CONSTITUTIONAL LAW—RIGHT TO COUNSEL—SIXTH AMENDMENT RIGHT TO ASSISTANCE OF COUNSEL IS NOT VIOLATED WHEN TRIAL COURT JUDGE PROHIBITS DEFENDANT FROM CONFERRING WITH COUNSEL DURING A FIFTEEN MINUTE RECESS BETWEEN THE DIRECT AND CROSS EXAMINATION OF DEFENDANT—*Perry v. Leeke*, 109 S. Ct. 594 (1989).

The sixth amendment is an indispensable safeguard to ensure a criminal defendant a fair trial.[1] Included in this fundamental right is an accused's right to have the assistance of counsel to mount his defense.[2] Historically the right to counsel received a very limited interpretation.[3] Indeed, prior to 1932 there was nominal focus placed upon expanding the literal interpretation of the sixth amendment.[4] However, over the past fifty years the

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[1] *See generally* L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 16-40, at 1634 (2d ed. 1988); Fellman, *The Federal Right to Counsel in State Courts*, 31 NEB. L. REV. 15 (1952) (defendant's right to counsel in criminal prosecutions in state court proceedings). This is the second article dealing with this issue. The first article in the series can be found in 30 NEB. L. REV. 559 (1951). *See also* Brecher, *The Sixth Amendment and the Right to Counsel*, 136 U. PA. L. REV. 1957-63 (1988) (discussing constitutional limitations of right to counsel).

[2] U.S. CONST. amend. VI. The sixth amendment states:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Id.

[3] *See* Betts v. Brady, 316 U.S. 455, 466 (1942); Powell v. Alabama, 287 U.S. 45, 60 (1932). Recognition of a right to assistance of counsel dates back to 17th century English common law. *Powell*, 287 U.S. at 60. Historically, a defendant charged with treason or a felony did not receive assistance from counsel unless he had specific legal questions. *Id.* In contrast, however, defendants in civil suits or those charged with misdemeanors were afforded complete assistance of counsel. *Id.* Consequently, this rule entitling aid of counsel in petty offenses and denying it in serious crimes has been the subject of much criticism, resulting in the evolution of this area of the law. *Id.* Many of the colonies did not accept this rule. *Id.* at 61. Prior to adopting the federal Constitution, Maryland's constitution stated "[t]hat, in all criminal prosecutions, every man hath a right . . . to be allowed counsel . . . ." *Id.* Many other states had similar provisions in their constitutions. *Id.*

[4] *See* W.M. BEANEY, THE RIGHT TO COUNSEL IN AMERICAN COURTS 27-34 (1955) (discussing application and development of the right to counsel). A few of the Supreme Court's past decisions mentioned the issue of counsel. Anderson v. Tiest, 172 U.S. 24 (1898) (Court upheld the appointment of defense counsel by trial judge, when judge severed trial of co-defendant because of a conflict of interest). *See also* Urban v. United States, 46 F.2d 291 (10th Cir. 1931) (the attorney for one of many co-defendants was not present throughout the impaneling of the jury, but his recognition of the panel at his arrival eliminated any problems which might have

right to assistance of counsel has undergone various stages of development leading to a more significant application.[5] Conversely, the decades of expansion have created concern as to the limits and constitutional dimensions of the right to counsel, at times resulting in judicial retreat.[6] Recently, the United States Supreme Court signaled further retreat from liberal sixth amendment interpretation. In *Perry v. Leeke*,[7] the Supreme Court held that an order by a state trial court judge prohibiting a defendant from conferring with counsel during a fifteen minute break, between direct and cross examination, did not violate the defendant's sixth amendment right to the assistance of counsel.[8]

Donald Ray Perry was tried and convicted in a South Carolina state court for murder, kidnapping and sexual assault.[9] Evidence presented to the jury by a psychiatrist and a psychologist indicated that Perry was slightly retarded, but basically non-vio-

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occurred); Holtzoff, *The Right of Counsel Under the Sixth Amendment*, 20 N.Y.U. L. REV. 1, 4 (1944) (defendant in a criminal case has the right at trial to be represented by counsel).

[5] For further clarification of the expansion see Strickland v. Washington, 466 U.S. 668 (1984) (Court held the right to counsel is the right to the effective assistance of counsel and a defendant must prove he was deprived of a fair trial because his attorney's work was deficient and that this deficiency prejudiced the outcome of his defense); United States v. Cronic, 466 U.S. 648 (1984) (A court must analyze an attorney's individual performance in deciding whether there has been a denial of an effective assistance of counsel, except when the surrounding circumstances qualify an assumption of ineffectiveness); Geders v. United States, 425 U.S. 80 (1976) (automatic reversal of conviction because defendant's sixth amendment right to counsel was violated when trial court forbid consultation between clients and counsel during overnight recess); Argersinger v. Hamlin, 407 U.S. 25 (1972) (held that no indigent misdemeanant could be imprisoned unless he had been appointed counsel); United States v. Wade, 388 U.S. 218 (1967) (the sixth amendment guarantees a defendant the right to counsel at any critical confrontation by the opposing party, including corporal pre-trial proceedings where the outcome may likely determine the results of the trial and where the absence of an attorney may significantly affect the decision); Gideon v. Wainwright, 372 U.S. 335 (1963) (the right to counsel is essential and fundamental to ensure a fair trial and is therefore made obligatory by the fourteenth amendment upon the states); Powell v. Alabama, 287 U.S. 45, 71 n.12 (1932) (holding due process requires the appointment of counsel for an indigent criminal defendant who is being prosecuted for a capital offense if he is "incapable, adequately of making his own defense because of ignorance, feeblemindedness, illiteracy, or the like").

[6] *See, e.g.*, Lassiter v. Dept. of Social Servs., 452 U.S. 18 (1981) (due process does not require appointment of counsel in each parental termination proceeding where parent is indigent); Middendorf v. Henry, 425 U.S. 25 (1976) (no right to appointed counsel in summary court-martial proceedings).

[7] 109 S. Ct. 594 (1989).

[8] *Id.* at 602.

[9] *Id.* at 596.

lent.[10] Perry took the witness stand in his own defense.[11] At the end of the direct examination, the trial judge called a fifteen minute break.[12] During this period, and without prior notice to counsel, he forbade Perry to speak with anyone, specifically his attorney.[13] Upon resumption of the trial, Perry's attorney moved for a mistrial.[14] The judge denied the motion on the basis that a defendant should not be allowed any additional preparation or coaching immediately before the cross examination.[15]

On appeal, the South Carolina Supreme Court upheld Perry's conviction.[16] The court stressed that a defendant would not "normally confer" with an attorney during a short recess between direct and cross examination.[17] Consequently, the United

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10 *Id.* The experts asserted that Perry, who at that time was 21 years old, had experienced learning disabilities and by the ninth grade had dropped out of school. *Id.* at 606 n.6. He had an extremely immature personality and an I.Q. of 86. *Id.* The experts stated that Perry frequently had trouble distinguishing reality from fantasy. *Id.*

11 *Id.* at 596.

12 *Id.*

13 *Id.*

14 *Id.*

15 *Id.* The judge stated that Perry "was in a sense then a ward of the Court. He was not entitled to be cured or assisted or helped approaching his cross examination." *Id.*

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

17 Perry v. Leeke, 109 S. Ct. 594, 597 (1989). Relying on a strict construction of "normally confer," the state supreme court distinguished Perry v. Leek from the United States Supreme Court decision in Geders v. United States, 425 U.S. 80 (1976), stating:

> We attach significance to the words "normally confer." Normally, counsel is not permitted to confer with his defendant client between direct examination and cross examination. Should counsel for a defendant, after direct examination, request the judge to declare a recess so that he might talk with his client before cross examination begins, the judge would and should unhesitatingly deny the request.

Id. (quoting State v. Perry, 278 S.C. at 491-94, 299 S.E.2d at 325-26). The state supreme court held that *Geders* was not applicable because that decision stressed that a defendant normally would consult with his attorney at some point in an overnight recess. *Id.* at 596. The court also explained that "we do not deal with . . . limitations imposed in other circumstances." *Id.* (quoting *Geders*, 425 U.S. at 91). Justice Ness avidly dissented. *Id.* at 597. He believed *Geders* should apply because a defendant would "normally confer" with counsel during a short recess. *Id.* He asserted that the fundamental rights at issue are far more important than deterring an attorney from "coaching" his client during a fifteen minute break. *Id.* He agreed with the decision set forth by the court in United States v. Allen, 542 F.2d 630 (4th Cir. 1976), *cert. denied*, 430 U.S. 908 (1977), which stated that "the Sixth Amendment right to counsel is so fundamental that it should never be interfered with for any length of time absent some compelling reason." *Perry*, 109 S. Ct. at 597 n.1. More specifically, Justice Ness maintained:

> To allow defendants to be deprived of counsel during court-ordered re-

States Supreme Court denied Perry's petition for certiorari.[18]

Over four years after his trial court conviction, and more than two and one-half years subsequent to the denial of certiorari, Perry filed a petition to obtain a writ of habeas corpus.[19] The federal district court held that the fundamental right to counsel should not be interrupted for any reason without some compelling interest.[20] Accordingly, the court granted Perry a writ of habeas corpus.[21] The court also held that it was not necessary to demonstrate prejudice when there has been a denial of counsel in order to set aside the conviction.[22] The United States Court of Appeals for the Fourth Circuit, sitting *en banc*, reversed the district court decision.[23] The court of appeals believed the

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> cesses is to assume the worst of our system of criminal justice, *i.e.*, that defense lawyers will urge their clients to lie under oath. I am unwilling to make so cynical an assumption, it being my belief that the vast majority of lawyers take seriously their ethical obligations as officers of the court . . . . "Even if that assumption is to be made, the *Geders* opinion pointed out that opposing counsel and the trial judge are not without weapons to combat the unethical lawyer. The prosecutor is free to cross-examine concerning the extent of any coaching or the trial judge may direct the examination to continue without interruption until completed. Additionally, as noted in *Allen*, a lawyer and client determined to lie will likely invent and polish the story long before trial; thus, the State benefits little from depriving a defendant of counsel during short recesses.
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> I think the Sixth Amendment right to counsel far outweighs the negligible value of restricting that right for a few minutes during trial."

Id. (quoting *Perry*, 278 S.C. at 495-97, 299 S.E.2d at 327-28 (1983) (Ness, J., dissenting)).

18 461 U.S. 908 (1983).

19 Perry v. Leeke, 832 F.2d 837, 839 (4th Cir. 1987). "Habeas corpus" is defined as

> [t]he name given to a variety of writs . . . having for their object to bring a party before a court or judge. The primary function of the writ is to release from unlawful imprisonment. The office of the writ is not to determine guilt or innocence, and only issue which it presents is whether prisoner is restrained of his liberty by due process.

BLACK'S LAW DICTIONARY 638 (5th ed. 1979).

20 *Perry*, 109 S. Ct. at 597. The district court relied on the holding in United States v. Allen, 542 F.2d 630, 633-34 (4th Cir. 1978), *cert. denied*, 430 U.S. 908 (1977).

21 *Perry*, 109 S. Ct. at 597.

22 *Id.* In Strickland v. Washington, 466 U.S. 668 (1984), the Court formulated a two prong test which a petitioner must satisfy in order to sustain an ineffective assistance of counsel claim. *Id.* at 669. The petitioner must first prove that counsel's performance was insufficient, and then that this performance prejudiced the outcome of his trial. *Id.* at 691-96. *See also* Kimmelman v. Morrison, 477 U.S. 365 (1986) (to succeed on an ineffectiveness of counsel claim, a defendant must prove gross incompetence resulting in a prejudicial outcome of the trial).

23 *Perry*, 109 S. Ct. at 597 (1989). The court of appeals' conclusion was based on

conviction should stand because, although there was a constitutional error, it was not prejudicial to the outcome of the trial.[24] The court concluded that it was essential to establish that the constitutional error had a prejudicial influence upon the outcome of the case in order to automatically reverse the conviction.[25] The United States Supreme Court subsequently granted certiorari.[26] The Court, after refusing to apply a prejudice analysis,[27] held that the trial court's order prohibiting the defendant from conferring with his attorney during the short, mid-trial recess did not violate the right to the assistance of counsel guaranteed in the sixth amendment.[28]

The right to counsel is embedded in explicit constitutional language.[29] The *Perry* Court supported its decision with precedent which dates back fifty years—one-quarter of the entire time which the constitutional language has existed.[30] Thus, one need

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the belief that the holdings in United States v. Cronic, 466 U.S. 648 (1984) and Strickland v. Washington, 466 U.S. 668 (1984) hinted that this type of trial error was not so fundamentally threatening to a fair trial to automatically reverse a conviction. *Perry*, 109 S. Ct. at 597.

24 *Id.* After reviewing the record, the court of appeals decided that the proof against Perry was so "overwhelming," that there was no reason to believe that his responses during the cross-examination would have changed if he had been permitted time to speak with his attorney during the short break. *Id.* (quoting Perry v. Leeke, 832 F.2d 837, 843 (4th Cir. 1987)).

25 *Id.* (citing *Strickland*, 466 U.S. at 668 (1984)). Four judges dissented in the *Perry* decision. *Id.*

26 108 S. Ct. 1269 (1989).

27 *Perry*, 109 S. Ct. at 599. The Court cited to *Geders* to express that, "[a]ctual or constructive denial of the assistance of counsel altogether, . . . [was] not subject to the kind of prejudice analysis that is appropriate in determining whether the quality of a lawyer's performance itself has been constitutionally ineffective. . . . Thus, we cannot accept the rationale of the Court of Appeals' decision." *Id.* at 600 (citing *Strickland*, 466 U.S. at 692) (citations omitted).

28 *Id.* The Court distinguished between the constitutional rights of a defendant and those of a witness:

> The distinction rests instead on the fact that when a defendant becomes a witness, he has no constitutional right to consult with his lawyer while he is testifying. He has an absolute right to such consultation before he begins to testify, but neither he nor his lawyer has a right to have the testimony interrupted in order to give him the benefit of counsel's advice.
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> The reason for the rule is one that applies to all witnesses—not just defendants.

Id.

29 *See* U.S. CONST. amend. VI.

30 *Id.* On July 2, 1789, the sixth amendment was incorporated into the Bill of Rights. W.M. BEANEY, *supra* note 4, at 23. The Bill of Rights recently celebrated its 200th birthday. *See* Holtzoff, *The Right of Counsel Under the Sixth Amendment*, 20 N.Y.U. L. REV. 1, 4, 7 (1944).

only trace back to 1932, to *Powell v. Alabama*,[31] to locate the historical genesis of this constitutional right in case law.

In *Powell*, seven black defendants were charged with the rape of two white girls.[32] The defendants were not allowed an adequate chance to acquire their own legal counsel or contact their families.[33] Prior to the trial, the judge appointed the entire membership of the bar to represent the defendant for purposes of arraignment.[34] However, the court did not appoint a specific attorney until the actual morning of the trial.[35] The trial court sentenced all seven defendants to death, with each of the three separate trials concluded in one day.[36]

The Supreme Court reversed the trial court's decision, finding that in light of the capital consequences of the proceedings, the court's failure to appoint counsel denied the defendants due process of law.[37] The Court reasoned that this denial placed the defendants in a perilous situation because the newly appointed counsel was unfamiliar with the case.[38] Recognizing the funda-

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[31] 287 U.S. 45 (1932). "The right to effective assistance of counsel emerged as a corollary to the basic right to counsel in *Powell v. Alabama*." Smithburn & Springmann, *Effective Assistance of Counsel: In Quest of a Uniform Standard of Review*, 17 WAKE FOREST L. REV. 497, 499 (1981).

[32] *Powell*, 287 U.S. at 49, 51. At the state's request, the trial court tried the defendants in three severed groups. *Id.* at 49. Punishment for rape ranged from a prison term of ten years to a death sentence. *Id.* at 50. Sentencing was left to the discretion of the jury. *Id.*

[33] *Id.* at 57-58.

[34] *Id.* at 56. It was a matter of speculation or anticipation by the trial court whether these attorneys would represent the defendants at the trial. *Id.* The *Powell* Court pointed out that even if such an appointment of the entire bar had been made for representation at trial, this would not have satisfied the sixth amendment guarantee of effective assistance of counsel. *Id.*

[35] *Id.*

[36] *Id.* at 50.

[37] *Id.* at 70-73. In refusing to extend its holding beyond the unique circumstances of this case, the *Powell* Court cautioned:

> All that is necessary to decide . . . is that in a capital case, where the defendant is unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeble mindedness, illiteracy, or the like, it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law . . . .

Id. at 71.

The Court opined that in failing to supply the defendant with an "effective appointment of counsel," thus denying "effective aid in the preparation and trial of the case," the lower court denied the defendants due process of law. *Id.*

[38] *Id.* at 58. The court noted:

> The defendants, young, ignorant, illiterate, surrounded by hostile sentiment, haled back and forth under guard of soldiers, charged with an atrocious crime regarded with especial horror in the community where they were to be tried, were thus put in peril of their lives within a few

mental character of this constitutional right, the *Powell* court held that the defendants were denied any meaningful right to counsel by the "*pro forma*" representation they received.[39]

Ten years after *Powell*, in *Betts v. Brady*,[40] the Court determined that it was not a denial of due process to fail to appoint counsel in a state trial for robbery.[41] In *Betts*, the defendant was indicted for robbery.[42] Due to a lack of funds, Betts requested that counsel be appointed for his representation.[43] The judge denied his request, adhering to a local law which allowed appointed counsel only for murder and rape cases.[44] Betts received a sentence of eight years in prison.[45] The *Betts* Court held that the right to counsel was limited to cases involving a capital offense[46] or when "exceptional circumstances" were present.[47]

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moments after counsel for the first time charged with any degree of responsibility began to represent them.

Id. at 57-58. *See also* McMann v. Richardson, 397 U.S. 759 (1970) (defendant who is indigent is entitled to "reasonably competent" advice from appointed counsel); Smithburn & Springmann, *supra* note 31, at 498-99 (discussing the lack of standard to determine the effectiveness of appointed counsel).

39 *Powell*, 287 U.S. at 58. The Court concluded that:

> [D]uring perhaps the most critical period of the proceedings against these defendants, that is to say, from the time of their arraignment until the beginning of their trial, when consultation, thorough going investigation and preparation were vitally important, the defendants did not have the aid of counsel in any real sense, although they were as much entitled to such aid during that period as at the trial itself.

Id. at 57. *See also* Note, *The Right to Effective Assistance of Counsel in California: Adoption of the Sixth Amendment "Reasonably Competent Attorney" Standard*, 12 SW. U.L. REV. 53 (1980-81) [hereinafter Note, *Right to Effective Assistance of Counsel*] (discussing California's management of ineffective assistance of counsel claims past and present, with an in-depth analysis of the recently developed reasonably competent attorney test); Note, *Identifying and Remedying Ineffective Assistance of Criminal Defense Counsel: A New Look After* United States v. DeCoster, 93 HARV. L. REV. 752 (1980) (examining some major approaches to remedying the dilemma, and formulating standards for claims of ineffective assistance of counsel); Johnson v. Zerbst, 304 U.S. 458 (1938) (six years after *Powell*, the right to assistance of counsel requirement applicable to indigent defendants in capital cases was expanded to include all felony cases).

40 316 U.S. 455 (1942).

41 *Id.* at 471.

42 *Id.* at 456.

43 *Id.* at 456-57.

44 *Id.* at 457.

45 *Id.*

46 *Id.* at 471. The *Betts* Court failed to extend the holding in *Powell* to the states via the fourteenth amendment. *Id.*

47 *Id. See also* Decker & Lorigan, *Right To Counsel: The Impact of* Gideon v. Wainwright *in the Fifty States*, 3 CREIGHTON L. REV. 103, 104 n.11 (1969) (citing Carnley v. Cochran, 369 U.S. 506 (1962) (illiteracy); Chewning v. Cunningham, 368 U.S. 443 (1962) (habitual criminal); McNeal v. Culver, 365 U.S. 109 (1961) (complexity of statute and nature of defense charged); Hudson v. North Carolina, 363 U.S. 697

This "exceptional circumstances" situation was often the basis for overturning non-capital felony convictions.[48]

Over three decades passed before the Court again embarked on further expansion of the scope of the sixth amendment. In *Gideon v. Wainwright*,[49] the state charged the defendant with breaking and entering a poolroom with the ultimate intent to commit a misdemeanor.[50] This constituted a felony under Florida state law.[51] The defendant asked the court to appoint an attorney to represent him because he had no money.[52] The court denied Gideon's request for appointed counsel because the crime committed was not a capital offense.[53] The defendant conducted his own defense, and the jury convicted him.[54] He received a sentence of five years in a state prison.[55] The defendant thereafter sought habeas corpus relief in the Florida Supreme Court claiming that he had not been afforded the rights guaranteed under the United States Constitution.[56]

Subsequently, the Supreme Court held that the right to

(1960) (youth); Moore v. Michigan, 355 U.S. 155 (1957) (youth, race, and minimal education); Herman v. Claudy, 350 U.S. 116 (1956) (limited educational background); Massey v. Moore, 348 U.S. 105 (1954) (mental retardation); Palmer v. Ashe, 342 U.S. 134 (1951) (mentally abnormal); Uveges v. Pennsylvania, 335 U.S. 437 (1948) (youth); Townsend v. Burke, 334 U.S. 736 (1948) (misconduct by court officials); Wade v. Mayo, 334 U.S. 672 (1948) (extent of defendant's prior experience with criminal proceedings); Gayes v. New York, 332 U.S. 145 (1947) (youth); DeMeerleer v. Michigan, 329 U.S. 663 (1947) (youth); Rice v. Olson, 324 U.S. 786 (1945) (complex legal questions)).

This exceptional circumstances situation often overturned non-capital felony convictions. *See* Decker & Lorigan, *supra*, at 104 n.12. Betts v. Brady was outmoded virtually from the day it was decided. *Id.* at 104. In a concurring opinion in *Gideon*, Justice Harlan wrote:

> In noncapital cases, the "special circumstances" rule has continued to exist in form while its substance has been substantially and steadily eroded . . . . The Court has come to recognize . . . that the mere existence of a serious criminal charge constituted in itself special circumstances requiring the services of counsel at trial. In truth the Betts v. Brady rule is no longer a reality.

Id. (Harlan, J. concurring) (quoting Gideon v. Wainwright, 372 U.S. 335, 350-51 (1963)).

48 *See* Gideon v. Wainwright, 372 U.S. 335 (1963).

49 372 U.S. 335 (1963).

50 *Id.* at 336.

51 *Id.* at 336-37.

52 *Id.* at 337.

53 *Id.* "Capital offense" is defined as "one in or for which death penalty may, but need not necessarily, be imposed." BLACK'S LAW DICTIONARY 189 (5th ed. 1979).

54 *Gideon*, 372 U.S. at 337.

55 *Id.*

56 *Id.* The petitioner signed and prepared his own petition for habeas corpus. *Id.* In his petition he declared, "I, Clarence Earl Gideon, claim that I was denied

counsel in criminal cases was essential and fundamental to a fair trial.[57] In delivering the opinion of the Court, Justice Black reasoned that the federally acknowledged right to assistance of counsel for indigent defendants should be extended to state felony prosecutions.[58] The decision in *Gideon* expressly overruled *Betts v. Brady*.[59]

Four years after *Gideon*, in *United States v. Wade*,[60] the Supreme Court interpreted the sixth amendment right to counsel to include pre-trial corporeal identification procedures.[61] In

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the rights of the 4th, 5th and 14th amendments of the Bill of Rights." *Id.* at 337 n.1.

57 *Id.* at 344. Also commenting on the fundamental nature of the right, Justice Sutherland in Powell v. Alabama 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. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. 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 in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.

Powell v. Alabama, 287 U.S. 45, 68-69 (1932).

58 Gideon v. Wainwright, 372 U.S. 335, 331-44 (1963). *See generally* Note, *Right to Effective Assistance of Counsel*, *supra* note 39, at 58-60 (post-1963 treatment of state criminal defendants under the Constitution).

59 *Gideon*, 372 U.S. at 345. The *Gideon* Court concluded that the *Betts* Court wandered from the logical wisdom for which the *Powell* Court had rested. *Id.* While a few states wanted *Betts* to remain good law, most states, in support of the Court, believed that *Betts* was "an anachronism when handed down" and that it was time to overrule it. *Id.*

60 388 U.S. 218 (1967).

61 *Id.* at 236-37. The sixth amendment right to counsel has been interpreted to apply to all "critical" stages of trial proceedings. *Id.* at 224. The *Wade* Court noted that the explicit language of this right includes counsel's assistance at all times that are necessary to supply a meaningful "defence." *Id.* at 225. Further, the opinion determined that the assistance of counsel should be supplied where particular rights may be lost or sacrificed because "[w]hat happens there may affect the whole trial. Available defenses may be irretrievably lost, if not then and there asserted . . . ." *Id.* (quoting Hamilton v. Alabama, 368 U.S. 52, 54 (1961)). *See also* Escobedo v. Illinois, 378 U.S. 478 (1964) (failure by police to warn defendant of his constitutional right to remain silent, and denial of access to his counsel who was present elsewhere in the building, violated defendant's sixth and fourteenth amendment rights); Massiah v. United States, 377 U.S. 201 (1964) (incriminating statements made by the defendant should be inadmissible as evidence because, without any notice to the defendant's attorney, federal agents set up a meeting between an informant and the defendant); White v. Maryland, 373 U.S. 59 (1963) (due process

Wade, a grand jury indicted the defendant for bank robbery and conspiracy.[62] Without prior notice to counsel, Wade was placed in a lineup, forced to put pieces of tape on his face as the robber had supposedly done, and told to say words that the robber had allegedly spoken.[63] Two bank employees positively identified Wade as the robber.[64] At trial, the same bank employees again identified Wade as the perpetrator.[65] Wade's counsel moved to strike the courtroom identifications as violative of the fifth and sixth amendments.[66] The trial court denied the motion and Wade was ultimately convicted.[67] The United States Court of Appeals for the Fifth Circuit reversed, and granted a new trial.[68]

Justice Brennan's majority opinion recognized that in a pre-trial lineup there is certainly potential for prejudice to occur which may not be able to be recaptured for review at trial.[69] The majority reasoned that because an attorney's presence can often deter prejudice as well as add to the meaningfulness of the confrontation at trial, undoubtedly this post-indictment lineup was a

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clause of fourteenth amendment violated when defendant entered guilty plea in absence of attorney).

62 *Wade*, 388 U.S. at 220.

63 *Id.*

64 *Id.*

65 *Id.*

66 *Id.*

67 *Id.*

68 *Id.* at 221. At the new trial, it was ordered that the in-court identification not be permitted as evidence because although Wade's fifth amendment rights were not violated by the lineup, "the lineup, held as it was, in the absence of counsel, already chosen to represent appellant, was a violation of his Sixth Amendment rights . . . ." *Id.* (quoting Wade v. United States, 358 F.2d 557, 560 (5th Cir. 1966)). The United States Supreme Court granted certiorari, 385 U.S. 811 (1966).

69 *Wade*, 388 U.S. at 236. The majority further reasoned that lineups can be inherently suggestive, intentionally or not, via the techniques used. *Id.* Justice Brennan recognized that what occurs at the pre-trial identification may taint a later in-court identification. *Id. Cf.* United States v. Ash, 413 U.S. 300 (1973) (right to counsel not applicable where witness views still or moving pictures of the suspect for purposes of identification); Kirby v. Illinois 406 U.S. 682 (1972) (right to counsel not extended to lineups occurring before the institution of formal proceedings against the suspect); Schmerber v. California, 384 U.S. 757 (1966) (no sixth amendment right to counsel permitted where blood sample is taken from suspect). The *Wade* Court differentiated such cases as not worthy of "critical stage" classification because the

> [k]nowledge of techniques of science and technology is sufficiently available, and the variables in techniques few enough that the accused has the opportunity, for a meaningful confrontation of the government's case at trial through the ordinary processes of cross examination of the government's expert witnesses, and to presentation other evidence of his own experts.

Wade, 388 U.S. at 227-28.

critical stage for Wade; he was "as much entitled to such aid [of counsel] . . . as at the trial itself."[70] Therefore, Wade and his attorney should have been informed about the lineup, and counsel should have been present unless waived by the defendant.[71] The Court determined that an accused is guaranteed the right to counsel by the sixth amendment during any critical confrontation by the prosecuting attorney, not just at the trial.[72] This includes pre-trial proceedings where the outcome might play a part in the accused's fate and where counsel's absence might diminish the fairness of the trial.[73] The Supreme Court thus established a bright line rule that any identification of this nature, occurring in the absence of counsel, unless effectively waived, must be excluded as evidence at trial.[74]

In 1972, the Court expanded the right of counsel to misdemeanor cases in *Argersinger v. Hamlin*.[75] In *Argersinger*, an indigent defendant accused of carrying a concealed weapon, a crime which carries a six-month maximum prison sentence and/or fine, received a sentence of ninety days imprisonment.[76] At trial, the court did not appoint counsel to the defendant.[77] The Florida Supreme Court held that the defendant had no right to assistance of counsel because punishment was, at the maximum, only six months.[78] The defendant claimed the court had failed to assist him with his constitutional right to counsel.[79] The *Argersinger*

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70 *Id.* at 237 (quoting Powell v. Alabama, 287 U.S. 45, 57 (1932)).

71 *Id. See also* Carnley v. Cochran, 369 U.S. 506 (1962) (fourteenth amendment due process guarantees illiterate defendant the assistance of counsel unless intelligently and knowingly waived); Johnson v. Zerbst, 304 U.S. 458, 464 (1938) (waiver is ordinarily considered a purposeful relinquishment or abnegation of an understood privilege or right).

72 *Wade*, 388 U.S. at 224-26.

73 *Id.* At any pretrial confrontation procedure after indictment, a defendant has an absolute right to counsel. *Id.* These confrontations include lineups as well as one-man showups. *Id.* A lineup is a situation in which a witness picks the suspect from a group of similarly looking individuals. BLACK'S LAW DICTIONARY 189 (5th ed. 1979). A one-man showup is a situation in which the witness sees only the suspect and is asked whether he is the assailant. *Id.*

74 *Wade*, 388 U.S. at 224-26.

75 407 U.S. 25 (1972).

76 *Id.* at 26-27.

77 *Id.* at 26.

78 *Id.* at 27. This four to three decision by the Florida Supreme Court was based on the United States Supreme Court's reasoning in Duncan v. Louisiana, 391 U.S. 145, 159 (1968), which dealt with the right to trial by jury. *Argersinger*, 407 U.S. at 27. The *Duncan* Court stated that only trials "for non-petty offenses punishable by more than six months imprisonment," should have the right to a court appointed attorney. *Id.*

79 *Id.* at 26. The defendant claimed that as an indigent layman, he did not have

Court stated that "absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial."[80] The Court determined that the right to counsel extended to every indigent, misdemeanor defendant subject to a potential jail sentence.[81] The Court stated that the sixth amendment right to counsel should not be applied inconsistently to those charged with felonies and those charged with misdemeaners.[82]

Four years after *Argersinger*, the Court again applied a liberal interpretation of the sixth amendment in the seminal case of *Geders v. United States*.[83] In *Geders*, the defendant was charged with conspiracy to import and illegal transportation of marijuana from Columbia to the United States.[84] The defendant testified on his own behalf.[85] After the conclusion of the defendant's direct examination, but before cross examination by the prosecution, the court called an overnight recess.[86] The judge, by request of the prosecutor, forbade the defendant to speak with counsel at any point throughout the recess.[87] During the trial proceedings, the same instructions had been given to all witnesses whose testimony was stopped temporarily for a recess.[88] The defense attor-

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the ability to sufficiently represent himself against the charges for which he was convicted, thus alleging an unconstitutional deprivation of his right to counsel. *Id.*

80 *Id.* at 37. The Court agreed with the reasoning of the Supreme Court of Oregon in Stevenson v. Holzman, 254 Or. 94, 458 P.2d 414 (1969), where the court stated:

> We hold that no person may be deprived of his liberty who has been denied the assistance of counsel as guaranteed by the Sixth Amendment. This holding is applicable to all criminal prosecutions, including prosecutions for violations of municipal ordinances. The denial of the assistance of counsel will preclude the imposition of a jail sentence.

Id. at 108, 458 P.2d at 418.

81 *Argersinger*, 407 U.S. at 37.

82 *Id. See also* Baldasar v. Illinois, 446 U.S. 222 (1980) (prior uncounseled misdemeanor conviction may not be used to augment a permissible sentence for a second offense); *In re* Gault, 387 U.S. 1 (1967) (juveniles entitled to the right to appointed counsel in a juvenile delinquency proceeding when there is the possibility of institutional commitment).

83 425 U.S. 80 (1976).

84 *Id.* at 81. More specifically, in the Middle District of Florida, a grand jury indicted petitioner and many co-defendants for possession of marijuana, conspiracy to import unlawful substances, and the illegal importation of a controlled substance to the United States in violation of federal law. *Id.* at 81-82.

85 *Id.*

86 *Id.*

87 *Id.*

88 *Id.*

ney objected, but the judge upheld the bar order.[89] The defendant was later convicted.[90] The United States Court of Appeals for the Fifth Circuit affirmed the conviction.[91] The United States Supreme Court granted certiorari,[92] and reversed, holding that an order forbidding a defendant from conferring with his attorney throughout a seventeen hour overnight break in between his direct and cross examination violated his sixth amendment right to assistance of counsel.[93]

Chief Justice Burger's majority opinion noted that a defendant would normally confer with counsel during a seventeen-hour overnight recess.[94] The majority also emphasized that they were not addressing bar orders placed upon the defendant in other circumstances.[95] Significantly, the Court acknowledged its unwillingness to determine whether the *Geders* holding would apply to shorter periods than a seventeen-hour overnight recess, particularly in the case of a "brief routine recess during the trial

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89 *Id.* Defendant's attorney claimed this was a deprivation of the right to assistance of counsel. *Id.* Counsel argued that he had a right to discuss other matters with his client other than the immediate cross-examination. *Id.* The judge replied, "I think he would understand it if I told him just not to talk to you; and I just think it is better that he not talk to you about anything." *Id.*

90 *Id.* at 85. Petitioner was found guilty on all three counts. *Id.* For each count he was sentenced to a three year prison term, which were to be served concurrently. *Id.*

91 *Id.* at 85-86 (citing United States v. Fink, 502 F.2d 1 (5th Cir. 1974)). Several other claims of error had been disposed of by the court of appeals. *Id.* The court determined that failing to show that the denial of access to counsel had prejudiced his defense fatally affected his appeal. *Id.* (citing United States v. Leighton, 386 F.2d 822 (2d Cir. 1967), *cert. denied*, 390 U.S. 1025 (1968)) (defendant's right to counsel was not violated by a trial court ruling that defendant could not speak with his lawyer during a lunch break absent a showing of prejudice to the outcome of the trial). *Cf.* United States v. Venuto, 182 F.2d 519 (3d Cir. 1950) (not necessary to prove prejudice in order to automatically reverse a conviction in case dealing with bar order on an overnight break).

92 421 U.S. 929 (1975).

93 Geders v. United States, 425 U.S. 80, 91 (1976). The case was reversed and remanded to the court of appeals, with directions that it be further remanded to the district court. *Id.* at 91-92.

94 *Id.* at 88. The majority noted that during an overnight recess, it is common for an attorney and client to discuss the events which occurred during the trial, as well as tactical decisions and new strategies. *Id.* The opinion further recognized that new information, serious work, and other significant matters are discussed during an overnight period; the lawyer's guidance is therefore of great necessity to ensure the defendant is well equipped to comprehend the trial process. *Id.* at 89 (citing Argersinger v. Hamlin, 407 U.S. 25, 31-36 (1972); Gideon v. Wainwright, 372 U.S. 335, 343-45 (1963); Powell v. Alabama, 287 U.S. 45, 68-69 (1932)).

95 *Id.* at 91. Chief Justice Burger concluded: "We need not reach, and we do not deal with, limitations imposed in other circumstances." *Id.*

day."[96]

In a concurring opinion, Justice Marshall, with whom Justice Brennan joined, further reasoned that the general principles of this case should apply to a "brief routine recess."[97] Justice Marshall stated that the general rule should be applicable to the analysis of all restrictions on defendant-counsel contact, at least where the contact would not interrupt the contrivance and orderliness of the trial.[98] Justice Marshall also posited that any time a defendant claims that his right to confer with counsel has been infringed upon, no preliminary evidence of prejudice should be necessary.[99] The concurring opinion concluded that orders of this nature were inherently suspect, and a preliminary justification by the government should be required.[100]

The issue of a preliminary finding of prejudice requirement was squarely dealt with in the two 1984 decisions of *Strickland v. Washington*[101] and *United States v. Cronic*.[102] The defendant in *Strickland* pleaded guilty to an indictment containing three capital murder charges.[103] He informed the trial judge that his past criminal history contained nothing more than some burglaries, and that he was under a great deal of stress due to personal familial reasons.[104] The judge, affected by the defendant's confession, stated he had "a great deal of respect for people who are willing to step forward and admit their responsibilities."[105]

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96 *Id.* at 92.

97 *Id.* (Marshall, J., concurring). More specifically, Justice Marshall stated: "I would assume, however, that the Court's repeated reference to the length of the overnight recess in this case—17 hours—is not intended to have any dispositive significance, and that the Court's holding is at least broad enough to cover all overnight recesses." *Id.* at 92 n.1 (Marshall, J., concurring).

98 *Id.*

99 *Id.*

100 *Id.* at 92-93 (Marshall, J., concurring). Justice Marshall noted that the only justification specifically dealt with by the Court was the avoidance of unethical coaching by counsel. *Id.* at 93 (Marshall, J., concurring).

101 466 U.S. 668 (1984).

102 466 U.S. 649 (1984).

103 *Strickland*, 466 U.S. at 672. In addition to the three counts of first degree murder, defendant was to be charged with conspiracy to commit a robbery, multiple counts of robbery, kidnapping and ransom, attempted murder, breaking and entering, and assault. *Id.* After waiving his right to a trial by jury, defendant pleaded guilty to all charges, against his counsel's advice. *Id.* Additionally, the defendant decided to be sentenced by the trial judge independent of a jury recommendation. *Id.*

104 *Id.* In addition, defendant told the trial judge that "he accepted responsibility for the crimes." *Id.*

105 *Id.* The judge also noted that he was not making any determinations as to how he would sentence the defendant. *Id.*

While preparing for the sentencing hearings, the defense attorney neglected to obtain a psychiatric examination or attempt to locate any character witnesses.[106] The trial judge found many aggravating circumstances[107] and absolutely no mitigating circumstances surrounding the murder in the pre-sentencing hearing.[108] The court thus sentenced the defendant to death on all three murder counts.[109] On appeal, the defendant claimed that counsel had been ineffective in neglecting to present any mitigating circumstances.[110]

After the Florida Supreme Court affirmed the trial court decision, the defendant filed a writ of habeas corpus petition claiming, *inter alia*, ineffective assistance of counsel.[111] Ultimately, the United States Supreme Court, in affirming the conviction, determined that an inquiry into whether the claimed violation of effective assistance of counsel was valid required a preliminary prejudice analysis.[112] The *Strickland* Court ruled that in order to obtain automatic reversal, a defendant must show that his coun-

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106 *Id.* at 673.

107 *Id.* at 674. More specifically, the trial judge found that

> all three murders were especially heinous, atrocious, and cruel, all involving repeated stabbings. All three murders were committed in the course of at least one other dangerous and violent felony, and since all involved robbery, the murders were for pecuniary gain. All three were committed to avoid arrest for the accompanying crimes and to hinder law enforcement. In the course of one of the murders, respondent knowingly subjected numerous persons to a grave risk of death by deliberately stabbing and shooting the murder victim's sister-in-law, who sustained severe—in one case, ultimately fatal-injuries.

Id.

108 *Id.* at 674-75.

109 *Id.* at 675. Defendant was sentenced to prison terms for the other offenses. *Id.*

110 *Id.*

111 *Id.* at 678.

112 *Id.* at 700. The Court stated:

> Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim. Here there is a double failure . . . respondent has made no showing that the justice of his sentence was rendered unreliable by a breakdown in the adversary process caused by deficiencies in counsel's assistance. Respondent's sentencing proceeding was not fundamentally unfair. We conclude, therefore, that the District Court properly declined to issue a writ of habeas corpus. The judgment of the Court of Appeals is accordingly reversed.

Id. at 700-01. *See generally* Smithburn & Springmann, *supra* note 31, at 508-09 (citing Chapman v. California, 386 U.S. 18, 22 (1967)) (in a particular case, some constitutional errors may be so trivial and insignificant that they may, commensurate with the federal Constitution be considered harmless error, not mandating automatic reversal).

sel's demeanor was so detrimental that it biased his defense.[113]

Building upon the *Strickland* decision, *United States v. Cronic*[114] reaffirmed the necessity of a prejudice analysis to automatically reverse a sixth amendment right to counsel violation.[115] In *Cronic* the defendant and two associates were charged with mail fraud as a result of their involvement in a "check kiting" scheme in which checks were transported between a Florida bank and an Oklahoma bank.[116] The government had been preparing their case for approximately four and a half years.[117] The defendant's attorney withdrew from the case causing the court to appoint a new attorney with little experience in this area of litigation.[118] The new attorney had only twenty-five days to prepare his case.[119] The court ultimately convicted the defendant.[120] The United States Court of Appeals for the Tenth Circuit reversed the conviction based on the fact that because the defendant's sixth amendment right to counsel was violated, no showing of prejudice was necessary "when circumstances hamper a given lawyer's preparation of a defendant's case."[121]

Justice Stevens, author of the majority opinion, stated that "[t]he right to the effective assistance of counsel is . . . the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing."[122] The majority held

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113 *Strickland*, 466 U.S. at 700. The two pronged test developed in *Strickland* required first a showing of deficient performance by counsel, and second, that this performance was prejudicial to the defendant's defense, in order to sustain a sixth amendment ineffectiveness of counsel claim. *Id*

114 466 U.S. 649 (1984).

115 *Id.*

116 *Id.* A transfer of more than $9,400,000 in checks was involved. *Id.*

117 *Id.* The government had reviewed thousands of documents and had conducted intensive investigations in preparation for trial. *Id.*

118 *Id.* The court appointed a young real estate attorney. *Id.*

119 *Id.*

120 *Id.* at 650.

121 *Id.* (quoting United States v. Cronic, 675 F.2d 1126, 1128 (10th Cir. 1982)). The court of appeals reversed the conviction based on the inference that defendant's sixth amendment right to effective assistance of counsel had not been satisfied. *Id.* at 652. Five criteria were used in coming to this conclusion: "(1) [T]he time afforded for investigation and preparation; (2) the experience of counsel; (3) the gravity of the charge; (4) the complexity of possible defenses; and (5) the accessibility of witnesses to counsel." *Id.* (quoting United States v. Golub, 638 F.2d 185, 189 (10th Cir. 1980)).

122 *Id.* at 656-57. Justice Stevens asserted: "When a true adversarial criminal trial has been conducted—even if defense counsel may have made demonstrable errors—the kind of testing envisioned by the Sixth Amendment has occurred. But if the process loses its character as a confrontation between adversaries, the constitutional guarantee is violated." *Id. See also id.* at 657 n.21 (counsel's performance is

that the critical factor in determining whether the right to effective assistance of counsel has been satisfied is whether the defendant received a fair trial.[123] The Court concluded that unless the defendant can show that some action or inaction by his attorney prejudiced the outcome of the trial, the sixth amendment generally would not be violated.[124]

The past fifty years of sixth amendment precedent reveals the Court's struggle to define the parameters of, and limitations upon, the rights to appointed and effective assistance of counsel.[125] The Court's prerequisite of a demonstration of prejudice, coupled with its "critical stage" charaterization, suggests an attempt to limit the expansion of such rights.[126] With this historical perspective as a backdrop, and in a continued effort to define the boundaries of the sixth amendment, the Court delivered its opinion in *Perry v. Leeke*.[127]

Justice Stevens, writing for the *Perry* majority, first analyzed the necessity of establishing prejudice in order for the *Geder's* rule to apply.[128] The majority distinguished between cases where the government directly interferes with the right to counsel and cases where an attorney's performance is lacking in some essential

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focus, not clients perception of performance or relationship between attorney-client); Jones v. Barnes, 463 U.S. 745 (1983) (counsel not constitutionally required to raise every nonfrivolous issue requested by a defendant, if in his professional discretion, he decides not to raise those issues); Morris v. Slappy, 461 U.S. 1 (1983) (a "meaningful attorney-client relationship" is not guaranteed by the sixth amendment).

123 United States v. Cronic, 466 U.S. 649, 658 (1984).

124 *Id. Cronic* explicitly stated that in certain situations prejudice may be presumed and *per se* reversal is appropriate. *Id.* The *Cronic* Court reasoned:

> There are . . . circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified.
>
> Most obvious, of course, is the complete denial of counsel. The presumption that counsel's assistance is essential requires us to conclude that a trial is unfair if the accused is denied counsel at a critical stage of his trial.

Id. (footnote omitted). Further, the *Cronic* majority recognized that the "Court has uniformly 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." *Id.* at 659 n.25.

125 *See supra* notes 32-124 and accompanying text.

126 *See, e.g., supra* notes 60-74, 101-113 and accompanying text (discussing *Wade* and *Strickland*).

127 109 S. Ct. 594 (1989).

128 *Id.* at 599. In Geders v. United States, 425 U.S. 80 (1976), the Court granted automatic reversal without considering whether actual prejudice resulted from the defendant's denial of counsel throughout the seventeen hour overnight recess. *See id.*

quality or element so as to render it ineffective.[129] The Court expressed "that direct governmental interference with the right to counsel is a different matter."[130] Accordingly, the Court rejected the appellate court's belief that *Strickland* required application of a prejudice analysis in this context.[131]

A number of rationales were set forth by the Court in support of its contention that the *Geder's* rule did not apply to a fifteen minute recess.[132] The majority first distinguished *Perry* from *Geders* on constitutional grounds.[133] Justice Stevens emphasized that before a defendant testifies he has a constitutional right to confer with counsel, but once he becomes a witness, he loses this fundamental right.[134]

The majority further distinguished *Perry*, relying on the content of a discussion in a fifteen minute break, as opposed to a seventeen-hour overnight recess.[135] The Court stated that it was normal during an overnight recess to discuss trial-related matters other than the defendant's testimony.[136] Justice Stevens pointed out that the defendant is constitutionally guaranteed the right to discuss these other matters with counsel at any time.[137] Alterna-

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129 *Perry*, 109 S. Ct. at 599. The Court stated:

> Our citation of *Geders* in this context was intended to make clear that "[a]ctual or constructive denial of the assistance of counsel altogether . . . is not subject to the kind of prejudice analysis that is appropriate in determining whether the quality of a lawyer's performance itself has been constitutionally ineffective."

Id. at 600 (quoting Strickland v. Washington, 466 U.S. 668, 692 (1984)) (citations omitted).

130 *Id.* at 599.

131 *Id.* at 600.

132 *Id.*

133 *Id.* More specifically, Justice Stevens stated: "Admittedly the line between the facts of *Geders* and the facts of this case is a thin one. It is, however, a line of constitutional dimension. Moreover, . . . it is not one that rests on an assumption that trial counsel will engage in unethical 'coaching.' " *Id.*

134 *Id.* The majority recognized that it is not uncommon for a judge to sequester a witness until the trial is over in order to obtain truthful statements, uninfluenced by what the other witnesses may be saying. *Id. See also id.* at n.4 (illustration and discussion of sequestration orders). The *Perry* Court stated that the constitutional right of the defendant to cross examine the witnesses makes him immune from this type of physical sequestration. *Id.* at 600. *See also* U.S. CONST. amend. VI, ("In all criminal prosecutions the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ."); *see generally* 6 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1837-38 (J. Chadbourn rev. 1976 and Supp. 1988) (discussing sequestration of witness); FED. R. OF EVID. 615 (discussing exclusion of witnesses).

135 Perry v. Leeke, 109 S. Ct. 594, 602 (1989).

136 *Id.* The Court inferred that the attorney and client may want to discuss the accessibility of new witnesses, trial strategies, or a possible plea bargain. *Id.*

137 *Id.* Furthermore, the Court maintained: "[W]e do not believe the defendant

tively, during a short recess, the Court presumed that only the testimony of the defendant would be discussed.[138] The Court stressed that the defendant has no constitutional right to discuss his own testimony with counsel during a break between his direct and cross examination.[139]

The Court next addressed the need to maintain the "status quo" during a short recess.[140] The majority asserted that a judge must be given the discretionary power necessary to preserve the effectiveness of the trial process.[141] Justice Stevens concluded that it was very probable that any discussion between the attorney and his client in the middle of the trial would relate to the defendant's current testimony.[142]

Applying these principles, the Court concluded that if time were allowed during a brief recess for a defendant to speak with counsel, the "truth-seeking function of the trial" may be frustrated.[143] Justice Stevens argued that the spontaneity of the defendant's answer was the key to finding truth.[144] Accordingly, the majority reasoned that a defendant's answers would be unduly influenced by a mid-trial consultation.[145] The Court feared

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has a constitutional right to discuss that testimony while it is in process." *Id.* at 601-02.

138 *Id.* at 602.

139 *Id.*

140 *Id.* at 601. The Court explained:

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

Id.

141 *Id.* at 602.

142 *Id.*

143 *Id.* at 601.

144 *See id.* at 601 n.7. Justice Mishler in an earlier opinion reasoned:

> The age-old tool for ferreting out truth in the trial process is the right to cross-examination . . . . The Court has consistently acknowledged the vital role of cross-examination in the search for truth. It has recognized that the defendant's decision to take the stand, and to testify on his own behalf, places into question his credibility as a witness and that the prosecution has the *right* to test his credibility on cross-examination.

Id. (quoting United States v. DiLapi, 651 F.2d 140, 150-51 (2d Cir. 1981) (Mishler, J., concurring), *cert. denied*, 455 U.S. 938 (1982)). *Cf.* 5 J. WIGMORE, *supra* note 134, at § 1367 (referring to cross-examination as "the greatest legal engine ever invented for the discovery of truth").

145 Perry v. Leeke, 109 S. Ct. 594, 601 (1989). The Court cautioned that this conclusion was not meant to insist upon prohibiting a client from conferring with counsel during a short recess. *Id.* at 602. Rather, Justice Stevens noted that it is a

that new strategies, as well as "unethical coaching," were likely to result, and that both would interfere with the effectiveness of the cross examination.[146]

Concurring in part, and dissenting in part, Justice Kennedy agreed with the majority's holding that there was no sixth amendment deprivation of the right to assistance of counsel.[147] Justice Kennedy, however, felt it was irrelevant to discuss the issue of prejudice when the constitutional right to counsel had been refused.[148]

In a puissant dissent, Justice Marshall denounced the majority's distinction between the right to counsel during a long recess and during a short recess.[149] Justice Marshall asserted that this distinction was illogical and had no constitutional basis.[150] The dissent criticized the majority's failure to deal with the true issue.[151] According to the dissent, the Court granted certiorari on the issue of whether a prejudice analysis was necessary to automatically reverse a denial of the right to counsel.[152] Justice Marshall pointed out that rather than dealing with the significant issue of the constitutional deprivation of a fundamental right, the majority determined that the complete barring of access between an attorney and a defendant was legitimate because it supported

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fact specific decision to be determined at the discretion of the particular judge, or in some cases statutes may permit consultation as a matter of law. *Id.* The *Perry* Court stated that another possibility would be for the judge to permit a defendant and counsel to confer during a brief recess but prohibit discussion of the current testimony. *Id.* at 602 n.8.

146 *Id.* at 602. Justice Stevens reasoned that "[o]nce the defendant places himself at the very heart of the trial process, it only comports with basic fairness that the story presented on direct is measured for its accuracy and completeness by uninfluenced testimony on cross-examination." *Id.* at 601 (quoting *DiLapi*, 651 F.2d at 151 (Mishler, J., concurring)).

147 *Id.* at 602 (Kennedy, J., concurring).

148 *Id.*

149 *Id.* at 602 (Marshall, J., dissenting). Justice Brennan and Justice Blackmun joined in the dissent. *Id. Compare* Geders v. United States, 425 U.S. 80 (1976) (automatic reversal of conviction because defendant's sixth amendment right to counsel was violated when trial court forbid consultation between client and counsel during overnight recess), *with* Perry v. Leeke, 109 S. Ct. 594 (1989) (no violation of defendant's sixth amendment right to counsel when trial court judge forbade consultation with counsel during a brief afternoon recess).

150 *Perry*, 109 S. Ct. at 602 (Marshall, J., dissenting). Diametrically opposed to the majority's holding, Justice Marshall argued that the sixth amendment precluded "*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." *Id.* (quoting Geders v. United States, 425 U.S. 80, 92 (1976) (Marshall, J., concurring)) (emphasis in original).

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

152 *Id.*

the "truth seeking function" of the trial.[153]

The dissent's argument focused on precedent and history.[154] Justice Marshall asserted that prior holdings illustrated that any bar on an attorney-defendant contact, regardless of the amount of time involved, was not permissible.[155] The Justice also noted that the sixth amendment does not allow any prohibition of attorney-defendant contact, particularly where such contact would not impede the normal functioning of the trial process.[156] Justice Marshall pointed out that the majority declined to mention the long line of cases which state that the defendant has the right to confer with counsel at every important step of the trial process.[157]

The dissent next questioned the majority's contention that a defendant loses his constitutional right to counsel when testifying.[158] Justice Marshall found this argument to be totally irrelevant.[159] The dissent emphasized that the question in this case was whether a defendant had the right to confer with counsel "af-

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153 *Id.*

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

155 *Id.* at 603 (Marshall, J., dissenting). *See also* Sanders v. Lane, 861 F.2d 1033 (7th Cir. 1988) (restriction on attorney-client contact during a lunchtime recess is a violation of defendant's right to counsel without necessity to show prejudice, but error held to be harmless); Bova v. Dugger, 858 F.2d 1539 (11th Cir. 1988) (violation of defendant's sixth amendment right to counsel occurred when state murder defendant was denied right to confer with counsel during a fifteen minute break called in the midst of defendant's cross-examination); Crutchfield v. Wainwright, 803 F.2d 1103 (11th Cir. 1988) (defense must show, on record, the desire to confer in order to maintain a deprivation of the right to effective assistance of counsel claim); Mudd v. United States, 798 F.2d 1509, 1510-14 (D.C. Cir. 1986) (trial court's order forbidding defendant to confer with counsel throughout a weekend trial recess, even though restriction was limited to testimonial discussion, was a deprivation of the right to effective assistance of counsel and a showing of actual prejudice was required in order to automatically reverse conviction); Stubbs v. Bordenkircher, 689 F.2d 1205 (4th Cir. 1982) (required defendant to prove that he wanted to confer with counsel, and would have done so but for the bar order by the trial judge), *cert. denied*, 461 U.S. 907 (1983); United States v. Conway, 632 F.2d 641 (5th Cir. 1980) (trial court's order not to discuss the case with counsel throughout a lunch break called during a defendant's cross-examination denied defendant effective assistance of counsel); United States v. Bryant, 545 F.2d 1035 (6th Cir. 1976) (restriction on client-counsel contact during a one-hour recess in the middle of direct testimony is a deprivation of defendant's sixth amendment right to counsel); United States v. Allen, 542 F.2d 630 (4th Cir. 1976) (automatic reversal for restriction on attorney client contact during short routine break is not constitutionally permissible regardless of whether any prejudice occurred which affected outcome of trial), *cert. denied*, 430 U.S. 908 (1977).

156 *Perry*, 109 S. Ct. at 603 (Marshall, J., dissenting).

157 *Id.*

158 *Id.*

159 *Id.* at 604 (Marshall, J., dissenting).

ter" a recess had been called by the judge, for some reason other than the desire of the attorney and the defendant to communicate.[160] The *Perry* dissent stressed that the issue was not whether the defendant had the "right to interrupt the trial."[161] It was the adequacy of the belief, according to Justice Marshall, that one may confer with one's attorney if such an interruption did occur.[162]

Justice Marshall observed that the majority referred to a general rule which forbids an attorney to make contact with a witness between the direct and cross examination.[163] The premise for this rule, according to the majority, was based on the belief that the cross examination was more likely to produce truthful testimony if the witness was not given the chance to speak with third parties.[164] Justice Marshall maintained that this general rule had no authority.[165] The dissent observed that evidence of the inconsistent application of the general rule was apparent in the case at bar.[166] Justice Marshall noted three occasions where recesses were called during the testimonies of state witnesses.[167] Justice Marshall further emphasized that no bar orders were issued during any of these recesses, thus allowing the state witnesses to

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160 *Id.* at 603 (Marshall, J., dissenting). Perry did not suggest he had a right to interrupt in order to obtain the benefit of conferring with counsel, nor did he seek to do so. *Id.*

161 *Id.*

162 *Id.* The dissent reasoned:

> 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.

Id. (quoting Powell v. Alabama, 287 U.S. 45, 68-69 (1932)).

163 *Id.* at 604 (Marshall, J., dissenting).

164 *Id.* The Court characterized the procedure of prohibiting lawyers or defendants to interrupt testimony, as analogous to the sequestration of witnesses. *Id. See also supra* note 134 and accompanying text (discussing witness sequestration). Justice Marshall pointed out that the majority goes so far as to list a long line of cases explaining the reasons for witness sequestration. *Perry*, 109 S. Ct. at 604 (Marshall, J., dissenting). The dissent stated, however, that the majority's logic was flawed in that sequestration rules do not apply to defendants. *Id. See also id.* at 605 n.4 (Marshall, J., dissenting) (distinguishing defendant's cross-examination from a non-party's). The dissent noted that the sixth amendment entitles the defendant to confront any witness that is testifying against him. *See id.* at 605 (Marshall, J., dissenting).

165 *Id.*

166 *Id.* at 604 (Marshall, J., dissenting).

167 *Id.* Of the three recesses, two were called towards the end of the direct testimony, but prior to the cross-examination. *Id.*

confer with anyone.[168] According to the dissent, the majority stretched this general rule beyond its constitutional dimensions.[169] Justice Marshall concluded that the majority overlooked the distinction between the rights guaranteed to a defendant, and those not guaranteed to a witness.[170]

Justice Marshall further criticized the majority's lack of evidence to support the majority's contention that the "truth-seeking function" would be disrupted by allowing an attorney and defendant to confer during a brief break in testimony.[171] In Justice Marshall's opinion, the purpose of the sixth amendment right to counsel was to aid the defendant in producing the truth.[172] The dissent therefore concluded that the "truth-seeking function" would not be disrupted by a defendant's conferring with counsel, even if a new course of action was adopted.[173] Justice Marshall declared that if the truth was found to be hindered during a short recess, it was logical to conclude that it would also be disrupted during an overnight recess.[174]

The dissent also rejected the majority's argument that a defendant was constitutionally guaranteed the right to speak with his attorney about "matters that go beyond the content of the defendant's own testimony."[175] Justice Marshall asserted that perhaps a judge may prohibit certain trial testimony to be discussed with one's counsel at a mid-trial recess.[176] The dissent

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168 *Id.* *See also id.* at 606 n.5 (Marshall, J., dissenting) (discussing "unethical coaching" and the proper role of the attorney in the administration of justice).

169 *See id.* at 604 (Marshall, J., dissenting).

170 *Id.* at 605 (Marshall, J., dissenting). The Court, aware of the defendant's atypical status in *Geders*, stated that "the petitioner was not simply a witness; he was also the defendant . . . . 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." *Id.* (quoting Geders v. United States, 425 U.S. 80, 88 (1976)).

171 *Id.*

172 *Id.* In an earlier opinion this term, Justice Stevens wrote:

> The paramount importance of vigorous representation follows from the nature of our adversarial system of justice. This system is premised on the well tested principle that truth—as well as fairness—is "best discovered by powerful statements on both sides of the question." Absent representation, however, it is unlikely that a criminal defendant will be able adequately to test the government's case, for, as Justice Sutherland wrote in Powell v. Alabama "[e]ven the intelligent and educated layman has small and sometimes no skill in the science of law."

Id. (quoting Penson v. Ohio, 109 S. Ct. 346, 352 (1988)) (citations omitted).

173 *Id.* at 606 (Marshall, J., dissenting).

174 *Id.*

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

176 *Id.* at 608 n.8 (Marshall, J., dissenting). Justice Marshall doubted the major-

stated, however, that the sixth amendment should protect the defendant from absolute denial of access to confer with one's counsel.[177] Justice Marshall's assertion supported the claim that Perry was denied a constitutional right when the judge precluded all contact between the attorney and his client during a brief recess.[178]

Justice Marshall's dissent, while taking a broader view of the right to counsel than the majority, suggested that perhaps a few calming words from counsel to a defendant may actually increase the production of truth.[179] The dissent embellished upon this position by expressing that a defendant may be nervous, scared, or unaware of the correct trial procedure.[180] Justice Marshall's assertion was particularly appropriate in Perry's case.[181] The dissent inferred that because Perry was mildly retarded, he may not have been aware of proper deportment and procedure.[182] Because the charges against Perry carried the death sentence, Justice Marshall believed that a few comforting words from Perry's attorney may have helped Perry to tell the truth.[183] The dissent reasoned that due process required that the defendant be able to appreciate the nature of the proceedings, in order to fairly testify in his own behalf.[184]

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ity's assumption that they will be able to distinguish testimonial discussions from trial strategy discussions. *Id.* The dissent asserted that the majority neglected to specify how, if possible, to distinguish between nontestimonial and testimonial discussions. *Id.* Justice Marshall further reasoned that this lack of a standard may well "have a chilling effect on cautious attorneys, who might avoid giving advice on nontestimonial matters for fear of violating [a court order barring recess discussions of testimonial matters]." *Id.* (quoting Mudd v. United States, 798 F.2d 1509, 1512 (D.C. Cir. 1986)).

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

178 *Id.* Justice Marshall further pointed out that "[i]n allowing trial judges to ban *all* brief recess consultations, even those including or limited to discussions regarding nontestimonial matters, the majority needlessly fires grapeshot where, even under its own reasoning, a single bullet would have sufficed." *Id.* (emphasis in original).

179 *Id.* at 606 (Marshall, J., dissenting).

180 *Id.*

181 *Id.* For a more detailed description of Perry's mental capacity, see *id.* at 606 n.6 (Marshall, J., dissenting).

182 *Id.* at 606 (Marshall, J., dissenting). *See also supra* note 10 and accompanying text (describing Perry's emotional and mental conditions).

183 Perry v. Leeke, 109 S. Ct. 594, 606 & n.6 (1989) (Marshall, J., dissenting). Justice Marshall posited that "[o]ne can only assume that the treatment the trial judge afforded Perry during the 15-minute recess exacerbated his sense of fright or trepidation." *Id.*

184 *Perry* 109 S. Ct. at 609 (Marshall, J., dissenting). *See, e.g.*, United States v. Ash, 413 U.S. 300, 309 (1973) (the Constitution attempts to diminish the inequities in the adversarial process). Justice Marshall pointed out that

Acknowledging the confusion surrounding the scope of the sixth amendment's right to counsel, Justice Marshall admonished that the confusion should not allow the majority to interpret the sixth amendment too narrowly.[185] The dissent described the majority's fears to be without merit, overly restrictive, and highly overstated.[186] The dissent concluded that one's constitutional rights heavily outweigh the possibility of hindering the truth.[187]

While the Court's inquiry regarding fairness is justified, its conclusion is contrary to the fundamental ideals that preserve a defendant's right to a fair trial.[188] To find no constitutional error when a state forbids a defendant from conferring with counsel because the "fairness" of the trial was not affected, seems to infer that the sixth amendment right to counsel should only be enforced when the fairness of the trial is in question. Surely, the framers did not intend that the sixth amendment be "result" oriented. Rather, it is more logical that the right to counsel was intended to be a *means* which justifies the ultimate *end*.[189]

Varying views have been expressed with regard to restrictions placed upon a defendant to consult with counsel during a trial recess.[190] In the majority of these types of cases, the circuit

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> [t]he majority twice disserves this noble goal—by isolating the defendant at a time when counsel's assistance is perhaps most needed, and by ignoring the stark unfairness of according prosecution witnesses the very prerogatives denied the defendant. The Constitution does not permit this new restriction on the Sixth Amendment right to counsel.

Perry, 109 S. Ct. at 609 (Marshall, J., dissenting).

185 *Id.*

186 *Id.* at 606 (Marshall, J., dissenting).

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

188 *See* Survey, *Right to Counsel Not Violated by Judge's Prohibiting Criminal Defendant from Conferring with Counsel Between Direct and Cross-Examination*, 40 S.C.L. REV. 47, 52 (1988).

189 In his majority opinion in *Gideon*, Justice Black contended:

> Not only these precedents but also reason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him . . . The right . . . to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. From 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 . . . .

Gideon v. Wainwright, 372 U.S. 335, 344 (1963).

190 Perry v. Leeke, 109 S. Ct. 594, 598 n.2 (1989). *Cf.* Stubbs v. Borderkircher, 689 F.2d 1205, 1206-07 (4th Cir. 1982) (constitutional error to deprive defendant right to confer with attorney during lunch break while defendant is testifying, but no deprivation of sixth amendment right in this situation because defendant did not express any desire to communicate with attorney, and no proof he would have

courts have automatically reversed.[191] The holding in *Perry v. Leeke*[192] further confuses this controversial aspect of the right to effective assistance of counsel. By abandoning many of the circuit courts' prior holdings of *per se* reversal, but not overruling the *Geders* decision, the Court leaves a cloud of confusion over denial of assistance of counsel for recesses of more than fifteen minutes, but less than seventeen hours.[193]

The Supreme Court's adjudication of sixth amendment right to counsel claims mandates uniform application of constitutional principles. The effect of the *Perry* decision will inevitably lead to a myriad of right to counsel lawsuits. The *Geder's* opinion, cited by the majority, is in favor of protecting the defendant's constitutional rights.[194] The Court's holding in *Perry*, however, is inconsistent with the logic set forth in *Geders*.[195] By establishing what is constitutional based upon arbitrary amounts of time, the Court may deprive individuals of fundamental rights which are protected by the sixth amendment. The Court's desire to distinguish *Perry* from *Geders* is an unwarranted value judgment, lacking a logical basis.[196] The majority fails to establish where its as-

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done so but for the restriction), *cert. denied*, 461 U.S. 907; Bailey v. Redman, 657 F.2d 21, 22-25 (3d Cir. 1981) (no constitutional deprivation when defendant was barred from discussing current testimony with anyone throughout an overnight recess because there was no evidence of a desire to confer which would have occurred but for the restriction, in addition, neither defendant nor counsel objected to the bar order), *cert. denied*, 454 U.S. 1153 (1982); United States v. Dilapi, 651 F.2d 140, 147-49 (2d Cir. 1981) (sixth amendment violation existed when defendant was denied access to attorney during a five minute break while defendant was testifying but no prejudice was apparent in this case), *cert. denied*, 455 U.S. 938 (1982); United States v. Conway, 632 F.2d 641, 643-45 (5th Cir. 1980) (trial court's order not to discuss the case with counsel throughout a lunch break called during a defendant's cross examination violates sixth amendment right to counsel); Untied States v. Bryant, 545 F.2d 1035, 1036 (6th Cir. 1976) (restriction on client-counsel contact during a one hour recess in the middle of direct testimony, was a deprivation of defendant's sixth amendment right to counsel); Ashurst v. State, 424 So.2d 691, 691-93 (Ala. Crim. App. 1982) (violation of right to counsel when defendant prohibited to confer with counsel during defendant's testimony, and all recesses).

191 *See Perry*, 109 S. Ct. at 598 n.2.

192 109 S. Ct. 594 (1989).

193 *See* Survey, *supra* note 188, at 52.

194 *See Perry*, 109 S. Ct. at 599 (citing Geders v. United States, 425 U.S. 80 (1976)).

195 *See* Survey, *supra* note 188, at 52.

196 *See, e.g., Perry*, 109 S. Ct. at 608 (Marshall, J., dissenting). In support of his contention, Justice Marshall noted, "[b]y not even providing a practical framework in which to answer these questions, the majority ensures that defendants, even those in adjoining courtrooms, will be subject to inconsistent practices. Such inconsistency is untenable when a critical constitutional right is at stake." *Id.*

sumptions and assertions have been drawn.[197] The Court assumes the role of a "super legislature" when it begin distinguishing fundamental rights based upon its own subjective analysis. Strict scrutiny should be applied to this type of encroachment upon the defendant's fundamental right to the assistance of counsel.[198] As expressed in the dissent, *Geders* was correctly decided, and *Perry* must follow it.[199] The distinction between a fifteen minute recess and a seventeen hour overnight recess is irrelevant. The holding should be based on the constitutional right to counsel, regardless of the length of time involved. Unfortunately, the majority's narrow holding leaves unstructured precedent for future cases. In addressing future right to counsel cases, the Court should develop a more concrete system of analysis to determine when there is an infringement upon a defendant's constitutional rights. A bright line rule of the right to counsel at *all* times would remedy the discrepancies.

Arguably, the decision in *Perry* was motivated by the mental capacity of the defendant and the heinous crimes involved. The Court frowns upon rape, kidnapping, and murder because of their violent nature. Accordingly, the opinion hints at the Court's bias towards such types of prosecution. One wonders what the outcome of *Perry* would have been had the defendant been on trial for an offense less serious than murder. The divided Court's decision clearly indicates that the intent and scope of the right to assistance of counsel is in need of further clarification. The majority's decision jeopardizes, if not vanquishes, the very essence and purpose of the sixth amendment.

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197 *Id.* at 607 (Marshall, J., dissenting). As Justice Marshall stated: "Once again, the majority reasons by assertion; it offers no legal or empirical authority to buttress this proposition." *Id.*

198 *See generally* G. GUNTHER, CONSTITUTIONAL LAW 586-89 (11th ed. 1985) (discussing equal protection). A strict scrutiny analysis will be applied by the Court to governmental action which impairs a "fundamental right" or interest. *Id.* at 588. Where the strict scrutiny test is used, the classification will only be sustained if its purpose is to provide a compelling governmental interest. *Id.* In addition, there must be a very close relationship between the means used in order to achieve the desired ends. *Id.* In Perry v. Leeke, 109 S. Ct. 594 (1989), there does not appear to be any governmental interest so compelling to deny the defendant his sixth amendment fundamental right to the effective assistance of counse. *See id.*

199 *See Perry*, 109 S. Ct. at 602 (Marshall, J., dissenting).