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CASE NOTE

PERRY V. LEEKE: THE PERMISSION OF TRIAL COURTS TO ORDER SILENT RECESSES

THIS CONTROVERSY AROSE out of alleged Sixth Amendment rights violations, which occurred during the trial of Donald Ray Perry, who had been accused of participating in a kidnaping and sexual assault that ended in a brutal murder. As part of Perry's defense, his counsel sought to establish that Perry was mildly retarded and that any wrongdoing on his part was solely attributable to the duress inflicted upon him by his cohorts.¹ The defense called a psychologist and a psychiatrist to testify as to Perry's mental capabilities. The experts stated that Perry had a "childlike personality," a difficulty distinguishing reality from fantasy and an "inability to cope with stressful situations."²

Despite his mental infirmities, the defendant took the stand to testify in his defense. Upon completion of the defendant's direct testimony, the court declared a fifteen-minute recess and ordered the defendant not to confer with anyone, including his attorney.³ Perry's counsel objected, stating that he merely wanted to confer with his client so that he could inform Perry of his rights during cross-examination.⁴ This request was denied and the emotionally disturbed defendant was taken to a very small room, with no windows. His attorney was not even given an opportunity to explain why Perry could not confer with him during the recess.⁵ Interestingly, during the state's presentation of its case-in-chief, the trial court ordered several recesses, some of which were ordered while witnesses were testifying. However, unlike the defendant, the

1. *Perry v. Leeke*, 109 S. Ct. 594, 596 (1989)

2. *Id.* at 606 n.6.

3. *Id.* at 594.

4. *Id.* at 606 n.6.

5. *Id.*

state's witnesses were not barred from engaging the prosecutor in conversation.⁶

Following the resumption of trial, counsel for the defendant moved for a mistrial. In denying the motion, the trial court stated that the defendant was not entitled to seek legal advice concerning his impending cross-examination.⁷

This matter was eventually appealed to the South Carolina Supreme Court where Perry's conviction was affirmed.⁸ In arriving at its decision, the court held that the trial court's order did not deprive the defendant of his Sixth Amendment rights because "[n]ormally, counsel is not permitted to confer with his defendant client between direct and cross-examination."⁹

Undaunted, the defendant then sought a writ of habeas corpus in federal court. The District Court held that defendants do indeed have a right to counsel during short recesses, denial of which constitutes grounds for reversal, regardless of whether the defendant is able to establish prejudice resulting therefrom.¹⁰ Based upon this reasoning, the District Court granted the defendant's petition for a writ of habeas corpus.¹¹

Much to the defendant's dismay, however, that decision was reversed by the Fourth Circuit Court of Appeals sitting in banc.¹² Although the court agreed that the trial court's ruling deprived Perry of a constitutionally protected right, it held that such deprivations must be subjected to a prejudice-harmless error analysis before they can be considered grounds for reversal.¹³ Based upon its review of the record, the court held that since the evidence indicating Perry's guilt was very strong, the denial of access to counsel merely constituted harmless error, and therefore his conviction should not be disturbed.¹⁴ Similar to the District Court, the dissent argued that such deprivations warranted automatic dismissal and that a prejudice inquiry was impractical because it would require a probe into past and predicted future client

6. *Id.* at 609 (Marshall, J., dissenting).

7. *Id.* at 596.

8. *State v. Perry*, 278 S.C. 490, 299 S.E.2d 324 (1983)

9. *Id.* at 493, 299 S.E.2d at 325-326.

10. *Perry v. Leeke*, 109 S. Ct. 594, 597 (1989).

11. *Id.*

12. *Perry v. Leeke*, 832 F.2d 837 (4th Cir. 1987) (in banc).

13. *Id.* at 839-40.

14. *Id.* at 843-44.

discussions.¹⁵

The disagreement between the majority and the dissent was indicative of the debate which arose among federal appellate courts as to whether denying access to counsel during a brief recess constitutes an automatic ground for reversal or whether such violations must first be subjected to a prejudice-harmless error analysis.¹⁶ Although the federal appellate courts disagreed as to the effect of such violations, most agreed that the denial of counsel during a brief court ordered recess constituted a constitutional violation. The Supreme Court of the United States recognized the importance of these issues and the frequency with which they arose, and sought to resolve them in *Perry*.¹⁷

I. HISTORY

The issue in *Perry* involves a defendant's right to counsel which is guaranteed by the sixth amendment.¹⁸ Traditionally, the right to counsel has been broadly construed to protect defendants at every stage of their defense. In *Powell v. Alabama*,¹⁹ the Supreme Court stated:

The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel [A defendant] is unfamiliar with the rules of evidence He lacks both the skill and knowledge adequately to prepare his defense, even though he [may] have a perfect one. He requires the guiding hand of counsel at every step of the proceedings against him.²⁰

One justification for a broad application of the right to counsel is that when an individual is confronted with the awesome power of the state he or she needs an attorney to help balance the inequities between the parties. By helping to achieve a more equitable balance between the parties, the truth-seeking function of the trial process is more likely to be effectuated.²¹

The parameters of the right to counsel had previously been

15. *Id.* at 848-49 (Winter, C.J., dissenting) (Judge Winter gives a number of examples showing the impracticality of determining what could be discussed in a fifteen minute recess).

16. *Perry*, 109 S. Ct. at 598 n.2.

17. *Id.* at 598-99.

18. U.S. Const., amend. VI.

19. 287 U.S. 45 (1932).

20. *Id.* at 68-69.

21. *Perry*, 109 S. Ct. at 605 (Marshall, J., dissenting).

construed by the federal appellate courts to encompass the right to counsel during brief court ordered recesses.²² The Supreme Court went further in *Geders v. United States*²³ when the Court considered whether a defendant was entitled to consult with his client during an overnight recess called while the defendant was testifying.²⁴ Although an overnight recess would obviously give defense counsel ample opportunity to discuss the remainder of the defendant's forthcoming testimony, the Court *unanimously* held that the trial court's order preventing the defendant from conferring with his attorney during the overnight recess constituted a violation of the defendant's sixth amendment right to assistance of counsel.²⁵

In light of the Supreme Court's holding in *Geders*, every federal appellate court and nearly all of the state courts considering the issue had agreed that any order barring communication between a defendant and his attorney during a recess constituted a Sixth Amendment violation, regardless of the duration of the recess.²⁶ The only controversy surrounding this area of the law was whether such a violation was an automatic ground for reversal or whether the error must be subjected to a prejudice-harmless error analysis.²⁷ The *Perry* case presented the Supreme Court with an opportunity to resolve this peripheral issue as to what effect such errors should have on appeal.

II. THE SUPREME COURT DECISION

A. The Opinion of the Court

Surprisingly, the Court began by restructuring the primary focus of the case. In rejecting the rationale of the Court of Appeals, the Court made a distinction between inquiries measuring the quality of a lawyer's work and inquiries involving a governmental interference with the right to counsel.²⁸ The Court held that an inquiry into actual or constructive denial of legal assistance "is not subject to the kind of prejudice analysis that is ap-

22. See *Stubbs v. Brodenkircher*, 689 F.2d 1205, 1206-07 (4th Cir. 1982), *cert. denied*, 461 U.S. 907 (1983); *U.S. v. Allen*, 542 F.2d 630 (4th Cir. 1976), *cert. denied*, 430 U.S. 908 (1977).

23. 425 U.S. 80 (1976).

24. *Id.* at 81.

25. *Id.* at 91.

26. *Perry v. Leeke*, 109 S. Ct. 594, 602-03 (1989) (Marshall, J., dissenting).

27. *Id.* at 603 (Marshall, J., dissenting).

28. *Id.* at 599-600.

propriate in determining whether the quality of a lawyer's performance itself has been constitutionally effective."²⁹

Having resolved what was previously considered the central dispute, the Court went on to consider the constitutionality of a defendant's entitlement to converse with counsel during a brief break in his or her testimony.³⁰ Although most federal appellate courts had previously concluded that defendants were entitled to advice of counsel during brief recesses, the Court held to the contrary, stating 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 good reason to interrupt the trial for a few minutes."³¹

Through its holding, the Court primarily sought to preserve the truth-seeking function of the trial process.³² When the defendant becomes a witness, the Court asserted that the defendant no longer has a "constitutional right to consult with his lawyer while he is testifying" and that neither "he nor his counsel has a right to have the testimony interrupted in order to give him the benefit of counsel's advice."³³ Writing for the majority, Justice Stevens concluded that since these rules apply to all other witnesses, they should also apply to defendants that choose to testify.³⁴ Justice Stevens further justified the Court's holding by asserting that trial court judges instruct witnesses not to discuss their testimony with third parties as a matter of common practice.³⁵

Underlying the Court's rationale was its assumption that during a brief recess the defendant's testimony would more than likely be the sole subject of any attorney-client conversation.³⁶ The Court determined that permitting a defendant to discuss his testimony with his attorney prior to cross-examination would obstruct the truth-seeking function of the trial process.³⁷ The Court explained that:

Cross-examination often depends for its effectiveness on the ability of counsel to punch holes in a witness' testimony at just the

29. *Id.* at 600.

30. *Id.*

31. *Id.* at 602.

32. *Id.* at 601.

33. *Id.* at 600.

34. *Id.* at 600-01.

35. *Id.* at 600.

36. *Id.* at 601.

37. *Id.*

right time, in just the right way. Permitting a witness, including a criminal defendant, to consult with counsel after direct examination but before cross-examination, grants the witness an opportunity to regroup and regain a poise and sense of strategy that the unaided witness would not possess. This is true even if we assume no deceit on the part of the witness; it is simply an empirical predicate of our system of adversary rather than inquisitorial justice that cross-examination of a witness who is uncounseled between direct examination and cross-examination is more likely to lead to the discovery of truth than is cross-examination of a witness who is given time to pause and consult with his attorney.³⁸

Despite the Court's deep-rooted fear of attorney influence, the Court maintained that its decision was not based upon the assumption that an attorney would engage in unethical witness "coaching" during a mid-testimony recess.³⁹

Although the Court's holding appeared to be a radical departure from *Geders*, it managed to preserve the *Geders* holding by a narrow distinction.⁴⁰ The Court distinguished the mid-testimony overnight recess at issue in *Geders* in that the normal attorney-client consultation which would occur 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."⁴¹ Thus, unlike during a "short recess," a defendant has an unrestricted right of access to his attorney during a "long" recess, even though the defendant may discuss matters concerning his or her ongoing testimony.⁴² This distinction was therefore based upon the Court's conclusion that it was "appropriate to presume that nothing but testimony" would be discussed during a short recess.⁴³ As the Court admitted, however, the distinction is a "thin one."⁴⁴

38. *Id.*

39. *Id.* at 600.

40. *Id.* at 602.

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.* at 600.

B. The Dissenting Opinion

Justice Marshall, who was joined by Justices Brennan and Blackmun, wrote an impressive and persuasive opinion which viciously attacked the majority's position.⁴⁵ Essentially, the dissenters concluded that the majority's distinction between short and long recesses was without a constitutional or logical basis.⁴⁶ As an alternative, the dissent proposed that the Sixth Amendment should be construed to forbid "any order barring communication between a defendant and his attorney, at least where that communication would not interfere with the orderly and expeditious progress of the trial."⁴⁷

Justice Marshall began his attack by pointing out that the majority's holding was contrary to the law's previously established view of the Sixth Amendment.⁴⁸ Justice Marshall reminded the majority that the Sixth Amendment rights had been previously guaranteed at every stage of the trial, especially when evidence of the defendant's guilt is being elicited.⁴⁹ The dissent was also highly critical of the majority's assertion that "allowing a defendant to speak with his attorney during a 'short' recess between direct and cross-examination invariably will retard the truth-seeking function of the trial" process.⁵⁰ Justice Marshall pointed out that the majority failed to provide evidence to support this assertion and that the effects upon the truth-seeking process were never considered in *Geders*.⁵¹ Furthermore, the dissent argued that advice of counsel can only enhance the truth-seeking function of adjudication. Justice Marshall based this claim upon the well-accepted notion that truth and fairness will be best served if there is equal representation for both parties.⁵²

The dissent also questioned the Court's assumption that the conversations in question would be limited to a discussion of the defendant's ongoing testimony.⁵³ During a brief mid-testimony recess, the dissent stated that counsel could also "remind [the] de-

45. *Id.* at 602-09 (Marshall, J., dissenting).

46. *Id.* (Marshall, J., dissenting).

47. *Id.* (Marshall, J., dissenting) (quoting *Geders v. United States*, 425 U.S. 80, 92 (1976)).

48. *Id.* at 602-03 (Marshall, J., dissenting).

49. *Id.* at 603 (Marshall, J., dissenting).

50. *Id.* at 605 (Marshall, J., dissenting).

51. *Id.* (Marshall, J., dissenting).

52. *Id.* at 605 (Marshall, J., dissenting).

53. *Id.* at 607 (Marshall, J., dissenting).

fendant that certain cross-examination questions might implicate his right against self-incrimination or relate to previously excluded evidence. . . ."⁵⁴ Similarly, counsel could use such an opportunity simply to remind the defendant to mind his demeanor and "to brace the defendant for the 'legal engine' steaming his way."⁵⁵

Finally, the dissent argued that the majority's opinion will create a tremendous amount of confusion amongst the lower courts.⁵⁶ When confronted with similar access-to-counsel cases, the lower courts will now be forced to draw narrow lines of distinction between the majority's opinion and *Geders* based merely upon the duration of the recess. In that regard, courts will have to guess as to whether a court ordered recess is long enough to be considered a long recess under *Geders* or whether it is a short recess as described in the majority's opinion.⁵⁷ Courts will also have to consider whether the holding is limited to post-direct testimony recesses or whether it encompasses all brief recesses called during a defendant's testimony. Thus, the dissent argued that the majority opinion raised more questions than it answered.⁵⁸

III. ANALYSIS

In *Perry v. Leeke* the Supreme Court was presented with an opportunity to resolve an appellate court conflict concerning the proper effect of court orders which bar conversation between defendants and their attorneys during court ordered recesses. Although the Court concluded that a prejudice-harmless-error inquiry is not appropriate, it went further and held that a right to counsel may be suspended during brief mid-testimony recesses.⁵⁹

Simply stated, the justifications supporting the majority's position are weak and unpersuasive. Perhaps the most noticeable flaw is that the Court's holding is completely based upon the assumption that the defendant's testimony will be the only subject of mid-testimony recesses.⁶⁰ Considering the wide range of topics which may be discussed during a brief recess, the majority's primary assumption is easily undermined.⁶¹ Nonetheless, the Court

54. *Id.* (Marshall, J., dissenting).

55. *Id.* (Marshall, J., dissenting).

56. *Id.* (Marshall, J., dissenting).

57. *Id.* at 608 (Marshall, J., dissenting).

58. *Id.* (Marshall, J., dissenting).

59. See *supra* text accompanying notes 29-31.

60. *Perry*, 109 S. Ct. at 601.

61. *Id.* at 607 (Marshall, J., dissenting).

determined that trial court judges should be vested with the authority to order silent mid-testimony recesses in order to maximize the effect of cross-examination.⁶² However, as the dissent pointed out, the loss of a constitutional right is too great a price to pay for the sake of preserving cross-examination.⁶³ Furthermore, such conversations may actually enhance the truth-seeking process by helping to add balance to the trial proceedings.⁶⁴

The majority opinion seems most inappropriate when viewed in light of the particular facts of this case. The defendant was mildly retarded and considered unable to handle stressful situations.⁶⁵ Of course, one could argue that these mental infirmities rendered the defendant more susceptible to persuasion and therefore rendered the truth in greater need of protection. However, a brief consultation with his attorney would have allowed the defendant to calm down and perhaps more accurately relate the facts of the case.

Another distasteful aspect of the majority's opinion is that it manifests a general distrust of attorneys. Although the majority expressly denied that its holding was based upon such ill will, the Court's firm belief that interaction with an attorney during a fifteen-minute break would jeopardize the truth-seeking function of the trial process indicates that attorney distrust played a significant part in the Court's decision.⁶⁶ If the Court believed that attorneys could be trusted to uphold their ethical duties perhaps it would have upheld the prior extensions of the right to counsel during brief mid-testimony recesses.

Finally, and perhaps most importantly, the majority opinion will produce confusion and inconsistency among the lower courts. As the dissent pointed out, lower courts will have to draw very fine lines based upon slight variations in the duration of the recesses.⁶⁷ Through subsequent adjudication, the courts will have to decide the extent to which the *Perry* holding applies, what constitutes a short recess, what constitutes a long recess and whether an attorney's promise not to discuss testimony is grounds for permitting a limited conversation.⁶⁸ Thus, by creating issues, the majority's

62. See *supra* text accompanying notes 50-52.

63. *Perry*, 109 S. Ct. at 608-09 (Marshall, J., dissenting).

64. See *supra* text accompanying notes 31-38.

65. *Perry*, 109 S. Ct. at 606 n.6 (Marshall, J., dissenting).

66. See *id.* at 601.

67. *Id.* at 608 (Marshall, J., dissenting).

68. *Id.* (Marshall, J., dissenting).

opinion has created more problems than it solves. Hopefully, when one of the newly created issues reaches the Supreme Court, it will reconsider the holding in *Perry* and perhaps overrule it entirely. As a substitute, the Court should adopt the all-inclusive rule proposed by the dissent.⁶⁹ By forbidding any order barring communication between a defendant and his or her attorney, the Court could resolve the inconsistencies it has created and better effectuate the spirit of the Sixth Amendment.

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69. *Id.* at 602 (Marshall, J., dissenting) (“[T]he Sixth Amendment forbids ‘any order barring communication between a defendant and his attorney, at least when that communication would not interfere with the orderly and expeditious progress of the trial.’”) (quoting *Geders v. United States*, 425 U.S. 80, 92 (1976)).