



IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. PD-0048-20

DAVID ASA VILLARREAL, Appellant

v.

THE STATE OF TEXAS

**ON APPELLANT'S PETITION FOR DISCRETIONARY REVIEW
FROM THE FOURTH COURT OF APPEALS
BEXAR COUNTY**

WALKER, J., filed a dissenting opinion.

DISSENTING OPINION

The Sixth Amendment of the United States Constitution guarantees all defendants, including Appellant David Asa Villarreal, the right to assistance of counsel during trial. This right would be gutted if a judge can ban a defendant from talking to his lawyer overnight during the course of the trial, and so the Supreme Court rightly held that this kind of order is unconstitutional. *Geders v. United States*, 425 U.S. 80, 91 (1976). However, a split-Supreme Court thought it would be permissible for a judge to keep a defendant from talking to his defense lawyer during a fifteen-minute break. *Perry v. Leeke*, 488 U.S. 272, 283–84 (1989).

Today, this Court decides that the trial court's order prohibiting Appellant and his defense counsel from discussing the case during a twenty-four hour,¹ overnight recess did not violate his right to counsel, because the recess occurred during the middle of Appellant's testimony and the trial judge referred to Appellant's testimony. I disagree. *Perry*, which upheld a discussion ban, repeatedly emphasized the shortness of the recess, which made it reasonable to presume that only the defendant's in progress testimony would be discussed during that short break. *Perry*'s holding was also limited—it merely held that the Sixth Amendment does not require a trial court to allow consultation regarding a defendant's ongoing testimony during an interruption in the trial “for a few

¹ The trial court called for a recess at 1:00 pm, and it asked the jury to be back at 1:00 pm the next day:

THE COURT: Ladies and gentlemen, as you know, I discussed earlier we are going to have to stop today. It's not how I really wanted to run the trial, but some other issues are coming up.

For tomorrow – we will come back tomorrow. But since we are leaving here almost at 1:00, why don't we start again tomorrow at 1 o'clock. So what I'm going to ask you to do is get here a little bit before 1 o'clock, assemble into the jury room. And as soon as we can, at 1 o'clock, we'll get the doors opened and get you in here, and we'll just proceed where we left off from today.

After the jury left, the trial court made the same request of the parties before adjourning:

THE COURT: . . . All right. Folks, then we will see you-all again tomorrow.

. . .

Just try to be here a little bit before 1 o'clock. I'd like to start right on the dot at 1 o'clock.

. . .

Court's in recess.
(Proceedings recessed at 12:58 p.m.)

minutes.” Not only was the twenty-four hour prohibition in this case far longer than the fifteen-minute break in *Perry*, but the trial court’s order was not as clean-cut as the Court makes it out to be. While the trial court pointed to the topic of Appellant’s testimony, it required counsel to treat Appellant as actively sitting and testifying on the witness stand. Counsel was virtually required to avoid discussing anything with Appellant for twenty-four hours, a time period of such a different character that discussions would necessarily encompass more than just the ongoing testimony.

A twenty-four hour ban on discussion falls squarely within *Geders* and violated Appellant’s Sixth Amendment right to counsel. The complete deprivation of counsel during the twenty-four hour overnight recess is structural error, requiring reversal regardless of whether there is a showing of harmlessness. Respectfully, I dissent to the Court’s decision to affirm the judgment of the court of appeals.

I — *Geders* and *Perry*

The Sixth Amendment provides that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense.” U.S. CONST. amend. VI. A defendant’s right to assistance of counsel is “important precisely because ordinarily a defendant is ill-equipped to understand and deal with the trial process without a lawyer’s guidance.” *Geders*, 425 U.S. at 88. The right to assistance of counsel means “that there can be no restrictions upon the function of counsel in defending a criminal prosecution in accord with the traditions of the adversary factfinding process that has been constitutionalized in the Sixth and Fourteenth Amendments.” *Herring v. New York*, 422 U.S. 853, 857–58 (1975).

In *Geders*, the Supreme Court held that “an order preventing petitioner from consulting his counsel ‘about anything’ during a seventeen-hour overnight recess between his direct-and

cross-examination impinged upon his right to the assistance of counsel guaranteed by the Sixth Amendment.” *Geders*, 425 U.S. at 91. While a trial court has “broad power to sequester witnesses before, during, and after their testimony” in order to prevent improper attempts to influence their testimony, that power is curtailed when the witness is the defendant. *Id.* at 87–88.

A sequestration order affects a defendant in quite a different way from the way it affects a nonparty witness who presumably has no stake in the outcome of the trial. A nonparty witness ordinarily has little, other than his own testimony, to discuss with trial counsel; a defendant in a criminal case must often consult with his attorney during the trial. Moreover, “the rule” accomplishes less when it is applied to the defendant rather than a nonparty witness, because the defendant as a matter of right can be and usually is present for all testimony and has the opportunity to discuss his testimony with his attorney up to the time he takes the witness stand.

Id. at 88. Furthermore, the duration of the order, covering an overnight recess, itself had constitutional dimension:

The recess at issue was only one of many called during a trial that continued over 10 calendar days. But it was an overnight recess, 17 hours long. It is common practice during such recesses for an accused and counsel to discuss the events of the day’s trial. Such recesses are often times of intensive work, with tactical decisions to be made and strategies to be reviewed. The lawyer may need to obtain from his client information made relevant by the day’s testimony, or he may need to pursue inquiry along lines not fully explored earlier. At the very least, the overnight recess during trial gives the defendant a chance to discuss with counsel the significance of the day’s events. Our cases recognize that the role of counsel is important precisely because ordinarily a defendant is ill-equipped to understand and deal with the trial process without a lawyer’s guidance.

Id. After discussing “a variety of ways to further the purpose served by sequestration without placing a sustained barrier to communication between a defendant and his lawyer,”² the Supreme Court concluded that:

² The Supreme Court suggested that the prosecutor could cross-examine the defendant about any “coaching” that may have occurred during the recess, or the trial court could simply wait to call the recess until after the defendant finished testifying. *Geders*, 425 U.S. at 89–91.

To the extent that conflict remains between the defendant's right to consult with his attorney during a long overnight recess in the trial, and the prosecutor's desire to cross-examine the defendant without the intervention of counsel, with the risk of improper "coaching," the conflict must, under the Sixth Amendment, be resolved in favor of the right to the assistance and guidance of counsel.

Id. at 91 (citing *Brooks v. Tennessee*, 406 U.S. 605 (1972)).

While the order preventing consultation during the seventeen-hour recess in *Geders* was unconstitutional, the Supreme Court upheld an order barring a defendant from consulting with his attorney during a fifteen-minute afternoon break in *Perry*, 488 U.S. at 284–85. The Supreme Court acknowledged that "the line between the facts of *Geders* and the facts of [*Perry*] is a thin one." *Id.* at 280. However, a defendant does not have "a constitutional right to discuss . . . testimony while it is in process," and the only thing that Perry and his counsel could possibly discuss during the fifteen-minute break was that testimony. *Id.* at 284. The Supreme Court emphasized the reality between a seventeen-hour overnight recess and a fifteen-minute break during testimony:

The interruption in *Geders* was of a different character because the normal consultation between attorney and client that occurs during an overnight recess would encompass matters that go beyond the content of the defendant's own testimony—matters that the defendant does have a constitutional right to discuss with his lawyer, such as the availability of other witnesses, trial tactics, or even the possibility of negotiating a plea bargain. It is the defendant's right to unrestricted access to his lawyer for advice on a variety of trial-related matters that is controlling in the context of a *long recess*. The fact that such discussions will inevitably include some consideration of the defendant's ongoing testimony does not compromise that basic right. But in a *short recess* in which it is appropriate to presume that nothing but the testimony will be discussed, the testifying defendant does not have a constitutional right to advice.

Id. (emphasis added) (citation omitted).

As Judge Keel deftly explains in her concurring opinion, all that matters is the length of the recess. (Keel, J., concurring opinion at 3) ("Short recess—no right. Overnight recess—unrestricted

right.”). Indeed, *Perry* made it clear in its final holding:

We merely hold that the Federal Constitution does not compel every trial judge to allow the defendant to consult with his lawyer while his testimony is in progress if the judge decides that there is a good reason to interrupt the trial for a few minutes.

Id. at 284–85. The significance of *Perry* is the fact that the recess was only a fifteen-minute break in the testimony, such that the only thing that would be discussed would be the ongoing testimony. Where the recess is long enough, such that how the trial was going and trial strategy would be discussed in addition to the testimony, there can be no conferral ban. *See Perry*, 488 U.S. at 284 (“The fact that such discussions will inevitably include some consideration of the defendant’s ongoing testimony does not compromise that basic right.”); *Geders*, 425 U.S. at 91 (“the conflict must, under the Sixth Amendment, be resolved in favor of the right to the assistance and guidance of counsel.”).

II — The Order in This Case

In this case, the trial court’s order was not a prohibition on conferring for fifteen-minutes. This was far longer than even the seventeen-hour recess in *Geders*. The overnight recess here, and its attendant conferral ban, lasted for twenty-four hours. While *Geders* and a strict reading of *Perry* would say this length of time is unconstitutional, the Court finds no violation because the trial court’s order, as the Court reads it, only prevented discussion of Appellant’s ongoing testimony.

But the trial court’s order was not so limited. In calling the recess, after the jury left the courtroom, the trial court said:

THE COURT: Mr. Villarreal, we’re in an unusual situation. You are right in the middle of testimony. Normally your lawyer couldn’t come up and confer with you about your testimony in the middle of the trial and in the middle of having the jury hear your testimony. And so I’d like to tell you that you can’t confer with your attorney but the same time you have a Fifth Amendment [sic] right to talk to your

attorney.

So I'm really going to put the burden on Mr. Scharff to tell you the truth. Mr. Scharff and Mr. Brown, too, as well. *I'm going to ask that both of you pretend that Mr. Villarreal is on the stand. You couldn't confer with him during that time.*

Now, Mr. Villarreal, if – puts us in an odd situation. But I believe if you need to talk to your attorneys, I'm not telling you, you can't talk to them. But I'm going to rely on both Mr. Scharff and Mr. Brown to use your best judgment in talking to the defendant because you can't – you couldn't confer with him while he was on the stand about his testimony. So I'm going to leave it to both of your good judgment of how you manage that, if for some reason he believes that he needs to confer.

MR. SCHARFF: All right. So just so I am clear and don't violate any court orders, that – because he is still on direct and still testifying, that it is your ruling that we cannot confer with our client?

THE COURT: Let me help you with that. For instance, suppose we go into a sentencing hearing and you need to start talking to him about possible sentencing issues, you can do that. Does that make sense? *I don't want you discussing what you couldn't discuss with him if he was on the stand in front of the Jury.*

MR. SCHARFF: Okay.

THE COURT: His testimony. I'm not sure whatever else you'd like to talk with him about while he's on the stand. But ask yourselves before you talk to him about something, is this something that – manage his testimony in front of the jury? Does that make sense to you?

MR. SCHARFF: Sure, it does.

MR. BROWN: We aren't going to talk to him about the facts that he testified about.

THE COURT: All right. Fair enough. But at the same time – I'm going to put the burden on the lawyers, not on him, because he has a constitutional right to confer with you. At the same time, all lawyers are under – they're under different rules than the defendants are.

MR. SCHARFF: Certainly.

THE COURT: And not that I'm saying this about Mr. Villarreal, but, you know, if – for instance, his attorney-client privilege is safe, but if any defendant or potential client or something like that, comes to a lawyer and talks about committing a future

crime, there's no privilege –

MR. SCHARFF: Sure.

THE COURT: – for that. And so I'm just using that as an analogy.

MR. SCHARFF: Sure.

THE COURT: *And you're going to have to decide, if he asks you any questions and such, is this something that is going to be considered to be conferring with him on the witness stand while the jury is there or not.*

MR. SCHARFF: Okay. All right. I understand the Court's judgment and just – just for in the future, I'm just going to make an objection under the Sixth Amendment that the Court's order infringes on our right to confer with our client without his defense.

THE COURT: Objection noted. All right. Folks, then we will see you-all again tomorrow.

(emphasis added). Clearly, the trial court pointed to the topic of Appellant's ongoing testimony. But the trial court did not simply tell counsel to avoid discussing only the testimony. The trial court repeatedly directed counsel to treat Appellant as if he were sitting on the witness stand, testifying in front of the jury, and the trial court told counsel they could not talk to Appellant at all if he is on the witness stand in front of the jury. The trial court's order required counsel "to pretend that Mr. Villarreal is on the stand. You couldn't confer with him during that time." And when counsel tried to ask if it was the court's order that counsel cannot confer with Appellant, instead of giving a straightforward answer of "You can confer with your client, but not about his testimony," the trial court told counsel that "I don't want you discussing what you couldn't discuss with him if he was on the stand in front of the Jury." The trial court further instructed counsel "to decide, if he asks you any questions and such, is this something that is going to be considered to be conferring with him on the witness stand while the jury is there or not."

The trial court's order here effectually put Appellant in a position where he had no right to confer with counsel. *See Perry*, 488 U.S. at 281 (a defendant "has no constitutional right to consult with his lawyer while he is testifying.").

And even if the trial court's order only told counsel to pretend Appellant was on the stand, without adding that they could not talk to him while up there, how could trial counsel confer with their client if he was actively sitting on the witness stand during trial, in full view of the jury? Counsel could not discuss overall trial strategy with Appellant while he was sitting on the witness stand in front of the jury. Counsel could not discuss evidence that had been admitted, or witnesses that they might want to call, while the jury was watching. Counsel could not discuss plea negotiations with him, nor could counsel discuss how the trial court's rulings were helping or hurting the case, and counsel especially could not discuss the jury in full view of the jury itself.

The trial court's order that counsel treat Appellant as if he were actively sitting on the witness stand barred counsel from discussing anything with Appellant. The trial court's overnight prohibition was essentially the same as the unconstitutional order in *Geders*.

III — No Harm Analysis Required

Certain errors that affect the framework within which the trial proceeded, rather than simply errors in the trial process itself, are deemed "structural errors" and require reversal regardless of whether the error was harmless. "All structural errors must be founded on a violation of a federal constitutional right, but not all violations of federal constitutional rights amount to structural errors." *Schmutz v. State*, 440 S.W.3d 29, 35 (Tex. Crim. App. 2014). In fact, "[m]ost constitutional errors are not 'structural.'" *Mendez v. State*, 138 S.W.3d 334, 340 (Tex. Crim. App. 2004). "For federal constitutional error that is not structural, the applicable harm analysis requires the appellate court to

reverse unless it determines beyond a reasonable doubt that the error did not contribute to the defendant's conviction or punishment." *Lake v. State*, 532 S.W.3d 408, 411 (Tex. Crim. App. 2017) (citing Tex. R. App. P. 44.2(a)). The list of structural errors is short, and:

In *Johnson v. United States*, the Supreme Court set forth its most recent list of structural errors: *the total deprivation of counsel at trial*, lack of an impartial trial judge, the unlawful exclusion of members of the defendant's race from a grand jury, the denial of the right to self-representation at trial, the denial of the right to a public trial, and an instruction that erroneously lowers the burden of proof for conviction below the "beyond a reasonable doubt" standard.

Johnson v. State, 169 S.W.3d 223, 235 (Tex. Crim. App. 2005) (discussing *Johnson v. United States*, 520 U.S. 461, 468–69 (1997)) (emphasis added).

"The total deprivation of counsel at trial" need not be limited to situations in which a defendant has no lawyer at all; *Geders* shows that a deprivation of counsel may be temporary. In *Perry*, the Supreme Court explained that "actual or constructive denial of the assistance of counsel *altogether* is not subject to . . . prejudice analysis." *Perry*, 488 U.S. at 280 (emphasis added). Consequently, the Supreme Court explained that it simply reversed on finding the violation in *Geders*:

In [*Geders*], we simply reversed the defendant's conviction without pausing to consider the extent of the actual prejudice, if any, that resulted from the defendant's denial of access to his lawyer during the overnight recess. That reversal was consistent with the view we have often expressed concerning the fundamental importance of the criminal defendant's constitutional right to be represented by counsel.

Id. at 279. And in *Cronic*, the Supreme Court cited *Geders* as an example of where it had "found constitutional error without any showing of prejudice when counsel was either totally absent, or prevented from assisting the accused during a critical stage of the proceeding." *United States v. Cronic*, 466 U.S. 648, 659 n.25 (1984); *see also Johnson*, 169 S.W.3d at 231 (likening the "denial

of counsel at a critical stage” to “the deprivation of a trial and the deprivation of an appeal” and reasoning both errors “would clearly be reversible without a showing of harm”). As far as the Supreme Court has been concerned, *Geders* error is structural error immune to harm analysis.

Indeed, as the D.C. Circuit Court of Appeals explained, if harm analysis were required, “it would be anomalous if defendant was also forced to relinquish the right to have his discussions with his lawyer kept confidential” because “[t]he only way that a defendant could show prejudice would be to present evidence of what he and counsel discussed, what they were prevented from discussing, and how the order altered the preparation of his defense.” *See Mudd v. United States*, 798 F.2d 1509, 1513 (D.C. Cir. 1986). Piercing the attorney-client relationship, in order to show harm to that right, is too much.

I would hold that the error in this case is a structural one.

IV — Conclusion

The court of appeals and this Court draw the wrong lesson from *Perry*. *Perry* took pains to emphasize the difference between a fifteen-minute break and an overnight recess during the defendant’s testimony. The Supreme Court made it clear that a trial court could not prohibit discussions overnight, even though those discussions would inevitably include the defendant’s ongoing testimony. The Supreme Court in *Perry* did not hold that trial courts can carve out that topic from overnight discussions.

Furthermore, the Court also misinterprets the trial court’s order to be narrower than it truly was. The trial court did not specifically limit consultation about Appellant’s testimony; the trial court required counsel to treat Appellant as if he were currently testifying on the witness stand. The trial court’s order effectually prohibited Appellant and his defense attorney from conferring for twenty-

four hours, violating Appellant's right to counsel guaranteed by the Sixth Amendment under *Geders*. And a violation of the Sixth Amendment right to counsel under *Geders* is structural error immune to harm analysis.

The court of appeals's judgment should be reversed. Because this Court chooses to affirm, I respectfully dissent.

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