No. 24-557

IN THE
Supreme Court of the United States

DAVID ASA VILLARREAL,

Petitioner,

v.

TEXAS,

Respondent.

On Writ of Certiorari to the Court of Criminal Appeals of Texas

BRIEF OF CONSTITUTIONAL ACCOUNTABILITY CENTER AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

ELIZABETH B. WYDRA
BRIANNE J. GOROD*
ALEXIS HOAG-FORDJOUR
NARGIS ASLAMI
ANA BUILES
CONSTITUTIONAL ACCOUNTABILITY CENTER
1200 18th Street NW, Suite 501
Washington, D.C. 20036
(202) 296-6889
brianne@theusconstitution.org

Counsel for Amicus Curiae

* Counsel of Record

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INTEREST OF *AMICUS CURIAE*[1]

Constitutional Accountability Center (CAC) is a think tank and public interest law firm dedicated to fulfilling the progressive promise of the Constitution's text and history. CAC works in our courts, through our government, and with legal scholars to improve understanding of the Constitution and preserve the rights and freedoms it guarantees. CAC has a strong interest in ensuring that the Constitution applies as robustly as its text and history require and accordingly has an interest in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

An accused person's right to the assistance of counsel is a cornerstone of this nation's adversarial system of justice. *See United States v. Ash*, 413 U.S. 300, 308-09 (1973). Breaking from English common law, the Framers guaranteed in the Sixth Amendment that "[i]n all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defence," U.S. Const. amend. VI. In so doing, the Framers sought to safeguard individual liberty against tyrannical or arbitrary government action. *See* Erica J. Hashimoto, *Resurrecting Autonomy: The Criminal Defendant's Right to Control the Case*, 90 B.U. L. Rev. 1147, 1167-68 (2010) (detailing the Framers' skepticism "that the government would . . . act in the defendant's interest").

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund its preparation or submission. No person other than *amicus* or its counsel made a monetary contribution to its preparation or submission.

Notwithstanding this critical constitutional guarantee, a Texas trial court prevented David Asa Villarreal from fully conferring with his counsel during a critical stage of his trial. About an hour into Mr. Villarreal's direct testimony at trial, the judge called a recess. *See* Pet. App. 5a. After excusing the jury, the judge instructed counsel that although he and Mr. Villarreal could confer on other matters, they could not discuss his testimony. *Id.* at 6a. The judge further informed the parties that the proceedings would resume 24 hours later, and that the prohibition on any discussion of Mr. Villarreal's testimony would remain in effect during that entire period. *Id.* at 8a-9a.

The divided court below held that the Texas trial court's order preventing Mr. Villarreal from discussing his testimony with counsel during a 24-hour recess did not violate Mr. Villarreal's Sixth Amendment right to counsel. *Id.* at 2a. Pointing to this Court's decisions in *Geders v. United States*, 425 U.S. 80 (1976), and *Perry v. Leeke*, 488 U.S. 272 (1989), the court below held that the court's restriction on "the type of communication" was the "controlling factor," and because the judge restricted only communication about Mr. Villarreal's testimony and not other matters, the court preserved Mr. Villarreal's right to counsel. Pet. App. 10a-11a. That decision fundamentally misunderstands this Court's precedents and also undermines the Sixth Amendment's ability to fulfill its fundamental role as a safeguard of liberty. This Court should reverse.

Although the English common law recognized only a limited right to the assistance of counsel, the American colonists quickly abandoned that common law rule, *see* infra at 7-10, and when the original Constitution was ratified without any protection of the right to counsel, state lawmakers

called for that protection to be added as part of the proposed Bill of Rights, *see infra* at 12-14.

In drafting the Sixth Amendment and the other amendments in the Bill of Rights, the Framers were influenced by the Enlightenment-era idea that a nation's citizens enjoy some inalienable rights, including a right to liberty, that the government cannot violate. And recognizing the significant threat that the criminal law can pose to liberty, they included in the proposed Bill of Rights a number of guarantees designed to protect those accused of crimes. One of those guarantees was that "[i]n all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defence," U.S. Const. amend. VI, and its inclusion in our new national charter was entirely uncontroversial.

Drawing on this historical background, this Court has time and time again recognized that the Sixth Amendment right to counsel plays a critical role in ensuring the fairness of trials in our adversarial system, which in turn is supposed to help guard against arbitrary or erroneous deprivations of liberty. As this Court explained in *Powell v. Alabama*, "[t]he right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel," and an opportunity to be properly heard is one of the "immutable principles of justice which inhere in the very idea of free government." 287 U.S. 45, 68-69 (1932).

Because of the importance of this right, this Court has made clear that "once the adversary judicial process has been initiated, the Sixth Amendment guarantees a defendant the right to have counsel present at all 'critical' stages of the criminal proceedings." *Montejo v. Louisiana*, 556 U.S. 778, 786 (2009). One

such critical stage is when the defendant is testifying. *See Geders*, 425 U.S. at 91. That is why this Court in *Geders* held that a defendant's right to have the assistance of counsel during their testimony extends to an overnight recess scheduled in the middle of that testimony. *Id.* While this Court later clarified in *Perry* that a defendant's access to counsel may be briefly interrupted if a trial court "decides that there is a good reason to" pause "the trial for a few minutes," *Perry*, 488 U.S. at 284-85 (holding that the defendant did not have a constitutional right to confer with his attorney during a 15-minute break in his testimony), that decision did nothing to undermine or limit this Court's holding in *Geders*—to the contrary, in *Perry*, this Court reaffirmed *Geders*, *id.* at 280 ("the line between the facts of *Geders* and the facts of [*Perry*]" is a "line of constitutional dimension"); *id.* at 284 ("[t]he interruption in *Geders* was of a different character").

Notwithstanding these precedents, the court below concluded that the trial court's order limiting Mr. Villarreal's access to counsel throughout a 24-hour recess during his testimony was constitutional because the trial court only prohibited Mr. Villarreal and his attorney from discussing Mr. Villarreal's testimony, and not other matters. But "[c]onsultation[s] between lawyers and clients cannot be neatly divided into discussions about 'testimony' and those about 'other' matters." *Mudd v. United States*, 798 F.2d 1509, 1512 (D.C. Cir. 1986). This is particularly true where, as here, the substance of Mr. Villarreal's testimony established the defense's theory of the case. Mr. Villarreal's defense was self-defense, and often a defendant's "testimony may be the only, or at least the most persuasive, way to communicate the defendant's fear that motivated the infliction of . . . death on the alleged victim," J. Vincent Aprile II, *The Accused's Decision to*

Testify, 38 Crim. Just. 56, 56-57 (2023). Indeed, here Mr. Villarreal was the defense's only witness. Thus, the trial court order limited Mr. Villarreal's ability to consult fully with his counsel during a critical stage of the criminal proceedings against him.

In short, as this Court has repeatedly recognized, and as the history of the Sixth Amendment makes clear, the right to the assistance of counsel is "fundamental and absolute," *Glasser v. United States*, 315 U.S. 60, 76 (1942), and stands as an "essential barrier[] against arbitrary or unjust deprivation of human rights," *Johnson v. Zerbst*, 304 U.S. 458, 462 (1938). The trial court's order violated Mr. Villarreal's Sixth Amendment right to counsel, and this Court should reverse.

ARGUMENT

I. The "Rich Historical Heritage" of the Sixth Amendment Right to Counsel Establishes Its Role as a Critical Safeguard of Life and Liberty.

As this Court has recognized, "[t]he right to counsel in Anglo-American law has a rich historical heritage, and this Court has regularly drawn on that history in construing the counsel guarantee of the Sixth Amendment." *Ash*, 413 U.S. at 306. Drawing on that history, this Court has concluded time and again that "the right to be represented by counsel is among the most fundamental of rights," *Penson v. Ohio*, 488 U.S. 75, 84 (1988), and is "necessary to insure fundamental human rights of life and liberty," *Johnson*, 304 U.S. at 462.

A. At the time of the Founding, English common law recognized only a limited right to the assistance of counsel that left many defendants

arbitrarily accused of serious crimes and forced to face the well-resourced prosecutor without counsel, knowledge of the law, or an independent and neutral judge. *See* 1 Wayne R. LaFave, et al., *Criminal Procedure* § 1.6(c) (4th ed. 2024); *see also* John H. Langbein, *The Criminal Trial Before the Lawyers*, 45 Univ. Chi. L. Rev. 263, 307-10 (1978).

Until late in the seventeenth century, only civil plaintiffs and defendants charged with criminal misdemeanors were permitted to have the assistance of counsel. Thomas M. Cooley, *A Treatise on the Constitutional Limitations* 406-07 (5th ed. 1883). The law denied counsel to those charged with felonies or treason, with a narrow exception permitting counsel to argue questions of law that the defendant suggested—a "poor privilege" for those defendants "unlearned in the law." *Id.* at 406.

Eventually, after the Glorious Revolution of 1688 revealed "that innocent men had been condemned to traitors' deaths," "the complaints of so many . . . defendants about the denial of counsel began to have posthumous effect." Langbein, *supra*, at 309. In 1695, in response to mounting grievances about the dire need for procedural safeguards, *id.* at 309-10, English common law extended the right to have the assistance of counsel at trial to those charged with treason, Cooley, *supra*, at 406-07.

But it was not until 1836, decades after the Bill of Rights was ratified, that English common law established a right to the assistance of counsel at trial for those accused of felonies other than treason. *Id.*

B. The American colonies quickly abandoned the common law rule that they inherited from Britain. Indeed, in 1641, decades before the English common law extended the right to counsel to defendants charged with treason, the Massachusetts Body of Liberties recognized an accused person's right to assistance in their defense: "Every man that find[s] himself[] unfit to plead his own[] cause in any Court shall have Libert[y] to [e]mploy any man against whom the Court doth not except, to help[] him, Provided he give him no[] fee or reward for his pain[s]." William H. Whitmore, *A Bibliographical Sketch of the Laws of Massachusetts Colony from 1630 to 1686*, at 39 (1890).

A little over two decades later, the Colony of Rhode Island followed suit, establishing its own right to counsel in statute: "it shall be accounted and owned from henceforth [until] farther order, the lawful privilege of any person that is indicted, to procure an attorn[ey] to plead any [point] of law that may make for the clearing of his innocenc[e]." 2 *Records of the Colony of Rhode Island and Providence Plantations, in New England* 238-39 (John Russell Barlett ed., 1857). This statutory right was necessary because, as the Colony's General Assembly explained, any innocent person could be indicted and accused of a crime "and yet[] may not be[] accomplished with so[] much wisdom[] and knowl[e]dge of the law as to plead[] his own[] innocenc[e]." *Id.* at 239.

Throughout the 1700s, nearly all the original American colonies recognized some form of a constitutional or statutory right to counsel. *Cf.* Charles Donahue, Jr., *An Historical Argument for Right to Counsel During Police Interrogation*, 73

Yale L.J. 1000, 1033-34 (1964) ("the colonists appreciated that if a defendant were forced to stand alone against the state, his case was foredoomed").

Maryland, New York, and Delaware all provided criminal defendants the right to "be allowed counsel." Md. Const. of 1776, Declaration of Rights, art. XIX; N.Y. Const. of 1777, art. XXXIV; Del. Const. of 1776, Declaration of Rights, § 14. The constitutions of Massachusetts and New Hampshire contained provisions recognizing a criminal defendant's right "to be fully heard in his defence by . . . counsel," Mass. Const. of 1780, pt. I, art. XII; N.H. Const. of 1784, art. I, § XV, and the Pennsylvania Constitution recognized the nearly identical "right to be heard by . . . council," Pa. Const. of 1776, Declaration of Rights, art. IX. Lastly, the New Jersey Constitution provided that "all Criminals shall be admitted to the same Privileges of Witnesses and Counsel, as their Prosecutors are or shall be entitled to." N.J. Const. of 1776, art. XVI; *see also* Del. Charter of 1701, art. V.

And most of those colonies that did not have constitutional provisions guaranteeing the right to counsel nevertheless granted at least some accused persons a statutory right to counsel. In the 1730s, South Carolina and Virginia passed statutes recognizing a right to counsel in all capital cases, thus going beyond the English common law, which still prohibited the assistance of counsel for felony charges other than treason. 2 Nicholas Trott, *The Laws of the Province of South Carolina* 518-19 (1736); 4 William Waller Hening, *The Statutes at Large; Being a Collection of all the Laws of Virginia, from the First Session of the Legislature, in the Year 1619*, at 404 (1820). North Carolina's

statutory language was even broader, providing that "every person accused of any crime or misdemeanor whatsoever, shall be entitled to council in all matters which may be necessary for his defen[se], as well to facts as to law." 1 *Laws of the State of North Carolina* 315 (1821).

Finally, in Connecticut, the right to counsel in criminal prosecutions was embedded in judicial practice. *See* 2 Zephaniah Swift, *A System of the Laws of the State of Connecticut* 391-404 (1796). Neither the 1639 Fundamental Orders of Connecticut nor the Charter of 1662, the colony's only governing documents until 1818, contained a declaration of rights or liberties; instead, both served principally to institute frameworks of government. 1 *The Federal and State Constitutions, Colonial Charters, and Other Organic Laws* 519-23, 529-36 (Francis Newton Thorpe ed., 1909). Notwithstanding that, it was established practice at arraignment for the court to "ask[] the prisoner if he desires counsel, which if requested, is always granted, as a matter of course," and "the court will appoint or assign" counsel. 2 Swift, *supra*, at 392. In fact, even when an accused "decline[d] to request or name counsel, and a trial [was] had, . . . the court [would nevertheless] assign proper counsel." *Id.* Moreover, upon the appointment of counsel, "the court [would] enquire of them, whether they have advised with the prisoner, so that he [was] ready to plead, and if not, [would] allow them proper time for that purpose." *Id.* This practice was a clear rejection of "that cruel and illiberal principle of the common law of England," resting on the "flimsy pretense[] that the court are to be counsel for the prisoner," which served to

"only heighten . . . indignation at the [common law] practice." *Id.* at 398-99.

In sum, twelve of the thirteen original colonies rejected the English common law rule. *See Powell*, 287 U.S. at 61. Even the most limited iteration of the right to counsel in the colonies, which was cabined to capital cases, was nevertheless broader than English common law at the time. *See* John D. King, *Beyond "Life and Liberty": The Evolving Right to Counsel*, 48 Harv. C.R.-C.L. L. Rev. 1, 7-8 (2013).

C. As reflected in the many protections of the right to counsel in colonial constitutions and statutes, critiques of the common law rule had been building for decades by the time the Constitution was ratified. *See* 4 William Blackstone, *Commentaries on the Laws of England* 349 (1st ed. 1765) (the "rule . . . seems to be not at all of a piece with the rest of the humane treatment of prisoners by the English law"); 2 Swift, *supra*, at 398 ("We have never admitted that cruel and illiberal principle of the common law of England, that when a man is on trial for his life, he shall be refused counsel, and denied those means of defen[se], which are allowed, when the most trifling pittance of property is in question.").

That the common law rule left those accused of criminal offenses in a particularly vulnerable position was especially salient to the Founding generation because firsthand experience had shown them that "the great instrument of arbitrary power is criminal prosecutions." *The Complete Bill of Rights* 426 (Neil H. Cogan ed., 1997) [hereinafter *Complete Bill of Rights*]. The "memory of Parliament and King George III was still fresh in the minds of the Framers," George C.

Thomas III, *When Constitutional Worlds Collide: Resurrecting the Framers' Bill of Rights and Criminal Procedure*, 100 Mich. L. Rev. 145, 179 (2001), and of particular significance to them was the parliamentary act permitting the forcible transport of colonists to England for trial upon accusations of treason or misprision, that is, the concealment of known felonies, including treason. Issued in retaliation for the Boston Tea Party, this act of Parliament was viewed by the Founders as "unjust," "cruel," and "arbitrary." Declaration and Resolves of the First Congress (U.S. Oct. 14, 1774), https://avalon.law.yale.edu/18th_century/resolves.asp.

While England had by this point established a right to counsel for those accused of treason, those accused of felonious misprision enjoyed no such right. In his rebuke of that infamous act of Parliament, Thomas Jefferson lamented: "[T]he wretched criminal, if he happen to have offended on the American side, . . . removed from the place where alone full evidence could be obtained, without money, *without counsel*, without friends, without exculpatory proof, is tried before judges predetermined to condemn." *A Summary View of the Rights of British America* (1774), https://avalon.law.yale.edu/18th_century/jeffsumm.asp (emphasis added). Such a fate would amount to being forcibly "offered [as] a sacrifice to parliamentary tyranny." *Id.*

One Founding Father viewed the right to the assistance of counsel to be so important that he risked his safety and reputation to ensure no person—not even the enemy—would be forced to face trial without assistance in defending themselves. When Captain Preston, the commanding officer

during the Boston Massacre, sought counsel for his defense, John Adams took up the cause: "I had no hesitation in answering that Council ought to be the very last thing that an accused Person should want in a free Country. . . . Persons whose Lives were at Stake ought to have the Council they preferred." 3 *Diary and Autobiography of John Adams* 293 (L.H. Butterfield ed., 1961). In explaining his decision, Adams underscored defense counsel's role in promoting fairness, noting that "if [Captain Preston] thinks he cannot have a fair [Trial] of that Issue without my Assistance, without hesitation he shall have it." *Id.*

C. Against this backdrop it is unsurprising that state lawmakers lamented the federal Constitution's omission of a provision guaranteeing the right to counsel. The ratifying conventions of Massachusetts, New York, North Carolina, and Virginia expressly sought the inclusion of a Bill of Rights "asserting, and securing from encroachment, the essential and unalienable rights of the people." 3 Jonathan Elliot, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 657 (2d ed. 1836); *accord Proceedings and Debates of the Convention of North Carolina* 270 (1788) (seeking a "declaration of rights, asserting and securing from encroachment the great principles of . . . liberty").

Among those rights sought to be secured was the right to counsel in all criminal prosecutions. *Complete Bill of Rights*, *supra*, at 401-02. In one of the earliest proposed Bill of Rights, which "undoubtedly influenced the subsequent state ratifying conventions which proposed amendments," Edward Dumbauld, *The Bill of Rights and What it Means Today* 11 (1957), the dissenting minority of

the Pennsylvania Convention objected to "the omission of a Bill of Rights, ascertaining and fundamentally establishing those unalienable and personal rights of men, without the full, free, and secure enjoyment of which there can be no liberty," *Complete Bill of Rights*, *supra*, at 430. Among these was the "invaluable right[]," which provided "for the safety of the accused" "in all capital and criminal prosecutions[,] . . . to be heard by himself and his counsel." *The Address and Reasons of Dissent of the Minority of the Convention of Pennsylvania to Their Constitutions*, *reprinted in* 2 Bernard Schwartz, *The Bill of Rights: A Documentary History* 664-68 (1971). A Massachusetts lawmaker shared this view, complaining that the lack of even "the smallest constitutional security that we shall be allowed" "the benefit of counsel" went against the "maxim universally admitted, that the safety of the subject consists in having a right to a trial as free and impartial as the lot of humanity will admit of." *Complete Bill of Rights*, *supra*, at 419, 420 (Holmes).

In drafting the Sixth Amendment and the other amendments in the Bill of Rights, the Framers were influenced by the Enlightenment-era idea that individuals possess fundamental and inalienable rights to life and liberty, and that governments must protect—not abuse—those rights. *See* Dumbauld, *supra*, at 145; Roscoe Pound, *The Spirit of the Common Law* 74, 101, 119-20 (1921). They also recognized the threat that abuses of the criminal laws could pose to liberty, 1 *The Complete Works of M. de Montesquieu* 241 (1777) ("It is therefore on the goodness of criminal laws that the liberty of the subject principally depends."), and thus appreciated that a lack of safeguards for

criminal defendants posed a great threat to that "security of liberty," *The Federalist No. 83*, at 508 (Alexander Hamilton) (Clinton Rossiter ed., 1961); *accord* Pound, *supra*, at 116-17.

Given that a trial represented "that part of the process in which the defendant's liberty was won or lost," Donahue, *supra*, at 1041, the English common law rule was irreconcilable with this view, *see* 1 LaFave, *supra*, at § 1.6(c); *accord Zerbst*, 304 U.S. at 462-63 (the Sixth Amendment reflects "the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is presented by experienced and learned counsel").

Thus, as the Framers drafted the Bill of Rights, there was no debate or controversy when it came to adopting the Sixth Amendment right to counsel. *See* 14 William M. Beaney, *The Right to Counsel in American Courts* 25 (1955).

* * *

In 1789, the assistance of counsel was widely regarded as one of several critical safeguards against "judicial despotism," *The Federalist No. 83*, *supra*, at 499 (Alexander Hamilton), and "the perversion of Law and the Corruption or partiality of Juries," 3 *Diary and Autobiography of John Adams*, *supra*, at 292. Although this Court "did not have much occasion to weigh in on the Sixth Amendment right to counsel until the twentieth century," Alexis Hoag-Fordjour, *Back to the Future: (Re)Constructing Ineffective Assistance of Counsel*, 58 U.C. Davis L. Rev. 111, 113 (2024), it has repeatedly drawn on that history in

recognizing the importance of this fundamental right, as the next Section discusses.

II. This Court Has Repeatedly Recognized that the Sixth Amendment Protects Defendants' Meaningful Access to Counsel.

A. In *Powell v. Alabama*, this Court recognized the critical role that the Sixth Amendment plays in safeguarding liberty when it held that a state denied capital defendants due process by failing to provide them the effective assistance of counsel. 287 U.S. at 52. "The right to be heard," the Court observed, "would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel." *Id.* at 68-69. Without the ability to "secure and have the advice and assistance of counsel" during a criminal trial, a defendant typically "lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one." *Id.* at 69-70. This was why, the Court explained, an opportunity to be properly heard was one of the "immutable principles of justice which inhere in the very idea of free government." *Id.* at 68 (internal citation and quotations omitted).

Six years later, in *Johnson v. Zerbst*, this Court extended the right to counsel to all federal criminal trials. In doing so, the Court first discussed the history of the amendment: "Omitted from the Constitution as originally adopted," the Court explained that the Sixth Amendment, among the other Bill of Rights, was submitted by the Founders as "essential barriers against arbitrary or unjust deprivation of human rights." 304 U.S. at 462. "The Sixth Amendment stands as a constant admonition that if the constitutional safeguards it provides be lost, justice will not still be done." *Id.* (internal citation and quotations omitted). This Court acknowledged then that without counsel, "the average

defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty." *Id.* at 462-63.

Then, in *Gideon v. Wainwright*, this Court extended the right to counsel to defendants facing potential incarceration in state courts. It explained that "[f]rom the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law." 372 U.S. 335, 344 (1963). "This noble ideal," the Court went on, "cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him." *Id.*

And finally in *Strickland v. Washington*, this Court further expanded the right, recognizing that "a person who happens to be a lawyer . . . at trial alongside the accused . . . is not enough." 466 U.S. 668, 685 (1984). Instead, the right to counsel "is the right to the *effective* assistance of counsel." *Id.* at 686 (emphasis added) (internal citation and quotations omitted).

Through this "long line of cases," *id.* at 684, this Court has repeatedly recognized that the Sixth Amendment right to counsel exists to ensure a fair trial and thereby guard again arbitrary deprivation of the "fundamental human rights of life and liberty." *Zerbst*, 304 U.S. at 462. "[C]entral" to this fundamental right is the guarantee that the "accused . . . need not stand alone against the State at any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial." *United States v. Wade*, 388 U.S. 218, 226 (1967).

B. Because of the important role the Sixth Amendment right to counsel plays in ensuring both the fairness and accuracy of criminal proceedings that can deprive the accused of their liberty, this Court has also made clear that "once the adversary judicial process has been initiated, the Sixth Amendment guarantees a defendant the right to have a counsel present at all 'critical' stages of the criminal proceedings." *Montejo*, 556 U.S. at 786. A critical stage is one where "the presence of [the accused's] counsel is necessary to preserve the defendant's basic right to a fair trial." *Wade*, 388 U.S. at 227. These are moments "where substantial rights of a criminal accused may be affected," *Mempa v. Rhay*, 389 U.S. 128, 134 (1967), or when "[a]vailable defenses may be irretrievably lost, if not then and there asserted," *Hamilton v. Alabama*, 368 U.S. 52, 54 (1961); *see United States v. Cronic*, 466 U.S. 648, 659 n.25 (1984) (collecting cases).

One such critical moment is when a defendant is testifying. *See Geders*, 425 U.S. at 91. Under the common law, a person charged with a criminal offense was thought "incompetent to testify under oath in his own behalf at his trial." *Ferguson v. Georgia*, 365 U.S. 570, 570 (1961). By the nineteenth century, however, the federal government and most states abolished this prohibition because "[i]t was seen that the shutting out" of a defendant from "his sworn evidence could be positively hurtful to the accused, and that innocence was in fact aided, not prejudiced, by the opportunity of the accused to testify under oath." *Id.* at 580-81; *see generally* Robert Popper, *History and Development of the Accused's Right to Testify*, 1962 Wash. U. L. Q. 454 (1962).

Once criminal defendants began testifying, this Court acknowledged that leaving a defendant

"debarred of all assistance from his counsel" would put him in "a trap into which none but the most cool and self-possessed could place himself with much prospect of coming out unharmed." *Ferguson*, 365 U.S. at 595 (internal citation omitted). For that reason, as the Court later explained, a criminal defendant has the right to have the assistance of counsel during his testimony. *Cronic*, 466 U.S. at 659 n.25 (citing *Ferguson* for the proposition that during a "critical stage of the proceedings" it is "constitutional error" to prevent counsel from "assisting the accused").

C. In *Geders*, this Court considered the specific question of whether a defendant's right to have the assistance of counsel during their testimony extends to an overnight recess scheduled in the middle of their testimony, and it concluded that it did. 425 U.S. at 82, 91.

As this Court explained, "an order preventing [a defendant] from consulting his counsel 'about anything' during a 17-hour overnight recess between his direct-and cross-examination impinge[s] upon his right to the assistance of counsel guaranteed by the Sixth Amendment." *Id.* at 91. This is because "the tensions of a trial for an accused with life or liberty at stake might alone render him utterly unfit to give his explanation properly and completely." *Ferguson*, 365 U.S. at 594. Without counsel during this critical stage, this Court held, a defendant "may fail properly to introduce, or to introduce at all, what may be a perfect defense." *Id*. (quoting *Powell*, 287 U.S. at 69).

Similarly, in *Brooks v. Tennessee*, this Court held that the state's usurpation of counsel's role in determining whether and when a defendant should testify at trial violates the defendant's right to counsel. 406 U.S. 605, 612 (1972). In that case, a state statute required defendants to testify before any other witness

for the defense. *Id*. at 606. In holding the statute unconstitutional, the Court explained that depriving the accused and his lawyer "an opportunity to evaluate the actual worth of their evidence," was an unconstitutional limitation in the "timing" and "planning" of this "critical element of his defense." *Id*. at 612-13.

This Court later clarified, in *Perry v. Leeke*, that a trial court can prevent a defendant from consulting with counsel during a "brief recess" in their testimony. 488 U.S. at 281. It did so because a testifying witness, like any other witness, "does not have a constitutional right to advice," *id.* at 284, and "in a short recess . . . it is appropriate to presume that nothing but the testimony will be discussed," *id.*; *see id.* at 284-85 ("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"). But, in doing so, this Court reaffirmed *Geders*, explaining that "[t]he interruption [there] 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." *Id.* at 284.

The order of the Texas trial court at issue in this case interfered with a "critical element of [Mr. Villarreal's] defense," *Brooks*, 406 U.S. at 612, as the next Section explains.

III. The Limitation the Trial Court Imposed on Mr. Villarreal's Ability to Confer with His Counsel Violates the Sixth Amendment.

The state of Texas charged Mr. Villarreal with murder, *see* Pet. App. 2a, and his defense was that he acted in self-defense, *see id.* at 25a-26a (Keel, J.,

concurring). Under Texas law, a person claiming self-defense is justified in using force, including deadly force. *See* Tex. Penal Code § 9.32. The burden is on the defendant to produce "sufficient evidence at trial that raises the issue of self-defense to have that issue submitted to the jury." *See Trammell v. Texas*, 287 S.W.3d 336, 340 (Tex. App. 2009).

To meet that burden, Mr. Villarreal testified at the guilt phase of the trial. Indeed, he was the only defense witness to testify at that stage. *See* Pet. App. 58a. A claim of self-defense relies on the defendant's state of mind and what the defendant reasonably believed at the time, making Mr. Villarreal's testimony crucial to the defense's theory of the case. *See* Aprile, *supra*, at 56-57 (explaining that defendant's "testimony may be the only, or at least the most persuasive, way to communicate the defendant's fear that motivated the infliction of . . . death on the alleged victim").

One hour into Mr. Villarreal's testimony, the court called a preplanned 24-hour recess and ordered Mr. Villarreal and his counsel to avoid discussing Mr. Villarreal's testimony. *See* Pet. App. 5a, 8a. The judge explained, "[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." Pet. App. 6a. The judge instructed Mr. Villarreal and his counsel that they could discuss other matters that did not include Mr. Villarreal's testimony. *Id.*

The trial court's restriction on Mr. Villarreal's ability to consult with counsel during a lengthy trial recess ran afoul of his Sixth Amendment right to counsel because it denied him the full assistance of counsel when he needed it the most, in contravention of this Court's cases, *see supra* at 15-19. In so doing, it also prevented the Sixth Amendment from fulfilling its role as a

fundamental safeguard for the accused, working to ensure that they will have a fair trial before they can be deprived of their liberty. *See Strickland*, 466 U.S. at 684-85 (referring to "a long line of cases . . . recogniz[ing] that the Sixth Amendment right to counsel . . . is needed[] in order to protect the fundamental right to a fair trial").

In *Geders*, the defendant was facing charges involving the possession and distribution of narcotics. 425 U.S. at 81-82. There, the trial court ordered a recess in the middle of the defendant's testimony, prohibiting the defendant from discussing anything with defense counsel during a 17-hour recess. *Id.* at 88. As noted earlier, this Court held that order unconstitutional, recognizing 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.*

Here, Mr. Villarreal was facing more serious charges than the defendant in *Geders*; the recess was longer; and Mr. Villarreal's testimony was essential to the defense's theory of the case in a way that it was not in *Geders*. Given all this, Mr. Villarreal's need for "the guiding hand of counsel at every step in the proceedings against him[]" was even more crucial than it was in *Geders*. *Cf. Powell*, 287 U.S. at 69 (relying on case-specific facts about the defendant and the charges the defendant faced to explain why the assistance of counsel was necessary).

To be sure, in *Perry*, this Court concluded that there was no Sixth Amendment violation when the defendant was denied access to his counsel during a 15-minute break in his testimony. 488 U.S. at 280. But the exceedingly short duration of the recess was key in *Perry*; as this Court explained, with such a short recess it is "appropriate to presume that nothing but the

testimony will be discussed," and the "testifying defendant does not have a constitutional right to advice." *Id.* at 284. Indeed, this Court made clear that a longer interruption would run afoul of the Sixth Amendment 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." *Id.*

Relying on this discussion in *Perry*, the court below concluded that the trial court's order did not violate the Sixth Amendment because it only prohibited Mr. Villareal from discussing his testimony, and not other matters. *See* Pet. App. 10a-11a; *id.* at 11a (concluding that "the type of communication being restricted" was "the controlling factor"). But this attempted hair-splitting cannot cure the constitutional violation. "Consultation[s] between lawyers and clients cannot be neatly divided into discussions about 'testimony' and those about 'other' matters." *Mudd*, 798 F.2d at 1512. Indeed, a restriction on discussing Mr. Villarreal's testimony would necessarily restrict discussion of other "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," *Perry*, 488 U.S. at 284. This is particularly true where, as here, the substance of Mr. Villarreal's testimony established the defense's theory of the case. As this Court put it in *Perry*, "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," and "[t]he fact that such discussions will inevitably include some consideration of the defendant's ongoing testimony does not compromise that basic right." *Id.*

The trial court in Mr. Villarreal's case was also concerned that defense counsel might potentially

impede the truth-seeking function of trial through coaching or managing Mr. Villarreal's testimony. *See* Pet. App. 15a (describing the court's concern with "managing the testimony in front of the jury" and noting "the judge['s] . . . focus[] on preserving the truth-seeking function of trial by preventing coaching"). But that concern cannot justify interfering with Mr. Villarreal's right to counsel. Because the right to the assistance of counsel is so "fundamental and absolute," *Glasser*, 315 U.S. at 76, when there is a conflict between a "defendant's right to consult with his attorney during a long overnight recess in the trial," and the prosecutor's interest in avoiding a 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," *Geders*, 425 U.S. at 91.

* * *

The Sixth Amendment was ratified to ensure that when the state seeks to deprive a person of his life or liberty, that person has the assistance of counsel when defending himself. As this Court has explained, "the Sixth Amendment right to counsel exists, and is needed, in order to protect the fundamental right to a fair trial." *Strickland*, 485 U.S. at 684. By prohibiting Mr. Villarreal from consulting with his counsel about important aspects of his case at a critical stage of his trial, the Texas trial court denied him his counsel's assistance when he needed it the most and denied him the fair trial that the Sixth Amendment guarantees. This Court should reverse.

CONCLUSION

For the foregoing reasons, the judgment of the Texas Court of Criminal Appeals should be reversed.

Respectfully submitted,

ELIZABETH B. WYDRA
BRIANNE J. GOROD*
ALEXIS HOAG-FORDJOUR
ANA BUILES
NARGIS ASLAMI
CONSTITUTIONAL
ACCOUNTABILITY CENTER
1200 18th Street NW, Suite 501
Washington, D.C. 20036
(202) 296-6889
brianne@theusconstitution.org

Counsel for Amicus Curiae

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* Counsel of Record