IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,	**No. S178823**
Plaintiff/Respondent,	(Ct. App. No. H031992)
v.	(Santa Cruz Sup. Ct. No. F12934)
JACOB TOWNLEY HERNANDEZ,	
Defendant/Appellant.	

ANSWER TO PEOPLE'S PETITION FOR REVIEW

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Jacob Townley-Hernandez by this Answer opposes the People's Petition for Review of the Sixth District Court of Appeal's unanimous opinion reversing his conviction. The People's Petition for Review was filed December 18, 2009; thus, this Answer is timely. Cal. Rule of Court 8.500(e)(4).

INTRODUCTION

In this case, the trial court issued an order which prohibited defense counsel from discussing with his client or with his investigator, the declaration of the state's most important witness, Noe Flores. The gag order went into effect in the critical weeks before trial and extended throughout the trial and post-trial proceedings; indeed, at the insistence of the state and the court, all appellate pleadings which refer to the content of that declaration continue to be filed under seal. Flores's declaration contained at least 23 details not contained in previous reports,[1] including the critical admission by Flores that he was the person wearing the red and black Pendleton shirt, identified as the shooter's shirt. (Reporter's Transcript [hereafter "RT"] 2887-88). Insofar as Flores had given several *versions* of the "truth" of what occurred, it was also vitally important that

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[1] Because the sealing order is still in effect, those details were described in the sealed portion of Appellant Townley's Petition for Rehearing in the Court of Appeal at pages 26-28. *See People v. Hernandez*, No. HO31992 (6th Dist. Nov. 9, 2009), Slip Op. at 19.

counsel be free to discuss with the defendant and investigator which version of the facts Flores would ultimately embrace in his testimony, in order to prepare to rebut this version. Moreover, as the Court of Appeal recognized, the trial court's gag order was so poorly worded that it was not clear whether counsel was free to discuss assertions or facts contained in other reports, if they were also contained in the declaration. *Hernandez*, Slip Op. at 20. In order to avoid the risk of sanctions for violating the court's order, any cautious counsel would avoid discussing not only these 23 details not contained in the prior reports, but would necessarily avoid a wide-range of legitimate topics involving trial preparation, developing evidence to rebut the facts in the declaration and other tactics and strategy, including plea negotiations.[2]

In a thorough and well-reasoned opinion, the Sixth District held that this ban on communication between defense counsel and the defendant was structural error pursuant to the Supreme Court's decisions in *Geders v.*

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[2] Defense counsel's need to treat the trial court's order cautiously was particularly acute here, where counsel had been the subject of public reproval by the State Bar only a month before the court's gag order, and was placed on one year State Bar probation which included the entire length of the trial. *See* State Bar No. 06-O-10112. The Sixth District denied counsel's Motion for Judicial Notice of Mr. Dudley's Public Reproval in State Bar No. 06-O-10112. If this Court were to grant review, this Court should reverse the denial of this motion for judicial notice. *See In re Visciotti* (1996) 14 Cal.4th 325, 349-350 (Court takes judicial notice of trial counsel's state bar record in analyzing sixth amendment claim).

United States (1976) 425 U.S. 80 and *Perry v. Leeke* (1989) 488 U.S. 272, which held that, except for brief recess, a criminal defendant has a "right to *unrestricted* access to his lawyer for advice on a variety of trial-related matters" (*Perry*, 488 U.S. at 284 (emphasis added)); thus, a court order that restricts counsel's communication with his client is structural error reversible per se. *Id.* at 278-279. *Every* case since *Geders* and *Perry* has agreed that a court order which prohibited all discussion with a defendant for more than a brief recess, or which prohibited a discussion of any subject related to the trial is structural error. The truly novel position which the state urges is altogether unprecedented. No justice of the Supreme Court has advocated for this position; nor has any state or federal appellate court since *Perry*. Review in this case is thus wholly unwarranted and wholly unwise.

I. REVIEW IS UNWARRANTED BECAUSE THE DECISION BELOW IS IN ACCORD WITH EVERY PUBLISHED STATE AND FEDERAL DECISION ON THE ISSUE INCLUDING TWO UNITED STATES SUPREME COURT DECISIONS.

As set forth in the Sixth District's Opinion below, every case which has considered a trial court's limitation on discussions between counsel and the defendant on *any substantive matter related to the trial*, has held such restrictions to be structural error reversible per se. The principles set forth in *Geders* and *Perry* are clear: "Except when the defendant is testifying, or

during brief recesses in that testimony, the defendant enjoys an *absolute 'right to unrestricted access* to his lawyer for advice on a variety of trial-related matters.'" *Moore v. Puckett* (8th Cir. 2001) 275 F.3d 685, 688 (quoting *Perry*, 488 U.S. at 284) (emphasis added); *United States v. Miguel* (9th Cir. 1997) 111 F.3d 666, 672-673 (same). Indeed, the Supreme Court's decisions in *Perry* and *Geders* were made *without dissent* with respect to these core holdings.[3]

Since that decision, lower federal courts have uniformly made clear that the *Geders* rule extends beyond an order that precludes all discussion between counsel and the defendant, and includes any order banning discussion of any substantive topic regarding the charges for which the defendant is on trial. The *Geders* rule extends beyond orders precluding discussion of a defendant's own testimony, and applies to "communication with counsel during cross-examination of the government's crucial witness." *Miguel*, 111 F.3d at 673.

Other courts, including some of our nation's most respected conservative judicial icons, have similarly broadly applied the *Geders* and *Perry* rule to any order restricting communication with the defendant on

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[3] *Geders* was unanimous. In *Perry*, three justices would have found structural error even in the case of a brief recess. *Perry*, 488 U.S. at 285 (Marshall, Brennan, and Blackmun, JJ., dissenting).

substantive topics. Thus, in *Mudd v. United States* (D.C. Cir. 1986) 798 F.2d 1509, the trial court directed counsel not to talk to his client "about his testimony," but permitted him to talk to the defendant "about other things." *Id.* at 1510. While recognizing that the court's order was "more limited than the one in *Geders*," the *Mudd* Court held that "the interference with sixth amendment rights was not significantly diminished." *Id.* at 1512. As *Mudd* made clear, "[c]onsultation between lawyers and clients cannot be neatly divided" between different subjects and different evidence; thus, even an order more limited than a flat prohibition on all communication can have a chilling effect on cautious attorneys, who might avoid giving advice on [any matter related to the prohibition] for fear of violating the court's directive." *Id.* at 1512. Then-judge Scalia concurred with this essential point. *Id.* at 1515 (Scalia, J., concurring).

Similarly, in *United States v. Santos* (7th Cir. 2000) 201 F.3d 953, the trial court ordered defense counsel not to discuss the defendant's testimony with her, but permitted discussion of strategy; the court also told the attorney to read and follow the *Perry* decision, if the court's instructions conflicted with *Perry*. *Id.* at 965. Judge Posner wrote for the Seventh Circuit and held that the court's ambiguous order put the attorney in "an impossible position;" if the attorney's interpretation of the order was different from the judge's interpretation, "the lawyer would be inviting the

judge's wrath, and possibly even courting sanctions for contempt of court, in disobeying the judge's instruction." *Id.* at 965-966. The Court found a *Geders* violation because the trial court's "confusing marching orders . . . may well have inhibited the exercise of Sixth Amendment rights . . . in a critical phase of the case, namely her cross-examination, though no effort to prove this has been, or in the nature of things could readily be, made." *Id.* at 966. *See United States v. Cobb* (4th Cir. 1990) 905 F.2d 784, 791-793 (trial court's order not to discuss the defendant's cross-examination over a weekend recess was structural error because it "effectively eviscerated his ability to discuss and plan trial strategy"); *see also United States v. Sandoval-Mendoza* (9th Cir. 2006) 472 F.3d 645, 650-652 (order precluding discussion of defendant's testimony effectively precluded counsel from asking "him for the name of a witness who could corroborate his testimony [and advising] him to change his plea after disastrous testimony, subjects *Perry* expressly says a defendant has a right to discuss with his lawyer . . .").

As the Sixth District recognized in its decision here, the court's order here was also highly ambiguous. *Hernandez*, Slip Op. at 20.[4] Surely

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[4] The trial court ordered that defense counsel could talk about what was contained in the police reports, "*but without the odds and ends that are in the signed statements from Mr. Flores and Mr. Rocha.*" (Reporter's Transcript ["RT"] 580-581) (emphasis added). The court subsequently

defense counsel who had been publicly disciplined by the State Bar just one month prior to the court's order, and was placed on State Bar probation for one year (covering the pretrial and trial proceedings in this case) was not required to risk further State Bar discipline by interpreting the trial court's order narrowly.

Every decision of every other court to address the subject is in accord. *United States v. Johnson* (5th Cir. 2001) 267 F.3d 376, 377-380; *Jones v. Vacco* (2d Cir. 1997) 126 F.3d 408, 416; *United States v. Romano* (11th Cir. 1984) 736 F.2d 1432, 1439, *vacated in part on rehearing on other grounds* (11th Cir. 1985) 755 F.2d 1401(finding, prior to *Perry*, a sixth amendment violation where the court ordered defendant not to discuss his testimony with counsel during a recess that spanned five days); *State v. Futo* (Mo. App. 1996) 932 S.W.2d 808, 815 (two and a half day prohibition of defendant's discussions with counsel concerning his testimony violates the sixth amendment); *see Moore*, 275 F.3d at 688; *Miguel*, 111 F.3d at 672-673.

The state's contention in one sentence of its Petition for Review, that there is a "split" among the federal circuits on this issue, is inaccurate and

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reiterated, "you may not share *the contents of that declaration* with your clients." (RT 1921) (emphasis added). Neither order made clear that details also contained in other documents could be freely discussed with the defendant.

misleading. (Petition for Review at 13). The only case cited is the Eighth Circuit's decision in *Schaeffer v. Black* (8th Cir. 1985) 774 F.2d 865. While the *Schaeffer* Court found no structural error, the case was decided before *Perry*, and does not cite or distinguish *Geders*. Moreover, the report that was the subject of the gag order in *Schaeffer* had been held by the state court to be "irrelevant;" the federal habeas petitioner had made no attempt to demonstrate that the report was relevant, and had not even provided a copy of the report to the federal court. *Id.* at 867 & n.4. Finally, after the Supreme Court's decision in *Perry*, the Eighth Circuit specifically rejected the state's position here, and adopted the position that a restriction on a defendant's access to counsel is structural error. *Moore*, 275 F.3d at 688-689. *Schaeffer* thus creates no split of authority on the meaning of *Geders* and *Perry*–which are both cases it does not cite. The Eighth Circuit is in line with every other federal circuit and state court on this issue, and has rejected the state's novel and untenable argument.

The state's attempt to distinguish a gag order restricting defense counsel's discussion of critical subjects from the structural errors described in *United States v. Cronic* (1984) 466 U.S. 648 is also unavailing. The *Cronic* Court specifically reaffirmed *Geders's* finding of structural error, stating that the Supreme Court "has uniformly found constitutional error without any showing of prejudice when counsel was . . . prevented from

assisting the accused during a critical stage of the proceeding." *Cronic*, 466 U.S. at 659 & n.25 (citing *Geders*, 425 U.S. 80). Subsequently, the Supreme Court unanimously and explicitly stated that a *Geders* violation fits within *Cronic's* analysis of errors that are structural, and thus require reversal without a showing of prejudice. *Perry*, 488 U.S. at 279 (citing *Cronic*, 466 U.S. at 653-654).

Thus, Appellant's claim is *not*, as the state argues, a claim of infringement of the right to effective assistance of counsel which requires showing an "effect . . . on the reliability of the trial process;" rather, it is a claim of denial of the "right to *unrestricted access to his lawyer* for advice on a variety of trial-related matters." *Perry*, 488 U.S. at 284 (emphasis added). Nor, as the state contends (Petition at 18-19), is a gag order that prohibits counsel from discussing critical evidence with the defendant throughout the trial, similar to a *Brady*[5] violation where the state fails to turn over material exculpatory evidence. A failure to turn over exculpatory evidence places no restrictions on the *communication* between defendant and counsel, and does not restrict advice from counsel on trial-related matters.

In this case, the trial court's restrictions prohibited counsel from

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[5] *Brady v. Maryland* (1963) 373 U.S. 83.

conferring with the defendant about any of the myriad details contained in Flores's critical declaration and about the particular version of the facts to which Flores would testify. These restrictions prevented the defendant from having any input into counsel's use of the declaration for cross-examination, for investigation and presentation of a defense based upon Flores's declaration and his anticipated testimony, or for discussions of plea bargaining and other strategy. Thus, Appellant could not be required to show that this restriction produced an "effect" on the evidence that did come in at trial; the constitutional infirmity of the order is that the gag order prevented discussion of what evidence could or might come in and thus the strategy and tactics which might have led to different cross-examination, developed different evidence at trial, or even led to plea bargain discussions. Moreover, the ambiguity of the trial court's order precluded defense counsel and defendant from freely discussing a host of legitimate strategic issues. *Santos*, 201 F.3d at 965-966; *Cobb*, 905 F.2d at 792; *Mudd*, 798 F.2d at 1512.

As made clear in *Cronic*, restrictions on the defendant's right to access to his attorney for advice on trial-related subjects, "are so likely to prejudice the accused that the cost of litigating their *effect* in a particular case is unjustified." *Cronic*, 466 U.S. at 658 (emphasis added). Thus, the Supreme Court has "uniformly found constitutional error without any

showing of prejudice" where the court has restricted the defendant's access to his counsel for advice on trial related subjects. *Cronic*, 466 U.S. at 658-659 & n.25; *see Hernandez*, Slip Op. at 23. This case falls squarely within *Cronic's* definition of structural error which specifically cited *Geders* error as an example.[6]

The thorough and well-reasoned decision of the Sixth District in this case was thus absolutely correct and wholly in line with the Supreme Court's decisions in *Perry* and *Geders*, and in accord with every published case that has applied *Perry* and *Geders*. As did the Sixth District, this Court should reject the state's novel theory that would place this Court at odds with every United States Supreme Court Justice and every lower court decision that has addressed the subject. This Court should deny review.

Finally, the extreme facts presented in this case make this case an inappropriate vehicle for review. Here, the gag order was justified on a theory of danger to the witness because the witness had been stabbed; yet the prosecutor conceded in the trial court that she was not contending that the defendants had anything to do with the stabbing, and the prosecutor

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[6] By letter dated December 31, 2009, the state directs this Court's attention to *People v. Noriega*, (No. S160953, *review granted* April 30, 2008) formerly published at 158 Cal.App.4th 1516. Insofar as *Noriega* concerns a claim of error for denial of the *state* constitutional right to counsel of choice, it has no bearing on the structural error claim presented by the conceded *federal* constitutional error in this case.

refused to provide the defense or the court with any discovery regarding the stabbing incident. (RT 1257-59). The Sixth District's opinion leaves open the possibility that in an appropriate case, the need to protect a witness may indeed justify "'a carefully tailored, limited restriction on the defendant's right to consult counsel.'" *Hernandez*, Slip Op. at 14, quoting *Morgan v. Bennet* (2d Cir. 2000) 204 F.3d 360, 367. The Sixth District concluded, however, that the order was neither justified by any showing in the trial court, nor was it carefully tailored or limited. *Hernandez*, Slip Op. at 14-19. In the face of the Sixth District's sound analysis, moreover, the state has now abandoned the theory that the gag order was justified based upon any danger to the witness.

Further, the gag order here was uniquely far-reaching. The gag order lasted as long or longer than any gag order in any reported case. It extended from the critical pretrial proceedings, throughout the entire trial, and the post-trial proceedings. Further, the order precluded defense counsel from discussing anything in the declaration of the state's most important witness not only with the defendant, but also with his investigator. The declaration contained 23 facts not discussed in prior reports including a critical statement that Flores, not Townley-Hernandez, was wearing the red and black Pendleton shirt identified as the shooter's shirt. Finally, the trial prosecutor repeatedly conceded that Flores's declaration was essential to the

state's ability to prove its case beyond a reasonable doubt. (RT 574, 2933-34, 3256, 5023). The fact-specific nature of the Sixth District's ruling thus also makes this an inappropriate case for review.

This Court should deny the Petition for Review.

II. IF THIS COURT WERE TO GRANT REVIEW, IT SHOULD ALSO REVIEW SEVERAL OTHER QUESTIONS RELATED TO THE GAG ORDER AND FLORES'S DECLARATION.

If this Court grants review, this Court should also review two related claims raised by Appellant Townley-Hernandez pursuant to Rule of Court 8.500(a)(2).

A. If This Court Grants Review, The Court Should Also Review Appellant's Claim That The Trial Court's Gag Order Infringed Upon Appellant's Federal Constitutional Right To An Investigator.

If this Court grants review, this Court should also review Appellant's claim that the trial court's gag order infringed upon his constitutional right to ancillary services. The court's order not only precluded counsel from showing the declaration to, or discussing the declaration with Appellant, but also from showing it or discussing it with *the investigator*. This wholly precluded counsel from investigating and preparing to rebut or exploit any of the factual assertions in the declaration, particularly those myriad assertions that were not contained in the police reports.

Pretrial investigation is a critical stage of the proceedings under

Cronic. *Mitchell v. Mason* (6th Cir. 2003) 325 F.3d 732, 742-743; *see Powell v. Alabama* (1932) 287 U.S. 45, 57. Moreover, the sixth amendment places upon counsel "a duty to make reasonable investigations." *Strickland v. Washington* (1984) 466 U.S. 668, 691; *see also Corenevsky v. Superior Court* (1984) 36 Cal.3d 307, 319-320 (right to investigator is part of right to counsel); *Ake v. Oklahoma* (1985) 470 U.S. 68, 76-77 (same).

Investigation, moreover, requires consultation with the defendant. *Mitchell*, 325 F.3d at 742-743. The gag order thus wholly frustrated counsel's ability to investigate the allegations made in the declaration prior to trial, throughout the trial and post-trial proceedings. The interference with the sixth amendment right to investigate was structural error requiring reversal.

B. If This Court Grants Review, It Should Grant Review Of The Claim That Refusal To Disclose Prior Versions Of The Declaration Was Statutory And Federal Constitutional Error.

As set forth in the Sixth District's opinion below, defense counsel moved in the trial court for production of previous versions of Flores's declaration. Defense counsel argued the failure to disclose this evidence violated his statutory and federal constitutional rights under *Brady v. Maryland* (1963) 373 U.S. 83. *See also People v. Lamb* (2006) 136 Cal.App.4th 575, 580-581 (interim drafts of reports are discoverable);

Roland v. Superior Court (2004) 124 Cal.App.4th 154, 161-162 (oral statements communicated through third parties are discoverable); *Thompson v. Superior Court* (1997) 53 Cal.App.4th 480 ("raw notes" of officers, investigators or attorneys which reflect witness statements are discoverable); *People v. Westmoreland* (1976) 58 Cal.App.3d 32, 46-47 (federal constitutional right to due process requires disclosure of discussions of leniency with witness). The trial court denied discovery under the theory that the prior versions of the statements written by the prosecutor and shown to the defendant and exchanged back and forth between defense counsel and the prosecutor were protected work-product. (RT 551-556, 565-568).

The Sixth District wisely discounted the trial court's holding that the versions of the declaration and corrections exchanged back and forth were work-product. *Hernandez*, Slip Op. at 26. Any work-product privilege was waived when the prosecutor showed the drafts to Flores and his counsel. *Regents of University of California v. Superior Court* (2008) 165 Cal.App.4th 672, 678-679.

The Sixth District, however, incorrectly ruled that Appellant Townley-Hernandez had not shown that the prior versions of the declarations were relevant and that Appellant had not proven prejudice. *Hernandez*, Slip Op. at 26-27. Because the state refused to produce the

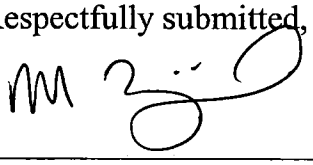
notes, neither the trial court nor Appellant have ever seen them. Thus, neither the Court nor Appellant are in any position to show relevance or prejudice. The appropriate remedy is conditional reversal. *See, e.g., People v. Wycoff* (2008) 164 Cal.App.4th 410, 415-416 (court reverses with instructions to trial court to review withheld information, grant discovery and assess prejudice).

CONCLUSION

For these reasons, this Court should deny review of the Sixth District's well-reasoned and wholly correct decision. This Court should reject the state's suggestion that this Court accept review and place itself at odds with the Supreme Court and every lower state and federal court that has reviewed this issue.

Dated: January 6, 2010

Respectfully submitted,



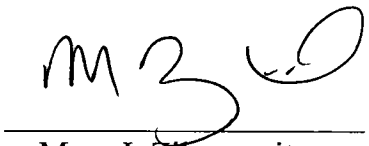
MARC J. ZILVERSMIT

Attorney for Appellant
JACOB TOWNLEY-HERNANDEZ

CERTIFICATE OF COMPLIANCE

I, Marc J. Zilversmit, hereby certify that the attached Appellant's Answer to Petition for Review is proportionately spaced, has a typeface of 13 points, and contains 3,683 words.

Dated: January 6, 2010



Marc J. Zilversmit

PROOF OF SERVICE BY MAIL -- 1013(a), 2015.5 C.C.P.

Re: *People v. Jacob Townley Hernandez* No. S178823

I am a citizen of the United States; my business address is 523 Octavia Street, San Francisco, California 94102. I am employed in the City and County of San Francisco, where this mailing occurs; I am over the age of eighteen years and not a party to the within cause. I served the within:

APPELLANT'S ANSWER TO PETITION FOR REVIEW

on the following person(s) on the date set forth below, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Post Office mail box at San Francisco, California, addressed as follows:

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[x] BY MAIL: By depositing said envelope, with postage thereon fully prepaid, in the United States mail in San Francisco, California, addressed to said party(ies); **and**

[ ] BY PERSONAL SERVICE: By causing said envelope to be personally served on said party(ies), as follows: **[ ] FEDEX [ ] HAND DELIVERY [ ] BY FAX**

I certify or declare under penalty of perjury that the foregoing is true and correct.

Executed on January 6, 2010 at San Francisco, California.

Marc J. Zilversmit