Supreme Court Further Limits Recess Testimony Communication with Counsel

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The Supreme Court recently attempted to strike a balance between a criminal defendant's Sixth Amendment right to counsel and the judiciary's interest in preventing witness coaching during trial. In a unanimous decision, the Court held in *Villarreal v. Texas,* 607 U.S. ___ (2026), that trial judges may prohibit criminal defendants from discussing their ongoing testimony with counsel during an overnight recess without violating their constitutional rights.

The case arose from the prosecution of David Villarreal, who was accused of fatally stabbing his boyfriend. Villarreal chose to testify at his murder trial, but his testimony was interrupted by a 24 hour overnight recess. The trial judge instructed defense counsel not to "manage his testimony." Villarreal resumed the stand the next day and was eventually convicted. He was sentenced to 60 years in prison. The instruction became the focal point of his appeal, ultimately carrying his case all the way to the United States Supreme Court.

On appeal, Villarreal's attorneys argued that there is no way to bar discussion of trial testimony during overnight recesses without significantly infringing on the Sixth Amendment right to counsel. Defense counsel emphasized that restrictions on recess testimony consultation can prevent other critical legal discussions, including those involving plea negotiations, potential perjury issues or logistical matters like obtaining expert witness information. The Supreme Court disagreed. Instead, it held that the trial court's "qualified" conferral order permissibly balanced the right to counsel against the burden of offering unaltered trial testimony.

Justice Ketanji Brown Jackson, writing for the majority, explained that "A criminal defendant has many unassailable rights during his trial, including the right not to testify and the right to access his lawyer. But if and when a defendant takes the stand in his own defense, his status shifts. He does not shed his rights as a criminal defendant. But he does assume some of the burdens of a testifying witness." In line with that view, she expanded, "[f]or the duration of the defendant's time on the stand, consultation about the testimony itself – rather than incidental discussion of testimony in service of protected topics – sheds its constitutional protection."

The opinion situates *Villarreal* within the framework of two prior decisions addressing whether (and to what extent) judges may restrict attorney client contact mid-testimony. The Court first discussed *Geders v. United States*, 425 U.S. 80 (1976), in which the Court struck down an absolute conferral ban instructing the testifying defendant not to discuss the case overnight with anyone. The Court then discussed *Perry v. Leeke*, 488 U.S. 272 (1989), in which it upheld a conferral restriction during a 15-minute routine recess during the trial day, concluding that testimony related discussions during short breaks may be barred because the defendant is still effectively on the stand.

Although the Court previously acknowledged in *Perry* that the factual line between these cases is "thin," it rejected Villarreal's argument that drawing a temporal line, by allowing more discussion during a longer break and less during a shorter break, makes no sense. In contrast, the Court rooted the distinction in content, reasoning that what matters is not the length of the recess, but whether the discussion concerns "the testimony itself" rather than "incidental discussion of testimony in service of protected topics." The opinion clarifies that a court "cannot prohibit a lawyer from asking his client about a new potential witness or a piece of evidence mentioned for the first time during the defendant's testimony," or from "asking his lawyer about compliance with the court's evidentiary rulings." But it may prohibit "discussion of testimony for its own sake," because it "threatens to shape the defendant's testimony and undermine the trial's search for the truth."

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Among the concurring justices were Justices Clarence Thomas and Neil Gorsuch, who agreed with the outcome but critiqued the majority's reasoning, arguing that it "opines on hypothetical situations not before the court and needlessly expands our precedents." In their view, in applying *Geders* and *Perry* as-is, the trial court's order was constitutional because it allowed discussions unrelated to the testimony. "Under *Geders* and *Perry*, the trial judge's order was constitutional because Villarreal could discuss matters other than his testimony," Justice Thomas wrote. Thus, in the opinion of the concurring justices, the Supreme Court's analysis should have ended there. Justice Thomas' critique of the majority's opinion was its clarification that defendants and attorneys can discuss testimony if it is "incidental to other topics" such as plea advice or strategy. "The trial judge's order here complied with our precedents," Justice Thomas wrote. "The trial judge instructed defense counsel not to 'discuss what you couldn't discuss with [Villarreal] if he was on the stand in front of the jury,' and explained that 'you couldn't confer with him while he was on the stand about his testimony.'"

Justice Alito also authored a concurring opinion in an effort to provide additional context for the majority's opinion. In doing so, he discussed the baseline situation in which a defendant completes his testimony without any break in the proceedings, pointing out that during such a situation, the jury hears the defendant's testimony from his own mouth, "not a version of that story scripted or choreographed by counsel." Justice Alito noted that the defense cannot show the jury a video statement being read by the defendant, pass him notes during his testimony or speak with him via an earpiece. As a result, he explained, "A break in the proceeding – either a short break during the trial day or an overnight recess – should not fundamentally alter the rule that the defendant must testify without coaching by counsel."

At oral arguments on October 6, 2025, Andrew Warthen, counsel for the Bexar County Criminal District Attorney's Office, argued for a rule barring defense counsel from coaching or managing the substance of testimony during breaks, while preserving testimony-related discussions, such as counseling a defendant to make eye contact or speak more clearly. The United States solicitor general's office received time for oral argument as well as an amicus to the state of Texas, but took a more aggressive stance, arguing that testimony should not be discussed at all. Villarreal's attorney, Stuart Banner, on the other hand, argued that trying to create a line allowing some discussion lightly touching on testimony while prohibiting other discussion that relates to testimony more directly is not only impossible, but would abridge Sixth Amendment rights. Banner argued, "Responsible defense lawyers, worried about being held in contempt for crossing this invisible line, will be chilled from offering the assistance that the defendant needs and that the Sixth Amendment guarantees." He noted that trying to distinguish between direct and incident discussions of testimony is "not a line, it's a Rorschach blot."

In reality, the Court's effort to draw a content-based distinction may invite uncertainty in practice. As Villarreal's counsel argued, trying to navigate an unclear situation in which defense counsel may engage in some testimony-related discussion with the defendant while cutting off other discussion that touches on testimony more directly places defense counsel on uncertain ethical footing as they attempt to provide the assistance guaranteed by the Sixth Amendment without running afoul of the Supreme Court's invisible line. Moreover, as a practical matter, it is difficult to foresee how or whether this invisible line will be enforced.

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