High Court Right-To-Counsel Case Could Have Seismic Impact

By **Lee Cortes and Ryan Fenn** (October 2, 2025)

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On Oct. 6, the U.S. Supreme Court will hear argument in Villarreal v. Texas. The court will weigh whether a defendant's Sixth Amendment right to counsel is violated when the trial court issues a qualified order prohibiting counsel from discussing with the defendant their ongoing testimony during an overnight recess.

The court's ultimate decision could have significant implications for criminal defendants, and their counsel's ability to zealously advocate for them, by imposing a barrier in the attorney-client relationship.

Applicable Supreme Court Precedent

The Supreme Court considered a defendant's Sixth Amendment right to counsel while testifying twice before.

In Geders v. U.S., the Supreme Court in 1976 held that "an order preventing [a defendant] from consulting his counsel 'about anything' during a 17-hour overnight recess between his direct- and cross-examination impinged upon his right to the assistance of counsel."[1] In its decision, however, the court emphasized that it was not "deal[ing] with limitations imposed in other circumstances."[2]

Case in point: In Perry v. Leeke, the court in 1989 held that a defendant's right to counsel was not violated where the trial court prohibited discussions with counsel during a 15-minute recess.[3]

In its decision, the court emphasized that the "interruption in Geders was of a different character" because topics of conversation during an overnight recess often "go beyond the content of the defendant's own testimony."[4] Thus, 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."[5]

Left open by the court, however, was whether a qualified order preventing a defendant only from conferring with counsel during an overnight recess about matters related to the defendant's testimony violates the Sixth Amendment. Enter Villarreal.

Factual Background in Villarreal v. Texas

David Asa Villarreal was charged with his boyfriend's murder.[6] Villarreal raised an affirmative defense of self-defense and testified at trial.[7] However, he was unable to complete his direct testimony in one day, testifying for only an hour before an overnight recess was called.[8]

Prior to the overnight recess, the 186th District Court of Bexar County instructed Villarreal and his counsel that, "[n]ormally 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 that the court was placing "the burden on" [defense counsel] ... to use [their] best judgment in talking to the defendant because [they] ... couldn't confer with him

while he was on the stand about his testimony."[9]

After defense counsel inquired further into the confines of the court's ruling, the judge noted that he was "not sure whatever else [counsel would] like to talk with [the defendant] about while he's on the stand," but that counsel is "going to have to decide, if [the defendant] asks [them] 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."[10]

Villarreal's counsel objected to the court's order on Sixth Amendment grounds.[11]

Villarreal was convicted and sentenced to 60 years in prison.[12] Villarreal appealed, alleging the trial judge's instruction violated his Sixth Amendment right to counsel.[13]

The Fourth Court of Appeals and the Texas Court of Criminal Appeals affirmed the trial court's decision, finding that the instruction did not violate the Sixth Amendment because it only limited the restriction to discussions regarding the defendant's testimony.[14]

In reaching its decision, the Court of Criminal Appeals reasoned that "the type of communication being restricted [was] the true controlling factor" in Geders and Perry.[15] While a defendant "has no constitutional right to consult with his lawyer while he is testifying" once he becomes a witness, he does have the right to discuss with his lawyer other details, "such as the availability of other witnesses, trial tactics, or even the possibility of negotiating a plea bargain."[16]

Lower Courts Split on This Issue

Lower courts are split on whether a qualified order during an overnight recess preventing defendants and counsel from discussing ongoing testimony violates the Sixth Amendment.

All six federal circuit courts to address this issue, along with three state supreme courts, concluded that the Sixth Amendment guarantees a defendant the right to confer with counsel about his testimony during an overnight recess.[17]

Those courts reasoned that "a defendant's constitutional right to consult with his attorney on a variety of trial-related issues during a long break, such as an overnight recess, is inextricably intertwined with the ability to discuss his ongoing testimony," in the words of the U.S. Court of Appeals for the Second Circuit's 2007 decision in U.S. v. Triumph Capital Group Inc.[18] In other words, the U.S. Constitution does not allow for an order like the one imposed on Villarreal.

Texas and the state supreme courts of Delaware, Kentucky and Ohio came out the other way. Each held that the Sixth Amendment does not guarantee defendants the right to consult with counsel about their testimony during an overnight recess.[19] They reasoned that qualified orders do not violate Geders because the court only "prohibited [the defendant] from discussing his uncompleted testimony with counsel," rather than restrict the defendant's access to his lawyer, as the Ohio Supreme Court reasoned in its 2006 decision in State v. Conway.[20]

The U.S. Supreme Court granted certiorari to decide "[w]hether a trial court abridges the defendant's Sixth Amendment right to counsel by prohibiting the defendant and his counsel from discussing the defendant's testimony during an overnight recess."[21]

Petitioner's Arguments

Villarreal's merits brief contends that, under the court's precedent, the "Sixth Amendment guarantees 'the defendant's right to unrestricted access to his lawyer for advice' during an overnight recess," even though "such discussions will inevitably include some consideration of the defendant's ongoing testimony."[22]

According to Villarreal, the Texas Court of Criminal Appeals' distinction between testimony and strategy is not easily distinguishable, as a "defendant's testimony is inseparable from the defense's trial strategy."[23] Specifically, Texas' rule would "make it impossible for" clients to receive advice to make informed decisions on strategy, as counsel would be prevented from advising defendants on issues regarding their testimony, "such as the importance of not mentioning excluded evidence and the need to avoid perjury."[24]

Villarreal's brief also heavily criticizes the Texas Court of Criminal Appeals' holding as unworkable. Because conversations about a defendant's testimony are so intertwined with discussions of strategy, judges "will have to make metaphysical distinctions between discussions of the defendant's testimony and discussions of trial strategy."[25] This case-by-case approach would "chill the advocacy of defense attorneys," who will be hesitant advocates out of fear of "crossing an impermissible line."[26]

And, according to Villarreal, to police this rule, judges would be forced to probe into the substance of attorney-client communications, thus "destroying the attorney-client privilege."[27]

Villarreal is supported by groups of retired federal and state judges, legal ethics scholars and others as amici curiae.[28]

Respondent's Arguments

Texas argues that the qualified order made in Villarreal's case is permissible under Geders, as the Geders decision only prohibited absolute no-conferral orders.[29]

More importantly, Texas emphasizes that Perry focused on the substance of the communication rather than the length of the break, and thus "recognized a constitutional distinction between discussing ongoing testimony (not protected) and discussing other trial-related matters (protected)."[30]

Texas' brief, to a degree, abandons the Texas Court of Criminal Appeals' decision, clarifying what qualified orders can prohibit: "testimonial management."[31] Attorneys cannot "coach[], regroup[], and strategiz[e] about the testimony itself."[32] However, while attorneys cannot manage a defendant's testimony, "[c]ounsel can still discuss a range of issues related to the testimony, including calling additional witnesses, plea bargains, legal objections, court orders, excluded evidence, and the implications of perjury."[33]

With respect to Villarreal's administrability argument, Texas asserts that the statements of Villarreal's counsel indicating that they understood the judge's order, and their subsequent failure to request reconsideration, demonstrates the workability of qualified orders.[34]

Texas also emphasizes that its position would not unduly interfere with the attorney-client privilege, as attorneys are already permitted to cross-examine regarding witness coaching, and any privacy concerns can be addressed through in camera review.[35]

Texas' position is supported by the U.S., along with a group of states as amici curiae.[36] The solicitor general, set to speak at argument, argued — like Texas — that text, history and precedent support qualified orders, and Villarreal's policy arguments are unpersuasive. Specifically, the government emphasized that the right to counsel has always been subject to reasonable limitations, and courts have discretion to weigh a defendant's right against the need to preserve the truth-seeking function of the trial.[37]

Most notably, the government argued any error would be harmless, as the evidence was overwhelming, Villarreal's testimony was weak and counsel the next day did not express a specific need to confer.[38]

Oral Argument Preview

The court will hear argument from counsel for Villarreal, Texas and the government. There are several themes to pay attention to at argument.

Administrability

The justices will likely be interested in the administrability of Texas' proposed rule. Whether a rule is clear and administrable is often a consideration by the court at oral argument, as the court desires to set clear guidance for lower courts and individuals to prevent further disputes arising related to the issue.

Thus, several justices will likely test the outer boundaries of Texas' proposed rule, and if any ambiguities exist that may create additional confusion moving forward. If the justices appear concerned with administrability at oral argument, that could signal a decision favoring Villarreal.

Strategy vs. Testimony

The court will likely focus on whether issues of trial strategy are truly distinguishable from conversations about a defendant's ongoing testimony. This issue is similarly intertwined with the above administrability argument, and will likely center on the ease for defense counsel in balancing compliance with qualified orders, and their ethical obligation to provide effective counsel to their clients.[39]

Original Intent of the Sixth Amendment

It will be interesting to see whether the court grasps onto the parties' arguments regarding history and original intent.[40] Since both parties, to some extent, cite to the history of the Sixth Amendment to support their position, originalism and history could play a role in the court's decision, given its makeup.

Potential Implications of the Court's Decision

The court's ultimate decision could have significant impacts on defendants and their lawyers. Given the uniform authority from the federal circuit courts, the gravity of those decisions could sink the Texas courts' decision. This would create a bright-line rule that would eliminate ambiguities about what counsel can speak to their clients about — anything — thereby encouraging open communication and zealous advocacy.

However, as Texas cautioned, it could endanger a "trial's truth-seeking function," given the risk that attorneys could coach their clients' testimony with impunity.[41]

Even though the possibility of witness coaching might pose an issue, the court may be enticed by the clarity that Villarreal's position brings.

On the other hand, adopting Texas' position would be seismic for defendants and defense counsel, particularly given the existing federal circuit decisions. First, such a decision would create great uncertainty for defense attorneys, who will be forced to make issue-by-issue determinations on whether their discussions with clients relate to the client's ongoing testimony in an impermissible way.

Retired federal and state judges, as amici curiae, agreed that "trial strategy [is] often 'inextricably intertwined with the'" defendant's testimony, and that Texas' position could result in "a chilling effect" on defense attorneys — lawyers may hold back in their representation out of fear of sanctions, thus impinging a criminal defendant's right to effective counsel.[42]

Additionally, as highlighted by a group of legal ethics scholars, an adverse ruling could interfere with the ethical obligations of criminal defense attorneys.[43] As detailed in their amicus brief, attorneys have many applicable ethical obligations, including the duty to zealously represent their clients and provide the information necessary to help their clients make informed decisions.[44]

If counsel has to navigate metaphysical distinctions between what is permissible and impermissible consultation during overnight recesses, they will be forced to decide between their ethical obligations to their clients and the court, which could have dire implications for their clients, should counsel favor their duty to the court.

Overall, if the court sides with Texas, it will need to draw clear lines of what exactly are permissible consultation topics during these overnight recesses. However, as with any rule, there will likely be scenarios omitted, which will continue to create uncertainty and force split decisions among various state and federal courts.

How the court navigates these issues at oral argument will be interesting, and provide greater insight into its future decision.

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[1] Geders v. United States, 425 U.S. 80, 91 (1976).

[2] Id.

[3] Perry v. Leeke, 488 U.S. 272, 283-84 (1989).

[4] Id. at 284.

[5] Id.

[6] Br. at 3.

[7] Id.

[8] Id.

[9] Id. at 3-4

[10] Id. at 4-5.

[11] Id. at 5-6.

[12] Id. at 6.

[13] Id.

[14] Id. at 6-8, 9-11.

[15] Id. at 10; Pet. App. at 11a.

[16] Br. at 10; Pet. App. at 11a.

[17] United States v. Triumph Capital Grp., Inc., 487 F.3d 124, 132 (2d Cir. 2007); United States v. Cobb, 905 F.2d 784, 791 (4th Cir. 1990); United States v. Santos, 201 F.3d 953, 965 (7th Cir. 2000); United States v. Sandoval-Mendoza, 472 F.3d 645, 652 (9th Cir. 2006); United States v. Cavallo, 790 F.3d 1202, 1212 (11th Cir. 2015); Mudd v. United States, 798 F.2d 1509, 1510 (D.C. Cir. 1986); State v. Fusco, 461 A.2d 1169, 1174 (N.J. 1983); People v. Joseph, 646 N.E.2d 807, 807 (N.Y. 1994); Martin v. United States, 991 A.2d 791, 796 (D.C. Ct. App. 2010).

[18] See, e.g., Triumph Capital Grp., Inc., 487 F.3d at 133.

[19] See Bailey v. State, 422 A.2d 956, 963 (Del. 1980); Beckham v. Commonwealth, 248 S.W.3d 547, 553-54 (Ky. 2008); State v. Conway, 842 N.E.2d 996, 1021 (Ohio 2006).

[20] See, e.g., Conway, 842 N.E.2d at 1021.

[21] No. 24-557 Docket entry (S. Ct. Apr. 7, 2025).

[22] Br. at 13, 18-24.

[23] Br. at 14, 25-26 (noting "[t]he defendant's testimony is inexplicably intertwined with the defense's trial strategy").

[24] Br. at 14, 26-30.

[25] Br. 14-15, 37-38.

[26] Br. at 14-15, 38-39.

[27] Br. at 15-16, 39-40

[28] In support of Villarreal's position, the National College for DUI Defense, Retired Judges, Legal Ethics Scholars, the Constitutional Accountability Center, and the National Association of Criminal Defense Lawyers filed amicus briefs. See Docket No. 24-557.

[29] Br. in Opp. 13-14, 19-32

[30] Id. at 14, 19-24.

[31] Id. at 14, 25-31.

[32] Id. at 14, 27-28.

[33] Id. at 14, 27-31.

[34] Id. at 35-37.

[35] Id. at 39-44.

[36] In support of Texas's position, the United States and fifteen states including Ohio, filed amicus briefs. See Docket No. 24-557.

[37] See generally U.S. Br.

[38] U.S. Br. at 32-33. It is important to note that unlike Texas, who urged the Court in the event of a reversal to remand to the lower court to determine the issue of harmless error in the first instance, the Solicitor General asks the Supreme Court to decide harmless error itself in the first instance. Id.

[39] See generally, e.g., Legal Ethics Scholar Br.

[40] Br. at 44-48; Br. in Opp. at 50-52.

[41] Br. in Opp. at 29-30.

[42] Retired Judges' Br. at 4-5, 11-12.

[43] See generally Legal Ethics Scholars Br. at 8-14.

[44] Id.