explain those rights to cross examination to him.

It's clear from a review of this particular cross examination that Mr. Perry had took full advantage of that cross and had placed his story and his version of the events before the jury. Unlike the childlike position that he is seeking to present before this Court, Mr. Perry certainly was not a passive witness. He was able to resist efforts by the solicitor to color

his story as it was presented about certain versions of where he was, and he was able to tell his own version of the particular events in this case.

He denied going to the victim's apartment complex when that issue was raised about the location of the automobile and where her apartment complex was. He denied even knowing where that complex was, and essentially stated he had never been there in his life. He corrected the prosecution about who had possession of the particular gun. He was able to answer cogently and directly to those questions by the solicitor rather than a yes/no question to those very strong and serious questions. And he was able, clearly, from a review of the record, to fully explain his answers on cross examination.

The evidence of guilt in this case certainly was overwhelming if you look at the entire record. There was forensic evidence that included tire tracks from his own automobile, fingerprints on her car were found. A footprint of his was found on the scene of Mrs. Heimberger's death.

QUESTION: Mr. Fairey, let me interrupt to say, because I'd like you before you finish to comment on your opponent's argument that during a recess of this kind, if the defendant has to be placed in a cell for 15

or 20 minutes while the prosecutor is getting organized for cross examination, there's a little unfairness there, and my particular question now is supposing instead of giving what you say is good testimony on cross examination, he knew what he was doing, say he had stammered and indicated that he was really emotionally upset and one thing or another, but yet there's all the evidence of guilt in the world, as you're going to say, what result in that case?

MR. ZELENKA: I don't think it would be a constitutional situation. I think it would be a situation as to whether the judge had abused his discretion.

QUESTION: No, the only issue I'm directing this to is would there be prejudice if in reading the transcript you thought it may well be this man got quite upset by being isolated for 15 or 20 minutes, I can't really tell, but what do you do? Do you just look at the evidence of guilt, or do you look at whether you think maybe his testimony was somewhat less persuasive because of the way things developed?

What is the test of prejudice under your view?

MR. ZELENKA: I think the test would be to review the record as a whole overall.

QUESTION: Right.

MR. ZELENKA: The assertion that he presented was that MR. Perry was not adequately advised essentially of his rights on cross examination, so certainly the cross examination would be the initial place you would need to look on those situations, and if there was a situation where he was not able to answer the questions and counsel had asserted an objection, requesting him, or the court, to allow for there to be a further recess or further information given to allow the defendant to essentially catch his breath and develop more responsive answers to the question, I think that might be a situation [Inaudible] than it would be prejudice.

QUESTION: Or maybe counsel should object to the recess. Maybe counsel should object to the recess. If counsel is told that the recess will be one without his opportunity to confer with his client, and if he knows his client is likely to get upset in a 15 minute holding period without counsel, he should object to the recess.

MR. ZELENKA: That might be a situation that could be reviewed under a Strickland v. Washington determination as to whether that is something that reasonable counsel would have done under those circumstances, but again, we would submit that the right

to cross examination is certainly the right to ferret out the truth under the circumstances, and rigorous cross examination is something that our system of justice relies upon to allow that determination to be made by the jury.

QUESTION: No, but you wouldn't contend, I assume, that you could put the man, take a recess, and let him sit by himself in a cell for an hour before cross examination because that might make cross examination more effective. I don't think you'd take that position.

MR. ZELENKA: No, I don't, I don't assert that or contend that, and under the facts of this case, the record does not reveal that he was placed in the type of cell situation that Mr. Fairey described.

QUESTION: What is your understanding of what happened to him during the recess?

MR. ZELENKA: My understanding is that he did go back to a holding cell generally for that 15 minute period of time. Then he was returned to the witness stand.

QUESTION: And how many people were in the holding cell?

MR. ZELENKA: I do not know at this time. I do not know that.

We would submit that under the circumstances of this case, the Fourth Circuit Court of Appeals was correct in determining that this was not a per se rule that should be applicable as a total denial of counsel, that this -- the found denial of access to counsel is not the situation that contaminated the entire proceedings like the situations this Court has previously looked upon in making its determination that essentially a per se rule should be applicable.

We submit that counsel in this case clearly reflects, and the record clearly reflects that he was provided the effective assistance of counsel. That --

QUESTION: [Inaudible] are you happy with the Court of Appeals' judgement below?

MR. ZELENKA: Yes, sir, we are satisfied with --

QUESTION: Including its statement that there was a violation of the Fifth -- Sixth Amendment?

MR. ZELENKA: That differs with the determination made by the South Carolina Supreme Court which specifically found there was no violation.

QUESTION: Well --

MR. ZELENKA: Then it looked at the position we --

QUESTION: But if you are happy with the Court

of Appeals' judgment, it means that, I suppose, if the state judges see that unreversed, that there's not going to be this kind of a bar order entered in state trials again. It will just be wrong, and you are violating the Sixth Amendment to keep the defendant from talking to his counsel, even in a routine recess.

MR. ZELENKA: There may not be a bar order. The Fourth Circuit had previously held in the case of Stubbs v. Borden Kircher and the case of U.S. v. Allen that even a brief break possibly of one or two minutes was a denial of access to the --

QUESTION: And the state judges haven't paid too much attention to that.

MR. ZELENKA: There has, as this Court is probably well aware, there have been other state decisions in Florida and Tennessee and in Maryland that have similarly involved sequestrations or limited sequestrations during a trial break within the trial day, and it's our position that that significantly distinguishes this case from the Geders situation because here the break was so remote and so short a period of time during the trial --

QUESTION: But the Court of Appeals still thought it violated the Sixth Amendment.

MR. ZELENKA: Because there was a denial of

access to counsel during that particular time period, that is correct.

Unless this Court has further questions, I'll rest at this time.

QUESTION: Thank you, Mr. Zelenka.

Mr. Fairey, you have three minutes remaining.

REBUTTAL ARGUMENT OF W. GASTON FAIREY

ON BEHALF OF PETITIONER

MR. FAIREY: Thank you, Your Honor.

First, Justice Scalia, there was no notice that this order was going to take place until we attempted to consult with counsel. So your question to the state's attorney concerning could we have objected to the break, we didn't know we were going to be denied access until we attempted to have access.

QUESTION: Let me ask you this.

MR. FAIREY: Yes.

QUESTION: I'm affected, as Justice Stevens is, about the prospect that you paint of your client sitting all alone in a cell and having to worry for 15 minutes, but is that the reason we provide counsel? I thought the right to counsel is the right to legal assistance, that the reason we provide it is because the state has legally trained people at its disposal and this fellow is helpless before the state.

I mean, we're talking -- what you're complaining about is something different. Maybe they should have let his mother go into the cell, or his best friend or something else, but what does that have to do with the right to counsel?

Or maybe you have an objection for keeping him incommunicado for 15 minutes, but does it have anything to do with the right to counsel?

MR. FAIREY: Yes, sir, I believe it does because I think the right to counsel is much more than just a legal aspect. You are the advisor. That's why we call them counsellors. We don't call them necessarily just attorneys. We aid the client much more than just Fourth Amendment, Fifth Amendment, Sixth Amendment, Eighth Amendment. We help them know how to try a case.

I teach trial lawyers how to try cases. A big part of what we teach is, is numanizing that client and getting to know that client, and getting that client to trust you so that he will turn to you, seek your advice, and trust you.

If we start depriving access of the criminal defendant to that one friend in the courtroom, we are destroying the concept of this attorney-client relationship.

I think it is much more important than just you are the mouthpiece in the courtroom, and there I think is where the extremity, the real prejudice in this situation comes in. But it is much more, it is prejudice to the concept that we have recognized that, since Hamilton, that you don't deny a criminal defendant access to his counsel without a good reason. And we have found it is not a good reason that they may talk about upcoming cross examination, particularly when there's no fear that you're going to improperly talk about it, only that you're going to discuss the rules of cross examination.

There's no reason to deny it. There is every reason in the world to discourage this type of activity.

I would point out to the Court that the dissent in the Fourth Circuit I think raised a good point. This was not a case of overwhelming evidence. The jury was out two full days and almost hung up on the issue of guilt. There was a substantial duress defense presented. There was forensic evidence introduced -- and I'm sorry, I have finished my time.

Thank you.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Fairey.

The case is submitted.

(Whereupon, at 1:34 p.m., the case in the above-entitled matter was submitted.)

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

No. 87-6325 - DONALD RAY PERRY, Petitioner V. WILLIAM D. LEEKE, COMMISSION

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and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Judy Freilicher

(REPORTER)