IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff/Respondent, v. JACOB TOWNLEY HERNANDEZ, Defendant/Appellant.	**No. S178823**

Sixth Appellate District No. H031992
Santa Cruz County Superior Court No. F12934
The Honorable Jeff Almquist

APPELLANT'S ANSWER BRIEF ON THE MERITS

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STATEMENT OF ISSUES

I. **WHERE STATE AND LOWER COURT AUTHORITY UNIVERSALLY REJECT THE STATE'S POSITION, SHOULD THIS COURT BE THE FIRST COURT TO CARVE OUT AN EXCEPTION TO THE RULE SET FORTH IN THE UNANIMOUS DECISIONS OF THE UNITED STATES SUPREME COURT IN *GEDERS V. UNITED STATES* AND *PERRY V. LEEKE* WHICH HOLD THAT ANY BAN ON DISCUSSION OF A TRIAL-RELATED MATTER BETWEEN COUNSEL AND THE DEFENDANT THAT LASTS BEYOND A SHORT RECESS IS A STRUCTURAL SIXTH AMENDMENT ERROR REQUIRING REVERSAL PER SE?**

II. **DID THE LOWER COURTS ERR IN HOLDING THAT THE PROSECUTOR COULD CLAIM A WORK-PRODUCT PRIVILEGE FOR DOCUMENTS SHE REVEALED TO AN ADVERSE PARTY, AND IN HOLDING THAT THE DOCUMENTS WERE IRRELEVANT WITHOUT FIRST REVIEWING THE DOCUMENTS?**

INTRODUCTION

As the state now concedes, the trial court in this case violated Appellant Jacob Townley Hernandez's ("Townley's") Sixth Amendment rights when it 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 six-week 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.

The state itself repeatedly characterized this declaration as essential to proving its case and acknowledged that it contained the theory of the prosecution's case. Additionally, Flores's declaration contained at least twenty-two details not contained in previous reports including the critical admission by Flores that he was the person wearing the red and black Pendleton shirt, identified as the shooter's shirt. Insofar as Flores had given several *versions* of the "truth" of what occurred, it was also vitally important that 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.

This case is thus squarely controlled by the holdings in two United States Supreme Court cases. In *Geders v. United States* (1976) 425 U.S. 80 and *Perry v. Leeke* (1989) 488 U.S. 272, the Supreme Court held that a criminal defendant has a "right to *unrestricted* access to his lawyer for advice on a variety of trial-related matters" during any long recess (*Perry*, 488 U.S. at p. 284 [emphasis added]); thus, a court order that restricts for more than a brief recess counsel's communication with her client on any trial-related subject is structural error reversible per se. (*Id.* at pp. 278-279). *Every* state and lower federal 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 trial-related subject is

structural error. Indeed, the list of authors of opinions affirming this undisputed principle includes some of our nation's most highly respected conservative jurists.

Without any authority on point supporting its position, and with universal authority opposing it, the state is left to urge this Court to be the first court in the nation to create a novel exception to the *Geders* and *Perry* rule which would require courts to conduct harmless error review where a trial court's lengthy and unjustified ban on discussion is limited to one trial-related subject, even if that subject has been conceded to be critical to the state's case. While this Court may wish to reserve judgment about whether some exception to the rule might be justified in a future case, none of the potential exceptions apply here.

If legal rules and principles of *stare decisis* are to mean anything, then this Court must follow the holdings of the Supreme Court and the lead of every other court to address the subject and hold that the conceded constitutional error below requires reversal per se.

STATEMENT OF THE CASE

On February 22, 2006, Appellant/Minor Jacob Townley-Hernandez ("Townley") and Noe Flores were charged by complaint filed directly in

adult court pursuant to Welf.&Inst. Code § 707(d)(2). (1CT 1-5.)[1]

On May 2, 2006, a felony information was filed charging Townley, Flores, Jesse Carranco and Ruben Rocha with the premeditated attempted murder of Javier Lazaro (Penal Code § 664/187), and enhancements for personal use of a firearm, discharge of a firearm, and discharge of a firearm causing injury (Penal Code §§ 12022.5(a)(1), 12022.53(b), (c), (d)), and great bodily injury (Penal Code § 12022.7(a)). It was alleged that Minor Townley was eligible for direct filing pursuant to Welf.&Inst. Code § 707(d). (1 CT 30-33.)

On January 25, 2007, Townley's trial was severed from his codefendants. On April 17, 2007, Flores and Rocha entered guilty pleas. (4/17/06RT 1003-16, 1253-65.) On April 26, 2007, the trial court granted the prosecutor's motion to consolidate the trials of Carranco and Townley. (1RT 1-34.)

The trial began with pretrial motions hearings on May 2, 2007. (1RT 343-346.) On June 13, after three days of deliberations, the jury returned verdicts of guilty for Townley on all Counts and enhancements. (9CT 2004, 2024-30.)

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[1] The Clerk's Transcript is cited as "CT." Augmented portions of the Clerk's Transcript are cited as "Aug.CT." The consecutively numbered Reporter's Transcript is cited as "RT." Certain miscellaneous transcripts are cited by date.

On August 24, the court sentenced Townley to life on Count One, with a consecutive 25-years-to-life sentence on the gun enhancement. (12CT 2884-88; 24RT 6013-19.)

On November 9, 2009, the Court of Appeal reversed Townley's convictions. (*People v. Hernandez* (6th Dist. Nov. 9, 2009) Slip Op. at 19, No. HO31992.) This Court granted the People's petition for review on February 24, 2010.

STATEMENT OF FACTS

A. Witnesses To The Shooting.

At about 9:00 p.m., on the evening of February 17, 2006, Javier Lazaro was near the intersection of Merrill and 17th Streets in Santa Cruz. (6RT 1278-84, 1290-91.) A white car pulled up, and he heard someone say "come here" in Spanish. Three or four men chased him while yelling in Spanish with a Mexican accent. He ran until was shot. He did not see a weapon. Although he was wearing a blue North Carolina sweatshirt, he is not a gang member. (6RT 1284-89, 1292-1307; 7RT 1511-13; 20RT 4814-24.)

Lazaro had injuries to his hand, stomach, leg and back. He had surgery to remove a bullet, and had stitches. Two bullets were left in his body. (6RT 1297-1307; 11RT 2513-30.)

Witness David Bacon saw two hispanic boys pass in front of him

near a parked white Honda or Toyota. He heard gun shots and saw someone shooting downward. Two people went back to the car, and the car sped by. (7RT 1523-36; 8RT 1779-82, 1788-90.)

Susan Randolph heard gunshots; she went outside saw a four-door car, possibly a Toyota Camry. She saw three guys running towards her. They were dark-skinned, hispanic boys, about 19-25 years old. They got in the car and took off. (8RT 1817-19, 1821-28.)

Julie Dufresne was driving on 17th Avenue with Jeanne Taylor. She heard popping noises and saw three or four men running fast in front of her and get in a white Toyota or Honda. One was wearing a black and red plaid jacket. (11RT 2539-49, 2559-70.)

Jeanne Taylor also heard the shots and saw three men run in front of the car. (11RT 2595-99.) One appeared to be staggering drunk and was wearing a red and black plaid jacket. (11RT 2598-2601.) They looked about 15-20 years old. They got into an older white Honda or Mazda. (11RT 2601-08.)

Ginger Weisel heard yelling and arguing, including "fucking scrap." She saw four people talking and cussing at Lazaro in Spanish. (11RT 2650-57; 14RT 3362-67.) One of the three men had a silver gun and shot Javier from about three feet away. Javier fell after about four shots, and the attackers ran to a white car. (11RT 2650-64.) The gunman was wearing a

red and black Pendleton shirt. One of the other boys was wearing a white t-shirt. (11RT 2653-58, 2674-77, 2687.)

B. Noe Flores.

The state's key witness was Noe Flores. He was originally charged with attempted premeditated murder and faced life in prison; but he made a deal with the prosecutor to plead guilty to assault with a deadly weapon for three-years in prison. (8RT 1898-99; 11RT 2697-2700; 13RT 3040-42.) Flores had to sign a declaration under penalty of perjury and tell the court the declaration was true in order to get the deal avoiding a life sentence. (21RT 5071.) Flores, however, was a conceded liar, who lied to the police to try avoid responsibility for his part in the shooting. (8RT 1903-04; 11RT 2770-72, 2813-15; 13RT 3045-46.)

Flores testified that on February 17, he was with Townley. (8RT 1888-91.) Flores had known Townley for about a year. Townley knew Flores as "Tony." Although Flores speaks Spanish, he knew that Townley does not. (11RT 2828-33, 2859-60.)

On that evening, he spoke with Townley on the phone. Flores alternatively claimed that Townley suggested they "go for a ride" or "do a ride" or "go cruising around" depending on who was questioning him. Flores did not understand "ride" or "cruising" to mean that there would be a shooting or any violence. Flores agreed and went to Townley's house

where he picked up Townley and Townley's girlfriend, Amanda Johnston. Flores could not recall if he went into Townley's house. Flores was the driver throughout that evening. He owned a white 1992 Honda Accord. (8RT 1891-93, 1899-1900; 11RT 2706-08, 2821-25, 2829-31, 2891-93.) Flores kept a bat in the car because he had been beaten up by sureños. (11RT 2697-2700.)

According to Flores, shortly after Townley got in the car, he showed Flores a gun. Flores held the gun in his palm, took the clip out, and gave it back after a couple of seconds. He did not know if the gun was loaded. He never saw a bag of bullets. (8RT 1900-04; 11RT 2830-32.)

Townley gave Flores directions to go to Watsonville to pick up two people. They picked up Jesse Carranco and Ruben Rocha. Carranco got in front, and Rocha and Townley got in back with Johnston (8RT 1905-1908; 11RT 2835-37.)

They drove back to Santa Cruz and dropped off Johnston. Carranco told Flores to drive downtown. (8RT 1908-11.) Carranco then told Flores to turn around and gave Flores directions to Tony Gonzalez's apartment on Harper Street. They parked and went inside. Tony was intoxicated. There were about ten teenagers inside Tony's room, boys and girls. They stayed in Tony's room for about fifteen minutes. Carranco went out with Tony for a little while and came back. Flores, Townley and Rocha did not talk to

anyone. (8RT 1912-19; 11RT 2845-49.)

Eventually, the four of them all left together and went to the car without talking. Flores drove where Carranco told him to drive. They went to 17th Avenue. (11RT 2708-13.) Flores saw someone in a blue sweater. Carranco told Flores to make a U-turn and pull over. Flores testified that he made a U-turn, but told the police he did not. (11RT 2714-15, 2853-54.) Nobody talked about shooting or finding sureños. (13RT 3035-39.)

According to Flores, the other three boys got out, but Flores stayed in the car with the lights and engine on. Flores did not see a gun, and no one talked about a gun. He saw Carranco grab the bat. Flores thought Carranco was going to hit the guy with the bat. Then he heard sounds like a firecracker. (11RT 2774-77, 2853-59.)

The three boys got back in the car quickly. Carranco told Flores to go, and Flores drove away quickly. They went back to Gonzalez's apartment. (11RT 2778-81.) No one said anything or mentioned any shooting. When they arrived, they got out quickly and went inside. No one went to Tony's window; there was no conversation at the window. Flores insisted his only role was as "taxi driver." (11RT 2782-89, 2861-69.)

They went into the apartment and into Tony's room. Tony and the other kids were there. There was a bottle of liquor, but Flores did not remember who was drinking. Everyone was calm. No one said anything

about a shooting. He saw Carranco talking to Tony. (11RT 2790-95, 2865-69.)

Carranco tried to get a cell phone. He went outside and came back. Flores went outside and saw a white car drive up. Carranco and Rocha got in the car which drove away. (11RT 2795-99.)

Flores stayed. He heard a police car. Everybody went inside except Flores, who stayed outside because he dropped a glove. When the police came, Flores hid behind some stairs. The police towed his car. Eventually Flores walked around to the front of the apartment unnoticed and called his mother to come pick him up. The sheriffs came to his house the next morning and took him to the station. (11RT 2800-12.)

Carranco was wearing a red sweatshirt. Flores alternatively testified that he, himself, was wearing a white t-shirt or a blue t-shirt with a black sweatshirt with a hood. Flores testified that Townley was wearing the red and black Pendleton shirt, People's Exhibit 23. In his declaration, however, Flores swore "I was wearing a red and black Pendleton shirt." (11RT 2700-06, 2817-21.)

According to Sergeant Mario Sulay, when Flores first spoke with him, Flores insisted he did not know anything about the shooting. Sulay told him that he thought he had more information than he was telling them. Flores eventually told Sulay about picking up Townley and going for a ride.

Sulay made suggestions about what happened with which Flores agreed. Flores agreed that there must have been some talk about finding sureños and violence. He agreed that they were hunting for sureños. Flores said Carranco was doing the talking. (20RT 4855-59.)

C. Amanda Johnston.

On February 17, 2006, Amanda Johnston had just turned 20-years-old. She was in a romantic relationship with Townley. On that day, Townley was wearing a red and black Pendleton shirt (which she identified as People's 23) that Johnston had given Townley as a recent present. He had not worn it much before that day. He was wearing a white t-shirt underneath it. (14RT 3369-72.)

Flores picked them up. Then he picked up Carranco and his friend. She had seen Carranco a couple of times before, but had never seen his friend. (14RT 3373-79.)

Johnston confirmed that Townley does not speak Spanish. (14RT 3379-80.)

D. The Police Investigation At Harper Street And Interviews Of Townley And Randi Fritts-Nash.

The police went to Gonzalez's Harper Street apartment after the shooting and found Flores's white car and a number of teenagers drinking there. (15RT 3509-19; 20RT 4826-33.) Townley and Randi Fritts-Nash

were in Gonzalez's room. There was a red flannel shirt on the bed next to Townley. (15RT 3522-24, 3530-37.)

The police interviewed several occupants. (15RT 3539-42; 20RT 4833-37.) Then they interviewed Townley. Townley was wearing a white t-shirt and black pants. The police asked Townley whether he had previously said that he was wearing the red and black flannel shirt earlier. Townley did not say anything, but accepted the shirt when Officer Fish gave it to him. (15RT 3539-42; 20RT 4833-40, 4871-72.)

Townley denied involvement in the shooting and said he had been driving around with Tony, Alex and his girlfriend. The police were concerned that Townley seemed nervous and could not name the streets they had been driving on. They decided to take him to the Sheriff's Department for further questioning as a possible witness. (20RT 4838-43.)

The officers then spoke to Randi Fritts-Nash. (20RT 4843-44.) She was "buzzed" from drinking Jack Daniels with her friends at the apartment. She heard a car in parking lot. Gonzalez went to the window. (13RT 3111-19; 14RT 3290-96, 3335-36.) Fritts-Nash heard the "f" word and "scrap" and vaguely recalled hearing the word "hit." (13RT 3118-21, 3145-47; 14RT 3282-84.)

Gonzalez left and came back with four other boys. The only one she recognized was Townley. While the three other boys were hispanic,

Townley is "white." Townley was wearing a red and black plaid jacket, People's 23, and a white t-shirt underneath. (13RT 3121-35.)

Someone called "Oso" drove up in a Toyota 4-runner. Carranco, Flores and Rocha all got into the car and left. (13RT 3138-40; 14RT 3301-11; 15RT 3553-62.)

When the police arrived, Fritts-Nash was in the bedroom with Townley. When the police ordered everyone to come out of the room, Townley stayed in the room with Fritts-Nash. (13RT 3136-40; 14RT 3312-16.) Townley pulled a small handgun out of the pocket of the red and black jacket. He removed the clip and removed bullets from the clip. He wiped the gun on the blanket. He was moving the gun back and forth and handling it with both hands. He said "I need to hide this gun." She asked if it was registered to him, and he said "no." She suggested stashing it in Gonzalez's VCR in the closet, but he said he would not disrespect Gonzalez like that. Townley said he was looking at 25-to-life. Eventually, he put the gun in his shoe. He put a small velvet bag of bullets in his other shoe. He took the jacket off. Fritts-Nash asked Townley if he shot someone; he did not say anything, but made an ambiguous C-shaped motion with his head. (13RT 3140-47; 14RT 3316-27.)

An officer asked them to leave the room. Eventually, the officers took everybody down to the county building. (13RT 3145-51.)

E. The Transportation And Search Of Townley.

The police did a pat-down search of Townley and placed him in the back of the patrol car. While driving to the Sheriff's Office, they got a call relaying the information obtained from Fritts-Nash. (9RT 2052-63; 10RT 2278-84.) They pulled over and searched Townley. They found an unloaded .25 caliber pistol in one shoe, and twenty .25 caliber cartridges in a purple satchel in Townley's other shoe. (9RT 2064-73; 10RT 2282-84.) Townley was wearing a white t-shirt and had the red and black flannel jacket with him, People's 23, that the police had handed to him. The police seized it. (9RT 2069-70; 10RT 2258-59, 2289-91.)

F. The Interviews Of Sara Oreb And Anthony Gonzalez.

The police also transported Sara Oreb and Anthony Gonzalez to the station where they held them throughout the night until they changed their statements and corroborated Fritts-Nash's statement about hearing someone say something about hitting a scrap. Oreb described Townley as "really white." As was corroborated by the interrogation tape, Oreb testified that she did not recall most of the events, and had only told police she heard him say that they had "hit a scrap" because the police held her in custody until 7:00 a.m., would not let her call her parents, and would not give her food or drink; the police also threatened to send her to prison for fifteen years and lock up her boyfriend Gonzalez. (15RT 3563-78, 3689-99; 16RT 3755-66,

3779-82, 3791-3800, 3833-38; 9CT 1910-2, 1910-7, 1910-26-30, 1910-51-58, 1910-61-64.)

Similarly, as was corroborated by his interrogation tape, Anthony Gonzalez testified that he was drunk when the police took him to the station. He did not remember much about the evening, but he did remember the "white guy" (Townley) showed up. (17RT 4070-80, 4879-82; 9CT 1910-71-72, 1910-80.)

Gonzalez woke up in juvenile hall. The police told him what they wanted him to say, and told him that he could not leave until he told them what they wanted to hear. (17RT 4080-86, 4092-98.) The police repeatedly threatened to charge Gonzalez as an accessory to murder. (9CT 1910-83, 1910-93-94.) Gonzalez testified that he started guessing about things, lying to the police and trying to agree with them. (17RT 4095-98.) Finally, Gonzalez told police that Townley came to his house and said "we beat up some scrap." (9CT 1913.)

G. Forensic Evidence.

1. Gun Shot Residue.

Swabs taken from Townley's hands tested positive for gunshot residue, with more particles on the right hand. The particles could have been deposited by firing a gun, by handling a firearm that had been fired, or by being within a few feet of a gun that was fired. The pattern of finding

more particles on the right hand was consistent either with being a shooter or handling a fired gun and moving it from hand to hand. (13RT 3059-73, 3087-90, 3107-08.)

The red and black Pendleton shirt, People's 23, also tested positive for gunshot residue particles on the sleeves, with more on the right than the left sleeve. (13RT 3073-83.)

A videotape, however, showed Townley sitting on a bench at the Sheriff's Department, before the gunshot residue swabs were taken. He was not in handcuffs, and his hands were not bagged. His hands repeatedly touched the red and black Pendleton shirt, and his hands touched each other. (Defense Exhibit G; 21RT 5027-29.)

The defense expert testified that gunshot residue is easily transferred by touching a firearm that has been fired; it is easily transferred between hands, and between hands and clothing, and to different parts of clothing. (21RT 5040-50.) She opined that there is no scientifically reliable way to determine how particular gunshot residue particles were deposited. Townley's activity depicted in the video in Defense Exhibit G provided a reasonable explanation of how gunshot residue could have ended up on his hands and the shirt he was wearing, in the patterns found, even if he did not shoot a firearm. (21RT 5051-52.)

The defense expert was unaware of any laboratory that attempted to

do quantitative analysis of gunshot residue patterns to determine how the residue got deposited. It is unreliable to use the results of a gunshot residue test to opine that someone was a shooter. (21RT 5053-55.)

2. Ballistics.

The .25 caliber casings found at the scene of the shooting were fired by the gun seized from Townley. The bullet removed from Lazaro's body could have been fired by the gun seized from Townley. (11RT 2572-83, 2588.)

H. The Lack Of Identifications Of Appellant By Eyewitnesses.

Although all of the witnesses described the suspects seen shooting or running to the car as dark-skinned and hispanic, Appellant Townley was described by all witnesses as "white," "really white" and a "white guy," while Flores, Carranco and Rocha were described as hispanic. (13RT 3121-23; 9CT 1910-2, 1910-7, 1910-11, 1910-80.)

Although Lazaro and Wiesel stated that the assailants spoke in Spanish with a Mexican accent, witnesses Flores and Johnston both confirmed that Townley does not speak Spanish; but, Flores does speak Spanish. (12RT 2832-33, 2859-60; 14RT 3379-80.)

Susan Randolph recognized a photo of Carranco as the person who got in the front passenger seat with a flannel shirt on. She did not pick out

photos of Rocha, Flores or Townley. (8RT 1830-35, 1846-48.)

Jeanne Taylor identified Carranco's photo as the shorter, hispanic, drunk-looking person wearing the red and black Pendleton jacket, People's 23. Taylor did not identify Townley's photo. (11RT 2613-29; 20 RT 4875-77.)

David Bacon was unable to identify photos of Flores, Rocha, Carranco or Townley. (8RT 1767-74.) Ginger Wiesel was also unable to identify Townley or Carranco. (11RT 2663-69; 20RT 4876-78.)

ARGUMENT

I. THE UNITED STATES SUPREME COURT AND ALL STATE AND LOWER FEDERAL COURT PRECEDENTS AGREE THAT ANY UNJUSTIFIED RESTRICTION ON DISCUSSIONS BETWEEN COUNSEL AND THE DEFENDANT ON ANY TRIAL-RELATED SUBJECT THAT LASTS BEYOND A SHORT RECESS IS A STRUCTURAL ERROR, REVERSIBLE PER SE.

A. The Trial Court's Order Restricting Defense Counsel's Consultation With Appellant Townley And His Investigator.

1. The Plea, Declaration And Gag Order.

On April 17, 2007, the prosecution reached a plea agreement with codefendant Noe Flores.[2] Flores pleaded guilty to a reduced charge of

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[2] Flores and Rocha's plea transcripts and declarations remain under seal, but are available for the Court's review. (4/17/07RT 1005-16; Aug.CT 58-65, Court-Exh. 5A, 6A.)

Penal Code § 245(a)(2), assault with a firearm, for the mid-term of three-years in prison, and the prosecutor dismissed the attempted murder charge for which Flores was facing life in prison. (3RT 550-552; 9RT 1898-99; 11RT 2697-2700; 13 RT 3040-42; 1CT 31-32.) Coconspirator Ruben Rocha also entered into a plea bargain and signed a declaration. (3RT 550-552.)

The declaration signed by Flores provided that "I understand that I have to tell the judge in open court and under oath that the contents of this declaration are true." (8CT 1782.) The court initially ordered that the declarations remain sealed and that their existence not be revealed to defense counsel for Townley and Carranco. (3RT 583.)

Counsel for Appellant Townley and codefendant Carranco were eventually given a chance to review the declarations; but despite defense counsels' objections, they were given the copies only upon agreeing that they were not permitted to show the declarations to their clients or discuss the existence or contents of the declarations with their clients, with other attorneys or with defense investigators. (3RT 550-552, 8RT 1921; Aug.CT 34.) When the matters were discussed in court, the trial court required that the discussions take place outside the presence of the defendants. (3RT 530-534, 548-585.)

The prosecutor repeatedly explained the critical role of the

declarations. The declarations contained the state's theory of the case. (3RT 555). The prosecutor also made clear that the state needed the declarations to prevent any exculpatory testimony by Flores, who had given many different statements to the police about his role in the offense. The prosecutor was afraid that without the declarations, Flores might testify that he had the gun which "would probably create reasonable doubt" as to Townley's guilt, "and at minimum, a strong possibility of a hung jury." She explained the declarations were designed "to ins[u]late or in[n]oculate my trial from the possibility" of Flores "creating a problem in my jury trial" of Townley. (3RT 574.) Without the declarations, Flores or Rocha could "sabotage the People's case." (12RT 2933-34.) The declarations were required to prevent Flores from testifying that "*he was the shooter*, or had done some of the conduct[] that was described. (14RT 3256 [emphasis added].) The prosecutor needed to "make sure that [Flores and Rocha] signed declarations . . . identifying that they were not the shooter" so that her case against Townley would not be "sabotage[d]." (21RT 5023.)

Defense counsel made numerous objections to these procedures. (3RT 568; Aug.CT 34.) The court overruled the objections, but suggested that should Flores testify, then counsel would be able to impeach him with the declaration. (3RT 583-584.)

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2. *Problems Using The Declaration At Trial.*

The court took a break in middle of Flores's testimony and ordered that a copy of Flores's declaration be provided to defense counsel, but reiterated that the declaration remained "subject to the same nondisclosure to clients, to investigators, to other attorneys, it's only to be used by [Townley's counsel] and [Carranco's counsel] for purposes of doing cross-examination of Mr. Flores." (8RT 1921.) The court ordered that no copies be made and that the sole copies given to the attorneys be returned to the court. They remained under seal, and counsel was ordered not to bring them to court, where their clients might see them. (8RT 1921-22.) When counsel objected to the order and stated that he needed to show the documents to his client to prepare for Flores's cross-examination, the prosecutor admonished that defense counsel's objection violated the court's order not to discuss the declaration in front of the defendants who were present in court; the prosecutor further chastised counsel for placing the declaration on counsel's table where the client might be able to see it. The court admonished counsel to put the declaration in his briefcase "right now" and not to share it with his client. (8RT 1923-24.)

In addition to precluding defense counsel from preparing for trial and cross-examination with their clients, the gag order proved problematic in the courtroom. When Carranco's counsel asked Flores to identify the

document during cross-examination, the prosecutor objected to defense counsel reading the title of the document. (12RT 2886.)

Similarly, when Carranco's counsel attempted to question Flores about key facts that were *not* included in the declaration, prosecution objections were sustained. (12RT 2898-99, 2903.) When counsel attempted to show that Flores had added things in his testimony that he had not included in his declaration or statement to police, prosecution objections were sustained. (12RT 2905, 2931-35.)

Additionally, counsel had problems questioning Flores about the relationship of the declaration to his plea bargaining. The prosecutor acknowledged before trial that Flores's and Rocha's pleas to reduced charges and proposed prison sentences "included the requirement that each person sign a declaration about the truth of what they did," but she insisted there was "no leniency." (3RT 554.) However, when counsel for Carranco attempted to cross-examine Flores about the fact that he had to sign the declaration in order to get his three-year sentence, the prosecutor objected, the objection was sustained, and the prosecutor asked for counsel to be admonished. (12RT 2888-89, 2906; 14RT 3255-65.)[3] The court

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[3] The prosecutor objected that discussion between Flores and his attorney were privileged when defense counsel asked, (12RT 2906) but then asked questions about Flores's discussions with his attorney on redirect, which Flores answered. (12RT 2918.)

admonished Carranco's counsel in front of the jury for questioning Flores about the declaration, "there are reasons for the document to be prepared that Mr. Cave [Carranco's counsel] doesn't seem to understand or accept." Carranco's counsel was not permitted to respond. (12RT 2907, 2931-35.)[4]

When the prosecutor refused to stipulate, the trial court took judicial notice of the fact that the declaration was part of the plea bargain, and instructed the jury accordingly. (21RT 5071.)

3. Ambiguities In The Trial Court's Order.

On appeal, and again in this Court, the state contends that the court's order did not restrict consultation between counsel and Appellant because defense counsel could discuss Flores's statements in the police report and in his recorded interview, and after Flores testified, counsel could discuss the portions of Flores's declaration that were the subject of testimony. (Govt. Brief at pp. 29-30.)[5] The record, however, demonstrates that there were substantial ambiguities in the trial court's order regarding whether counsel could discuss information that was contained in the declaration with his

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[4] Townley's counsel reiterated his joinder in the objections. (14RT 3257.)

[5] At the state's request, the Court of Appeal took judicial notice of the February 20, 2006 police report which contains a three-page summary of Flores's interview. (People's Motion for Judicial Notice, Exhibit A, at pp. 7-10.) Additional copies of the report and portions of the tape recorded statement are included in Clerk's Transcript. (7CT 1543-64.)

client and investigator, if the information was also contained in other discovery or if it had been also discussed by Flores in his testimony. At the outset, when the trial court made the order, the court told counsel:

> You have suspicious [sic] information in the voluminous police reports to prepare to cross-examine and talk to your clients about everything there, *but without the odds and ends that are in the signed statements from Mr. Flores and Mr. Rocha.*

(3RT 580-581 [emphasis added].) By telling counsel that he could talk about the voluminous discovery with his client but "without the odds and ends that are in the signed statements," the court's order suggested that counsel should not discuss allegations that were contained in the signed declarations, even if the allegations are also contained in other discovery.

Later, when the court provided defense counsel with the declarations, the court reiterated that the declarations were,

> subject to the same nondisclosure to clients, to investigators, to other attorneys, it's only to be used by Mr. Cave and Mr. Dudley for purposes of doing cross-examination of Mr. Flores. . . . *[Y]ou may not share the contents of the documents with your clients.*

(8RT 1921 [emphasis added].) Again, by ordering counsel not to share the "contents of the documents" with his client, the court appeared to preclude counsel from talking about any the "contents" of the declaration, whether or not the allegations could be found in other statements, other discovery or Flores's subsequent testimony.

The Court of Appeal thus rejected the state's position and agreed with Appellant Townley. "We do not believe that the scope of the court's order was that clear." (*Hernandez*, Slip. Op. at p. 20). The Court of Appeal found the trial court's order "ambiguous," and noted that the court's "order could be reasonably interpreted as prohibiting counsel from discussing the contents of the declaration with Townley even after Flores testified to the contents." (*Id.*)

4. At Least Twenty-Two Details Contained In The Declaration That Were Not Contained In The Police Reports.

Moreover, regardless of the ambiguities in the order, contrary to the state's argument, the discovery did *not* contain all of the allegations in Flores's declaration. The four-page declaration contained at least twenty-two distinct details not contained in the police reports. (Exhibit 6A.)

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B. The Supreme Court's Decisions In *Geders* And *Perry* Establish That A Lengthy Violation Of A "Defendant's Right To Unrestricted Access To His Lawyer For Advice On A Variety Of Trial-Related Matters" Is Structural Error Requiring Reversal Without A Showing Of Prejudice.

The Sixth Amendment guarantees that "[i]n all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defence." (U.S. Const. amend VI.) "The core of this right has historically been, and remains today, 'the opportunity for a defendant to consult with an attorney and to have him investigate the case and prepare a defense for trial.'" (*Kansas v. Ventris* (2009) 129 S.Ct. 1841, 1844-45, quoting *Michigan v. Harvey* (1990) 494 U.S. 344, 348.)

As the state recognizes, in *United States v. Cronic* (1984) 466 U.S. 648, the Supreme Court made clear that while a claim of ineffective assistance of counsel requires a showing of prejudice, "there are, however, circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified." (*Id.* at p. 658.) Thus, the *Cronic* Court noted, "[t]he 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 p. 659 fn.25.)

In *Holloway v. Arkansas* (1975) 435 U.S. 475, 489-491, the trial

court's order required counsel to represent three codefendants with conflicting interests. The government argued that structural error was reserved for cases involving the complete denial of counsel, but the Supreme Court disagreed: "The mere physical presence of an attorney does not fulfill the Sixth Amendment guarantee" when the trial court's order has "effectively sealed his lips on crucial matters." (*Id.* at p. 490.) The Court made clear that reversal was required without a showing of prejudice because the court's unconstitutional order affected the strategic decisions about what evidence to present at trial, pretrial plea negotiations and sentencing. (*Id.* at pp. 490-491.)

In particular, amongst the type of structural errors requiring reversal without a showing of prejudice which were identified by the *Cronic* Court, is a trial court's restriction on an attorney's consultation with his or her client. (*See id.*, citing *Geders v. United States* (1976) 425 U.S. 80; *see also Strickland v. Washington* (1984) 466 U.S. 668, 686, citing *Geders*, 425 U.S. 80.)

In *Geders*, the Supreme Court held that a trial court's order directing the defendant not to consult with his attorney during an overnight recess violated the Sixth Amendment. (*Geders*, 425 U.S. at pp. 88-91.) The trial court had ordered all witnesses not to discuss their testimony with anyone. (*Id.* at pp. 88-89.) Pursuant to that ruling, the trial court ordered the

defendant "not to discuss your testimony in this case with anyone" and told counsel, "I just think it is better that he not talk to you about anything." (*Id.* at pp. 82-83 & fn.1.)

The Supreme Court noted that sequestration of non-defendant witnesses is a valid exercise of the court's power to control trial proceedings and may serve a number of permissible purposes. (*Id.* at p. 87.) Yet, the *Geders* Court noted that a "sequestration order affects a defendant in quite a different way from the way it affects a nonparty witness," because "a defendant in a criminal case must often consult with his attorney during the trial." (*Id.* at p. 88.) The Court noted the seventeen-hour overnight recess would necessarily restrict consultation beyond discussion of the ongoing testimony:

> It is common practice during such recesses for an accused and counsel to discuss the events of the day's trial. Such recesses are often times of intensive work, with tactical decisions to be made and strategies to be reviewed. The lawyer may need to obtain from his client information made relevant by the day's testimony, or he may need to pursue inquiry along lines not fully explored earlier. At the very least, the overnight recess during trial gives the defendant a chance to discuss with counsel the significance of the day's events. Our cases recognize that the role of counsel is important precisely because ordinarily a defendant is ill-equipped to understand and deal with the trial process without a lawyer's guidance.

(*Id.*) While preventing coaching of witnesses was also important to the

integrity of the judicial system, the *Geders* Court made clear that any "conflict must, under the Sixth Amendment, be resolved in favor of the right to the assistance and guidance of counsel." (*Id.* at p. 91.)

Thus, the Court reversed without any inquiry into prejudice, because the defendant had been deprived of his Sixth Amendment right to have "'the guiding hand of counsel at every step in the proceedings against him.'" (*Id.* at p. 89, quoting *Powell v. Alabama* (1932) 287 U.S. 45, 68-69; *see id.* at p. 91 ["We hold that an order preventing petitioner from consulting his counsel 'about anything' during a 17-hour overnight recess between his direct- and cross-examination impinged upon his right to the assistance of counsel guaranteed by the Sixth Amendment."])

Subsequently, in *Perry v. Leeke* (1989) 488 U.S. 272, the Court addressed a trial court's order that a defendant not consult with counsel during a fifteen-minute break in the defendant's testimony. (*Id.* at pp. 280-281.) The *Perry* Court clarified that the jurisprudence of the defendant's right to consult with counsel during trial. The Court made clear 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.

(*Id.* at p. 281.) Because a defendant has no right to have her testimony

interrupted in order to consult with counsel, the Court held that a trial court is within its power to declare a brief recess and order the defendant not to consult with counsel during that brief recess, "in which there is a virtual certainty that any conversation between the witness and the lawyer would relate to the ongoing testimony." (*Id.* at pp. 283-284.)

The *Perry* Court distinguished the brief interruption of testimony from an overnight recess:

> The interruption in *Geders* was of a different character because the normal consultation between attorney and client that occurs during an overnight recess would encompass matters that go beyond the content of the defendant's own testimony–matters that the defendant does have a constitutional right to discuss with his lawyer, *such as the availability of other witnesses, trial tactics, or even the possibility of negotiating a plea bargain.* It is the defendant's *right to unrestricted access to his lawyer for advice on a variety of trial-related matters* that is controlling in the context of a long recess.

(*Id.*, citing *Geders*, 425 U.S. at p. 88 [emphasis added].) Moreover, the Court held that "[t]he fact that such discussions will inevitably include some consideration of the defendant's ongoing testimony does not compromise that basic right." (*Perry*, 488 U.S. at p. 284).

Finally, the Court clarified that a *Geders* violation requires reversal without the need to show prejudice:

> There is merit in petitioner's argument that *a showing of prejudice is not an essential component of a*

violation of the rule announced in Geders.

(*Id.* at pp. 278-279 (emphasis added].) The *Perry* Court noted that the reversal without considering prejudice "was consistent with the view we have often expressed concerning the fundamental importance of the criminal defendant's constitutional right to be represented by counsel." (*Id.*) The Court particularly noted that its holding was consistent with the Court's holding in *Strickland*, 466 U.S. 668, in which the Court distinguished cases challenging the actual effectiveness of counsel which require a showing of prejudice from cases such as *Geders* which involve a government interference "with the ability of counsel to make independent decisions about how to conduct the defense." (*Strickland*, 466 U.S. at 686; *see Perry*, 488 U.S. at 280 [quoting same].) The *Perry* holding was without dissent on this key issue, as was *Geders*.[6]

Although, as the state points out, the Supreme Court has declined to extend the presumption of prejudice to a variety of different situations involving ineffective assistance of counsel (Govt. Brief at pp. 27-28 [citing cases]), none of the cases cited involve restrictions on the right of the defendant to the advice of counsel on trial-related matters during trial, nor

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[6] *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].)

do they involve interference with the ability of counsel to make independent decisions about conducting the defense.[9] The *Perry* Court expressly distinguished cases involving ineffective assistance of counsel from court orders restricting consultation–"direct governmental interference with the right to counsel is a different matter." *Perry*, 488 U.S. at p. 279. Moreover,

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[9] *See Florida v. Nixon* (2004) 543 U.S. 175, 189-190 (declining to extend a per se reversal rule where defense counsel made a strategic decision not to contest his client's guilt, in order to retain credibility in arguing mitigation at the penalty phase); *Bell v. Cone* (2002) 535 U.S. 685, 691-692, 695-696 (declining to require reversal per se where counsel made a strategic decision to waive closing argument in order to prevent the prosecutor from making a more damaging closing argument); *Roe v. Flores-Ortega* (2000) 528 U.S. 470, 482 (declining to extend a per se reversal rule where counsel failed to file a notice of appeal); *Morris v. Slappy* (1983) 461 U.S. 1, 10-12 (in a *pre-Cronic* case, Court found *no error* in denying the defendant's personal request for a continuance when a new public defender took over his case six days before trial, declared that he was ready to proceed, and obtained a hung jury on the most serious counts); *see also Mickens v. Taylor* (2002) 535 U.S. 162, 166 (declining to extend presumption of prejudice to conflict of interest case); *People v. Rundle* (2008) 43 Cal.4th 76, 164-174 (declining to extend presumption of prejudice to attorney's conflict of interest with witness at post-trial juror misconduct hearing that did not affect trial), *disapproved in People v. Doolin* (2009) 45 Cal.4th 390, 421.)

The precedential effect of many of the cases cited by the state is further clouded because they are habeas cases arising under the Anti-Terrorism Effective Death Penalty Act which permits reversal only when the state court judgment is an unreasonable interpretation of settled Supreme Court precedent. 28 U.S.C. § 2254(d)(1). (*See Wright v. Van Patten* (2008) 552 U.S. 120, 124-125 (per curiam) [no clear Supreme Court precedent establishes that counsel's appearance by speaker-phone interferes with defendant's right to assistance of counsel where arrangement did not prevent discussion between counsel and defendant]; *Bell*, 535 U.S. at pp. 699-702.)

as the state concedes (Govt. Brief at p. 25), since *Perry*, the Supreme Court has repeatedly reaffirmed this distinction, and has repeatedly reaffirmed that *Geders* error requires reversal without a showing of prejudice. (*See, e.g., Bell v. Cone* (2002) 535 U.S. 685, 696, fn.3; *Mickens v. Taylor* (2002) 535 U.S. 162, 166.)

Furthermore, *no court has questioned this holding*, as the state urges here. *Every court* since *Perry* has *held* that any trial court order that violates the "defendant's right to unrestricted access to his lawyer for advice on a variety of trial-related matters" is structural error, reversible per se. (*See United States v. Johnson* (5th Cir. 2001) 267 F.3d 376, 377-380 [order precluded consultation with counsel during overnight recesses]; *Jones v. Vacco* (2d Cir. 1997) 126 F.3d 408, 416 [order precluded consultation with counsel during weekend recess); *United States v. Cobb* (4th Cir. 1990) 905 F.2d 784, 791-793, *cert denied*, 498 U.S. 1049 (1991) [prohibition of defendant's discussions with counsel concerning his testimony over weekend recess required reversal per se]; *Mudd v. United States* (D.C. Cir. 1986) 798 F.2d 1509, 1512 [prior to *Perry*, court held error was reversible per se where attorney told not to discuss defendant's testimony with defendant during overnight recess]; *Martin v. United States* (D.C. App. 2010) 991 A.2d 791, 793-795 [order forbidding defendant from discussing testimony with counsel during a weekend recess in the middle of

testimony required reversal without a showing of prejudice]; *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]; *State v. Fusco* (1983) 93 N.J. 578, 461 A.2d 1169, 1174-75 [holding prior to *Perry* that overnight ban on discussion of defendant's testimony required reversal per se]; *see also United States v. Sandoval-Mendoza* (9th Cir. 2006) 472 F.3d 645, 650-652 [finding *Geders* error where defendant ordered not to discuss testimony with counsel, but declining to decide whether error was structural because Court reversed on other error]; *Moore v. Purkett* (8th Cir. 2001) 275 F.3d 685, 688-689 [prohibition on attorney consulting quietly with defendant during trial violated principle of *Geders* and required reversal per se]; *United States v. Santos* (7th Cir. 2000) 201 F.3d 953, 965-966 [finding *Geders* error where defendant ordered not to discuss testimony with counsel but declining to decide whether error was structural because Court reversed on other error]; *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 [prior to *Perry*, finding Sixth Amendment violation where the court ordered defendant not to discuss his testimony with counsel during a recess that spanned five days].)

Conversely, *no court* since *Perry* has adopted the novel position that

the state urges here–that some restrictions on the defendant's "right to unrestricted access to his lawyer for advice on a variety of trial-related matters" (*Perry*, 488 U.S. at p. 284 [emphasis added]) are reviewed for harmless error.[10] This Court should not become the first court to hold that *Geders* error may be reviewed for harmlessness.[11]

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[10] The only case cited by the state for its novel position is the Eighth Circuit's decision in *Schaeffer v. Black* (8th Cir. 1985) 774 F.2d 865. As described more fully below, *Schaeffer* does not support the state's position, because it was decided before *Perry*, and does not even cite *Geders*. Moreover, the trial court's order did not limit discussion of any evidence relevant to the defense. (*Id.* at p. 867 & fn.4.) Finally, the Eighth Circuit's subsequent decision in *Moore v. Purkett* (8th Cir. 2001) 275 F.3d 685, 688, clarified that *Geders* error is reversible without a showing of prejudice.

[11] The Government's reliance upon *United States v. Morrison* (1981) 449 U.S. 369 is particularly perplexing. (Govt. Brief at pp. 25-26.) The *Morrison* Court reaffirmed that *Geders* required reversal because "judicial action before or during trial prevented counsel from being fully effective." *Id.* at p. 364. The *Morrison* Court, however, rejected the defendant's claim that the interference of counsel in his case required *dismissal of the case with no chance of retrial*. *Id.* at pp. 365-367. The Court thus held that because cases like *Geders* permitted retrial of the case, the remedy should be tailored to the violation, and dismissal was inappropriate. *Id.* Here, of course, Appellant Townley asks only for a new trial–the remedy approved by *Morrison*.

C. The Trial Court's Unconstitutional Gag Order In This Case Fits Squarely Within The Holding Of *Geders* Because The Ban On Discussing The Declaration Containing The Proposed Testimony Of The State's Key Witness With The Defendant And His Investigator Throughout The Trial And Critical Pre-Trial Period, Was *More* Restrictive Than The Gag Order In *Geders*, And Was A Greater Infringement Of The Core Sixth Amendment Right To Assistance Of Counsel.

The state argues that because the court's order here banned only a discussion of the declaration or anything in the declaration, the ban was more limited than the seventeen-hour ban on all discussion in *Geders*. This distinction, the state contends, takes the instant case outside of the unanimous *Geders* and *Perry* holdings and permits an exception to the rule requiring reversal per se. (*See* Govt. Brief at pp. 26-35.) Yet such an exception would fly in the face of *Perry's* strong statement upholding the right of a criminal defendant "to unrestricted access to his lawyer for advice on a variety of trial-related matters," and its holding that restrictions on access require reversal without a showing of prejudice. (*Perry*, 488 U.S. at p. 284.) It is therefore not surprising that the state can cite no cases which apply such an exception; and thus the state asks this Court to go out on a legal limb and be the first to invent a subject-matter exception to the *Geders-Perry* holdings.

Moreover, Appellant Townley takes issue with the state's contention that the ban on consultation between counsel and the defendant in this case

was more limited than the ban in *Geders*. The *Perry* Court's holdings that "a showing of prejudice is not an essential component of a violation of the rule announced in *Geders*" (*Perry*, 488 U.S. at pp. 278-279), and that the fifteen-minute ban on consultation did not violate the defendant's constitutional rights are premised upon two factors–the *subject matter* of the ban on communication and the *duration* of the limitation. Because a defendant who testifies has no constitutional right to discuss his testimony with counsel during that testimony, the *Perry* Court held there was no constitutional violation in banning communication with counsel during a fifteen-minute break during testimony. (*Id.* at pp. 281-284.) In a short recess, moreover, there was no risk that the ban would intrude on the defendant's constitutional right to discuss trial-related matters: "It is defendant's right to unrestricted access to his lawyer for advice on a variety of *trial-related matters* that is controlling in the context of a *long recess*." (*Id.* at pp. 283-284 [emphasis added].) Thus, the *length* of the recesses in *Geders* and *Perry*, played a key role in demarcating the constitutional violation. (*See United States v. Sandoval-Mendoza* (9th Cir. 2006) 472 F.3d 645, 651 ["any overnight ban on communication . . . violates the Sixth Amendment"].)

While the subject of the ban on consultation was more limited than the ban in *Geders*, the ban here nonetheless precluded discussion of "trial-

related matters"–a point which the state does not dispute. The state concedes that Appellant Townley had a constitutional right to discuss the declaration and its contents with his counsel. Moreover, the subject of the ban here–the existence and contents of the declaration of the state's key witness–was undeniably an exceptionally important topic at this trial. The declaration contained the state's theory of the case (3RT 555), and Flores's declaration and testimony laid out almost the entirety of the state's evidence about the events of that evening. The prosecutor repeatedly emphasized that the declaration was critical to her ability to prove the state's case beyond a reasonable doubt, and that without the declaration there was a strong possibility that Flores's testimony would lead to an acquittal or hung jury. (3RT 574, 12RT 2933-34, 14RT 3256, 21RT 5023.) Certainly the ban on discussion of the declaration restricted counsel's consultation with the defendant about the subjects which *Perry* identified as critical components of the right to assistance of counsel–"the availability of other witnesses" to confirm or rebut details in the declaration or to pursue a different defense, "trial tactics" involving Flores's proposed testimony, "or even the possibility of negotiating a plea bargain" once Flores's declaration confirmed that Flores would testify and would not exonerate Townley as the prosecutor feared he might do without the declaration. (*Perry*, 488 U.S. at pp. 283-284).

Further, contrary to the state's contention that the order was clear and did not limit discussion of information that was covered in the declaration if it was also discussed in discovery or in Flores's testimony, the Sixth District's unanimous decision recognized that the trial court's order was broader, or at least was ambiguous as to its breadth. (*Hernandez*, Slip Op. at 20.) 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.*" (3RT 580-581 [emphasis added].) Later, during Flores's testimony, the trial court reiterated, "you may not share *the contents of that declaration* with your clients." (8RT 1921 [emphasis added].) Neither order made clear that contents of the declaration that were also contained in discovery or in testimony could be freely discussed with the defendant. Surely defense counsel was not required to risk a contempt finding and State Bar discipline by interpreting the trial court's order more narrowly than was possibly intended.[12]

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[12] Nor was counsel required to possibly incur the court's wrath by seeking to "clarify" the order, as the state now with the benefit of hindsight suggests. As the Sixth District made clear the broad interpretation was a reasonable one. Moreover, the court had just sternly admonished codefendant's counsel for objecting to the order. (8RT 1923-24.) Having just witnessed the stern admonishment of cocounsel for objecting to the order, it is unreasonable to expect that Townley's counsel should risk a similar admonishment by objecting to a lack of clarity in the court's order,

Moreover, the ban on consultation here was exponentially greater with respect to its *duration*. The restriction in *Geders* was limited to one seventeen-hour recess during trial. By contrast, the concededly unconstitutional gag order in this case was monumentally longer; it began during the critical weeks preceding trial, continued throughout the six-week trial and continues to this day.[13] Thus, the restriction on consultation regarding a critical declaration of the state's important witness which extended through the critical pretrial and trial stages was *more* restrictive than in *Geders*.

The extraordinary *duration* of the unconstitutional restriction on the defendant's access to counsel for advice on these critical trial-related subjects in this case is unprecedented and far exceeds the bans lasting overnight or over a weekend recess that are found in reported cases. Thus, the consultation ban was *more* restrictive than the one at issue in *Geders* or *Perry*, and concededly precluded discussion of crucial trial-related matters about which Appellant Townley had a right to the advice of counsel.

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as the state suggests. (Govt. Brief at p. 40.)

[13] The pretrial period is a critical stage of the proceedings under *Cronic*. (*See Mitchell v. Mason* (6th Cir. 2003) 325 F.3d 732, 742-743.) Moreover, "[i]t is difficult to perceive a more critical stage of a trial than the taking of evidence on the defendant's guilt." (*Carter v. Sowders* (6th Cir. 1993) 5 F.3d 975, 979; *Siverson v. O'Leary* (7th Cir. 1985) 764 F.2d 1208, 1217 & fn.6 [same].)

(*See Holloway v. Arkansas* (1975) 435 U.S. 475, 490 [reversal required without a showing of prejudice because the trial court's order "effectively sealed [counsel's] lips on crucial matters"].)

Additionally, the ban here not only extended to counsel's discussions with the defendant, but to counsel's discussions with his *investigator*. Thus, the ban not only infringed upon the Appellant's "right to unrestricted access to his lawyer for advice on a variety of trial-related matters" (*Perry*, 488 U.S. at p. 284), but also violated Appellant's right to investigation. (*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]; *see Strickland v. Washington* (1984) 466 U.S. 668, 691 [Sixth Amendment places upon counsel "a duty to make reasonable investigations"].) "[T]he opportunity for a defendant to consult with an attorney and to have him investigate the case and prepare a defense for trial" are the essential "core" of the Sixth Amendment right to assistance of counsel. (*Kansas v. Ventris* (2009) 129 S.Ct. 1841, 1844-45; *Michigan v. Harvey* (1990) 494 U.S. 344, 348.) Certainly, once counsel learned that Flores has signed a declaration stating that he was the person wearing the red and black Pendleton shirt, it was important to discuss that with the investigator and ask him or her to find additional witnesses to corroborate that Flores was wearing that shirt. Additionally, given that Flores told many

contradictory versions of the events to the police, many of which he later conceded were lies, once Flores signed a declaration affirming that this particular version of events was the "truth" (and revealing that this was the prosecutor's theory of the case) it was extremely important to discuss with the investigator *which version* Flores would testify was "true" in order to rebut it, or discuss whether based upon the declaration it was feasible to investigate and develop a *different* defense.[14]

In sum, a court infringes no less upon the defendant's core Sixth Amendment rights to consultation with counsel and to have counsel investigate and prepare the case for trial, when the court bans discussion with the defendant and the investigator of the declaration setting forth the anticipated testimony of the state's key witness which lasts throughout the six-week trial and the critical weeks before trial, than it does when it bans all consultation with the defendant during a seventeen-hour overnight recess. The unprecedented length of the court's ban here on consultation

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[14] For instance, witness Jeanne Taylor tentatively identified Carranco as wearing that red and black Pendleton shirt at the scene; moreover, she was quite clear that the person wearing that shirt "*looked like a staggering drunk in an attempt to run.*" (11RT 2599-2601 [emphasis added]). The defense, however, never developed an intoxication defense based upon this statement, which could have raised a reasonable doubt as to whether the shooter was unconscious or so intoxicated that he did not act with "premeditation and deliberation" and did not form an "intent to kill." (*See* CALCRIM 625, 626, 3426.)

between counsel and the defendant on this important trial-related subject which encompassed the critical pretrial period and the entire trial, and which also restricted communication with the investigator was *more* restrictive than the ban in *Geders* which the Court held required reversal per se. Although the facts of the instant case are not identical to *Geders*, there is no basis for distinction. (*See Panetti v. Quarterman* (2007) 551 U.S. 930, 953 [Supreme Court precedents "must be applied" by state courts to any case which reasonably fits within the general principle announced, and should not be restricted to cases with "nearly identical factual pattern[s]."] [internal quotations omitted].)

There is no basis for inventing an exception to the *Geders* and *Perry* rule requiring reversal without the need to show prejudice in cases where the court imposes restrictions on consultation on trial-related that last more than a brief recess. Certainly, the exceptionally long ban on consultation regarding a crucial subject in this trial, provides no basis for distinguishing the Supreme Court's unanimous holdings in *Geders* and *Perry*.

D. Every Court That Has Considered A More Limited Ban On Communication Restricted To Certain Trial-Related Subjects Has Found No Exception To The *Geders* And *Perry* Rule Requiring Reversal Without A Showing Of Prejudice.

Further, every case that has considered a ban that is limited to a certain topic, rather than an absolute ban on all communication between

defendant and counsel, has found the error indistinguishable from the unconstitutional ban in *Geders*. As described below, every such case has either held that the error requires reversal without an inquiry into prejudice, or reversed on other grounds without reaching the issue of prejudice. No case, however, has held that such error must be analyzed under the *Strickland* test for prejudice; the state urges this Court to become the first court to invent such an exception to the holdings of *Geders* and *Perry*.

Thus, in *Mudd v. United States* (D.C. Cir. 1986) 798 F.2d 1509, before an overnight recess, the 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 p. 1510.) While recognizing that the trial 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 p. 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 [matters related to the prohibition] for fear of violating the court's directive." (*Id.* at p. 1512.) "In short, *there is no question that even a limited order such as the one here conflicts with sixth amendment rights*." (*Id.* [emphasis

added].) The Court further held the error required reversal per se. (*Id.* at pp. 1513-14.) Then-judge Scalia concurred with these essential points: "[A] prohibition on attorney-defendant discussion during substantial recesses, even if limited to discussion of testimony, violates the sixth amendment and . . . like the similar violation at issue in *Geders*, it constitutes per se reversible error." (*Id.* at p. 1515 [Scalia, J. concurring].)

The *Mudd* Court's observations apply equally to Appellant Townley's case. How could Townley's counsel openly and freely discuss the discovery and anticipated testimony of the state's critical witness, without fear of accidentally referring to one of the twenty-two matters in the declaration? Moreover, the prosecutor repeatedly told the trial court that there was a very real possibility that Flores would testify he had the gun and shot the victim, if the prosecutor had not insisted that Flores sign the declaration. (3RT 574, 12RT 2933-34, 14RT 3256, 21RT 5023.) How could counsel adequately explain to Appellant Townley that Flores would not testify that he (Flores) had the gun and shot the victim, without inadvertently mentioning the declaration itself? Indeed, how could counsel discuss with Townley the anticipated testimony of Flores at all without mentioning that Flores had committed to testify to a particular version of the facts? Even if counsel somehow avoided mentioning the declaration, how could Appellant Townley trust counsel who insisted that he would not

tell Appellant why he knew what Flores's testimony would be given the many different versions he had stated before? Although the subject matter of the ban on consultation here was "more limited than the one in *Geders*," the duration was exponentially longer, and, as in *Mudd*, "the interference with sixth amendment rights was not significantly diminished." (*Id.* at p. 1512.)

Similarly, in *United States v. Cobb* (4th Cir. 1990) 905 F.2d 784, the trial court prohibited the defendant from discussing his testimony with his attorney during a weekend recess while he was testifying. (*Id.* at pp. 786, 791.) Considering the *longer duration* of the gag order at issue, the *Cobb* Court found "[t]he reasoning of *Geders* is even more persuasive here, where the recess in question was not merely one night, but an entire weekend." (*Id.* at p. 792.) Here, of course, the unconstitutional gag order lasted not just a weekend, but the throughout the entire six-week trial and the critical weeks before trial. Thus, "[t]he reasoning of *Geders* is even more persuasive" in Appellant Townley's case than in *Cobb*. (*Id.*)

The *Cobb* Court also rejected the distinction which the state urges here–that the more limited subject of the consultation restriction supported an exception to the *Geders* rule:

> To remove from Cobb the ability to discuss with his attorney any aspect of his ongoing testimony effectively eviscerated his ability to discuss and plan

> trial strategy. To hold otherwise would defy reason. How can competent counsel not take into consideration the testimony of his client in deciding how to try the rest of the case?

(*Id.*) The same reasoning holds true in Appellant Townley's case. How could "competent counsel not take into consideration [the declaration of the state's key witness] in deciding how to try the rest of the case?" Any holding to the contrary "def[ies] reason." (*Id.*) The holdings of *Geders* and *Perry* thus apply, and this Court must reverse the convictions without inquiry into prejudice.

Several other courts have similarly held that restrictions which limit discussion of certain subjects during an overnight recess violate the constitutional right to advice of counsel set forth in *Geders* and require reversal without a showing of prejudice. In *Martin v. United States* (D.C. App. 2010) 991 A.2d 791, the District of Columbia Court of Appeal recently held that "because the defendant 'had the right to discuss the entire case, including his own testimony, with his attorney,'" an order forbidding defendant from discussing his testimony with counsel during a weekend recess in the middle of testimony required reversal without a showing of prejudice even in the absence of an objection. (*Id.* at pp. 793-795, quoting *Jackson v. United States* (D.C. App. 1979) 420 A.2d 1202, 1205.) Similarly, in *Jackson* (which was decided prior to *Perry*), the Court

reversed without requiring a showing of prejudice where counsel was ordered not to discuss the defendant's testimony with him during a lunch recess. (*Jackson*, 420 A.2d at pp. 1203-05.) The *Jackson* Court quoted perhaps the most succinct statement on the subject:

> "It is not the function of the trial judge to decide . . . how much consultation between a defendant and his retained counsel is necessary to adequately cope with changing trial situations. That is the function of counsel."

(*Id.* at 1205, quoting *Commonwealth v. Werner* (1965) 206 Pa. Super. 498, 214 A.2d 276, 278 [reversible error for trial judge to direct defendant not to discuss testimony with attorney during overnight recess]; *see State v. Fusco* (1983) 93 N.J. 578, 461 A.2d 1169, 1174-75 [quoting same; overnight ban on discussion of defendant's testimony required reversal per se].)

Other Courts have similarly suggested that a ban on discussion of certain trial-related subjects requires reversal without a showing of prejudice, but have reserved decision on the prejudice issue while reversing on other grounds. Nonetheless, their reasoning is informative. Thus, in *United States v. Santos* (7th Cir. 2000) 201 F.3d 953, the trial court gave defense counsel an ambiguous order that told the attorney 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 p. 965.) Judge Posner

wrote for the Court and held that although the trial court had not prohibited all consultation as in *Geders*, the court's order "went further than the law permits, by forbidding any discussion of the witness's testimony." (*Id.*) Such an order "as a practical matter preclude[s] the assistance of counsel across a range of legitimate legal and tactical questions." (*Id.*)

Further, the Court noted that the ambiguities in the trial court's 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 pp. 965-966.) As the Court held, 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 p. 966.) The Court thus found a *Geders* violation. (*Id.*) The Court, however, found no need to resolve the structural error issue, because other errors required reversal. (*Id.*)

Indeed, many of hypothetical problems posed by Judge Posner in *Santos* came true here. Codefendant's counsel incurred the "wrath" of both the prosecutor and the court simply by objecting to the court's order in open court. (8RT 1923-24.) When the court noticed that the document was face

down on the counsel table, the trial court chastised codefendant's counsel, ordering him to put it in his briefcase "right now." (8RT 1924.)

Also, in *United States v. Sandoval-Mendoza* (9th Cir. 2006) 472 F.3d 645, the Court addressed a ban which prohibited counsel from discussing the defendant's testimony and cross-examination during an overnight recess. (*Id.* at p. 650.) Judge Kleinfeld, writing for the Court, rejected the Government's contention that *Perry* and *Geders* did not apply to a ban on a limited subject–the defendant's testimony. "We conclude that *any overnight ban on communication* falls on the *Geders* side of the line and violates the Sixth Amendment." (*Id.* at 651[emphasis added].) The Court noted the impossibility of discussing essential trial-related matters identified without violating the trial court's ban: "Indeed, it is hard to see how a defendant's lawyer could ask him for the name of a witness who could corroborate his testimony or advise him to change his plea after disastrous testimony, subjects *Perry* expressly says a defendant has a right to discuss with his lawyer during an overnight recess, without discussing the testimony itself." (*Id.*, citing *Perry*, 488 U.S. at pp. 283-284 [footnotes omitted].) The Court found *Geders* error, but found no need to decide whether the error was reversible per se, because another error required reversal. (*Id.* at p. 652.)

Nonetheless, the same concerns expressed in *Sandoval-Mendoza* and

Perry also apply here. Both courts recognize that except for a brief recess in a defendant's testimony, a defendant has a constitutional right to discuss a variety of trial-related matters with his lawyer, including "the availability of other witnesses, trial tactics, or even the possibility of negotiating a plea bargain" even if these "discussions will inevitably include some consideration" of a unprotected subject, such as the defendant's ongoing testimony. (*Perry*, 488 U.S. at pp. 283-284; *Sandoval-Mendoza*, 472 F.3d at p. 651.) Similarly, Appellant Townley had a constitutional right to have his counsel discuss "the possibility of negotiating a plea bargain" with him, based upon the critical development that Flores signed his declaration. The prosecutor repeatedly stated that the declaration was crucial to her ability to prove the case against Appellant Townley. (3RT 574, 12RT 2933-34, 14RT 3256, 21RT 5023.) Yet, how could counsel advise Townley to change his plea after reviewing the declaration of Flores which made clear that Flores would take little responsibility for the crimes, and would lay most of the blame on Townley? Once Flores had committed to *this version* of the events (the theory of the prosecutor's case), how could counsel discuss with Townley or the investigator the "availability of other witnesses" to testify to other versions which they might previously believed that Flores would support, without risking a violation of the court's order? How could counsel discuss a change in "trial tactics" such as reliance upon an

intoxication defense? Yet, these were all subjects which *Perry* expressly held defendant had a right to discuss with counsel. (*Perry*, 488 U.S. at pp. 283-284; *Sandoval-Mendoza*, 472 F.3d at p. 651; *see also United States v. Romano* (11th Cir. 1984) 736 F.2d 1432, 1438-39, *vacated in part on reh'g on other grounds* (1985) 755 F.2d 1401 [reversing after finding actual prejudice from the court's restriction on discussion of testimony with defendant which lasted five days violated *Geders*; where defendant's testimony was critical to the defense, order not to discuss testimony prevented counsel from discussing "options and tactics" in light of the testimony].)

Finally, one California case which preceded both *Geders* and *Perry* examined a similar constitutional violation and reversed without inquiry into prejudice. (*People v. Zammora* (1944) 66 Cal.App.2d 166, 225-227, 234-235.) In that case, numerous defendants were tried together. Counsel was prevented from consulting with the defendants during the progress of the trial because the defendants were seated in a group in the courtroom at sufficient distance from the five defense counsel as to be unable to confer except by walking the distance between their locations. (*Id.* at pp. 227, 234.) Consultation was further restricted by the trial court's order that counsel not talk to the defendants during trial recesses (apparently referring only to recesses during the day). (*Id.* at p. 227.) The *Zamorra* Court held

that the state and federal constitutional right to assistance of counsel "includes the right of conference with the attorney, and such right to confer is at no time more important than during the progress of the trial." (*Id.* at p. 234.) The Court further reasoned that the right to counsel "does not simply mean the right to have counsel present at the trial, but means that a defendant shall not be hindered or obstructed in having free consultation with his counsel, especially at the critical moment when his alleged guilt is being made the subject of inquiry by a jury sworn to pass thereon." (*Id.* at pp. 234-235.) Although the case long preceded *Geders* and *Cronic*, the *Zammora* Court nonetheless reversed without inquiry into prejudice. (*Id.* at pp. 235-236, citing *Powell v. Alabama* (1932) 287 U.S. 45, 53.)

The rule that has been developed in all of these cases is a simple one that cannot be squared with what the trial court's order here: "[e]xcept 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. Purkett* (8th Cir. 2001) 275 F.3d 685, 688, quoting *Perry*, 488 U.S. at 284.) The trial court's order here was a clear violation of holdings in *Geders* and *Perry* requiring reversal without inquiry into prejudice when the court restricts the defendant's consultation with counsel on trial-related matters for more than a brief recess. (*See also Holloway v. Arkansas* (1975) 435 U.S. 475, 490

[reversal required without a showing of prejudice because the trial court's order "effectively sealed [counsel's] lips on crucial matters].) Moreover, it was a violation of "[t]he core" of the Sixth Amendment right to assistance of counsel–namely, "the opportunity for a defendant to consult with an attorney and to have him investigate the case and prepare a defense for trial." (*Kansas v. Ventris* (2009) 129 S.Ct. 1841, 1844-45; *Michigan v. Harvey* (1990) 494 U.S. 344, 348.)

This Court must follow the lead of *every* court that has addressed this issue and hold that the concededly unconstitutional gag order here requires reversal without inquiry into prejudice. This Court should not take the state's suggestion to be the first court to carve out a novel exception to the unanimous holdings of *Geders*, *Perry* and state and lower federal courts.

E. This Court May Wish To Reserve Judgment On Potential Exceptions To The *Geders-Perry* Rule Which Do Not Apply In This Case.

Although no court since *Perry* has adopted the rule requiring a showing of prejudice that the state urges here, courts have suggested that the rule of *Geders* and *Perry* may indeed have some limits or exceptions. These potential exceptions include consultation bans on discussing an unprotected subject during a *brief* recess of fifteen minutes or comparable length, as set forth in *Perry* itself. *Perry*, 488 U.S. at pp. 281-284. There may also be exceptions for carefully tailored and limited restrictions on

consultation that are necessary to a protect a compelling interest, and for de minimus violations.

1. Assuming That A Carefully Tailored And Limited Ban Is Necessary To Protect A Compelling Interest, The State Concedes That This Exception Does Not Apply Here.

One Court has suggested that a brief and limited ban on consultation regarding an unprotected subject may be permissible under *Geders* when it is necessary and unavoidable to protect public safety or the integrity of the judicial system. Thus, in *Morgan v. Bennett* (2d Cir. 2000) 204 F.3d 360, there was evidence that the defendant's associates were plotting to harm a witness who was set to testify the next day. The trial court ordered defense counsel not to disclose to his client that the witness would testify the next day. (*Id.* at pp. 363-364.) The Second Circuit recognized that "[t]he court should not, absent an important need to protect a countervailing interest, restrict the defendant's ability to consult with his attorney, but when such a need is present and is difficult to fulfill in other ways, a carefully tailored, limited restriction on the defendant's right to counsel is permissible." (*Id.* at p. 367; *see also In re Terrorist Bombings of U.S. Embassies in East Africa* (2d Cir. 2008) 552 F.3d 93, 118-128 [limited order restricting manner of consultation regarding protected documents necessary to prevent "disastrous security breach" that would place lives in danger]; *United States*

v. Padilla (2d Cir. 2000) 203 F.3d 156, 158-160 [limited order prohibiting discussion of investigation of allegations of bribing witnesses and jurors for part of trial was justified].)[15]

Here, of course, the state concedes that the trial court's gag order was *not* justified on these grounds, as the Court of Appeal found. (Govt. Brief at p. 2, citing *Hernandez*, Slip Op. at pp. 20-22.) While this Court may wish to leave open the possibility that a "carefully tailored, limited restriction" on the defendant's right to consult with counsel might be appropriate in some future case to protect a compelling interest such as danger to life or the integrity of the judicial process, that exception cannot apply here.

2. *Assuming That A Triviality Exception To The Geders Rule Exists, It Would Not Apply To The Lengthy Ban On A Critical Trial-Related Subject Which Was Imposed By The Court At The Government's Insistence In This Case.*

The state does argue that there should be a "triviality" exception to the structural error rule set forth in *Geders* and *Perry*. (Govt. Brief at pp. 27-28, 36-37.) Thus, the state argues that not "'every deprivation in a category considered to be "structural" constitutes a violation of the

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[15] A similar exception exists to constitutional rule requiring open courtrooms. (*See Waller v. Georgia* (1984) 467 U.S. 39, 45, 48; *People v. Baldwin* (2006) 142 Cal.App.4th 1416, 1421).

Constitution or requires reversal of the conviction, no matter how brief the deprivation or how trivial the proceedings that occurred during the deprivation.'" (Govt. Brief at p. 27, quoting *Gibbons v. Savage* (2d Cir. 2009) 555 F.3d 112, 120; *see also People v. Bui* (2010) 183 Cal.App.4th 675, 686-688, *review pending* No. S182703 [exclusion of three individuals from courtroom for forty minutes during voir dire was de minimus violation of right to public trial].) The short rejoinder is, of course, that the deprivation here was neither brief (it lasted throughout the six-week trial and a substantial portion of the pretrial proceedings), nor was the subject of the ban trivial (it concerned the critical declaration of the state's key witness).

In *United States v. Triumph Capital Group, Inc.* (2d Cir. 2007) 487 F.3d 124, the Second Circuit found that there was a "triviality" exception to the *Geders* error rule. (*Id.* at pp. 134-137.) In doing so, however, the Court "emphasize[d] . . . the narrowness of our holding" (*id.* a p. 137) and made clear that the triviality exception is limited to truly "unusual circumstances." (*Id.* at p. 135.) The Court found that the three-hour ban[16] limited to precluding discussion of the defendant's testimony unconstitutional because it was too long to be justified on the basis of preventing discussion of

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[16] The government thus mischaracterizes the case as involving an overnight ban. (Govt. Brief at p. 36.)

testimony. (*Id.* at p. 133).

The Court did, however, find the restriction "trivial" based upon the totality of several unusual factors. First, because the trial court and government had begun to try to rescind the order within twenty minutes of making it, the *Triumph* Court blamed defense counsel for not attempting to mitigate any damage from the ban. (*Id.* at p. 136). Second, the topical ban precluded only a discussion of the defendant's testimony, a subject which he had no right to discuss with counsel. (*Id.*) Third, the trial court gave the defendant and counsel as much time as they needed to attempt to prepare and consult before resuming testimony. (*Id.*)

Finally, the Court noted that it was defense counsel that had first broached the subject of the ban, and that the government despite its initial objection immediately attempted to correct the error. While none of these factors alone supported a finding of triviality, when considered in total, the court found the error trivial. (*Id.* at pp. 136-137.)

By comparison, none of the factors identified by the *Triumph* Court are present here. The ban here was urged by the prosecutor, and ordered by the court despite repeated objections by defense counsel. The ban concerned an extremely important subject which Appellant Townley undeniably had a constitutional right to discuss. The ban lasted more than a few hours; indeed, it lasted throughout the entire six-week trial and the

critical weeks preceding the trial. There was no lack of diligence by defense counsel, and neither the trial court nor the prosecutor recognized the error, nor did they offer any accommodation to attempt to make up for the error. The error here is thus a core violation of the rule of *Geders* and *Perry* which protects the right of defendants to discuss "trial related matters," except during a brief recess. Reversal is thus required.

The state's argument here, moreover, is essentially an attempt to stand the "triviality" rule upon its head. The state's argument is that all violations of the *Geders* and *Perry* rule are subject to harmless error review, unless the court bans all communication with counsel. This argument, is of course, contrary to the language of *Perry* itself which recognizes that the "defendant's right to unrestricted access to his lawyer for advice on a variety of trial-related matters . . . is controlling in the context of a long recess." (*Id.* at pp. 283-284.) The state thus essentially asks this Court to overrule the Supreme Court's unanimous decisions in *Perry* and *Geders*.

While this Court may wish to leave open the possibility that a more limited ban of short duration made in good faith on a discreet point might be held to be truly trivial in some future case, a ban on discussing the declaration of the state's key witness which outlines the essential points of the witness's anticipated testimony and which lasts throughout the trial and critical pretrial period falls clearly outside this potential "narrow" exception

reserved for truly "unusual circumstances."

The consultation ban here which was of unprecedented duration and concerned an important topic, involved none of the exceptional circumstances present in *Triumph Capital*. This Court must reverse the convictions.

F. With Respect To Trial Court's Unconstitutional Gag Order, Appellant Townley Is Not Raising An Ineffective Assistance Claim, Nor A *Brady*[17] Claim, Nor A Discovery Violation Claim, Nor Any Of The Unrelated Claims That The State Discusses.

Although, as seen above, the trial court's error here fits squarely within the core principles set forth in *Geders* and *Perry* which hold that it is error to restrict communication with counsel on trial-related matters for more than a brief recess, and that such error requires reversal absent a showing of prejudice, the state attempts to fit Appellant's square claim into a round hole. The state thus claims that Townley is really challenging the effectiveness of his counsel and should be forced to show prejudice. The state argues that Townley must therefore show that his counsel's deficient performance had some prejudicial effect on his trial. (*See, e.g., United States v. Cronic* (1984) 466 U.S. 648, 658-659). But Townley is not claiming that counsel's actions were deficient, or "fell below an objective

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

standard of reasonableness." (*See Strickland v. Washington* (1984) 466 U.S. 668, 688). Why should counsel who repeatedly objected to the unconstitutional order be required to defend his actions in following the order?

Moreover, how does the state propose that Townley show prejudice? Ineffectiveness claims are usually brought in habeas proceedings with declarations and other evidence presented that is *not* contained in the record, and are only rarely permitted on direct appeal. (*People v. Lopez* (2008) 42 Cal.4th 960, 971-972). Must Townley file a habeas petition with a declaration from his counsel stating that the gag order affected "counsel's actual performance" (*Cronic*, 466 U.S. at p. 662), because it actually impaired counsel's ability to discuss with his client changes in strategy, the availability of other witnesses or plea negotiations, the concerns expressed by the *Perry* Court? (*See Perry*, 488 U.S. at pp. 283-284; *see also Holloway*, 435 U.S. at pp. 489-491.) Must Townley waive his self-incrimination privilege and state that he (like the prosecutor) thought there was a reasonable possibility that Flores would testify that he (Flores) had the gun and shot the victim?

Any such testimony from counsel or Appellant Townley would reveal strategy and other attorney-client privileged information which would unfairly prejudice Appellant on retrial. (*Bittaker v. Woodford* (9th

Cir. 2003) 331 F.3d 715, 722-723 (en banc).) While a defendant who attacks a lawyer's performance may necessarily give a limited waiver of the attorney-client privilege sufficient to permit the lawyer to defend herself (*see id.*), Appellant Townley does *not* blame defense counsel for the failure to discuss Flores's declaration: it was the prosecutor that sought the ban and it was court that ordered it, over defense counsel's repeated objections. "Having already been subjected to an improper judicial order, it would be anomalous if defendant was also forced to relinquish the right to have his discussions with his lawyer kept confidential." (*Mudd v. United States* (D.C. Cir. 1986) 798 F.2d 1509, 1513.)

Moreover, the state thus far has insisted on keeping the declarations and plea colloquies under seal. The state cannot expect the defense to show prejudice when counsel is still prohibited from showing the declaration to, or discussing it with the defendant and any investigator.

Nor is this case similar to cases in which the government eavesdrops on privileged communications or obtains privileged documents, or where the state fails to disclose exculpatory evidence or violates discovery rules, as the state claims. (Govt. Brief at pp. 34-35.) Eavesdropping, obtaining a privileged document, failure to turn over exculpatory evidence and delayed discovery are simply not restrictions on the *communication* between defendant and counsel; nor is it a restriction on advice from counsel on

trial-related matters. None of those claims explicitly infringe upon the "core" Sixth Amendment right to "consult with an attorney and to have him investigate the case and prepare a defense for trial" (*Kansas v. Ventris* (2009) 129 S.Ct. 1841, 1844-45; *Michigan v. Harvey* (1990) 494 U.S. 344, 348), as did the restriction here which prevented counsel from discussing critical evidence with the defendant and investigator. Nor do those claims involve the defendant's Sixth Amendment "right to unrestricted access to his lawyer for advice on a variety of trial-related matters" recognized as structural error, reversible per se, in *Perry*, 488 U.S. at 284.

In this case, the trial court's restrictions prohibited counsel from conferring with the defendant about any of the myriad details contained in Flores's critical declaration and about the fact that Flores would testify to this particularly incriminating version of the facts instead of an exculpatory version of the facts. These restrictions impaired the defendant's core right to consult with his attorney about this key evidence, about Flores's anticipated inculpatory testimony, and infringed upon the defendant's core right to investigate this inculpatory version of the facts, and the defendant's core right to prepare a defense for trial that rebutted or took into account Flores anticipated inculpatory testimony. (*See Ventris*, 129 S.Ct. at 1844-45; *Harvey*, 494 U.S. at 348.) It also prevented discussing plea negotiations based upon Flores's anticipated inculpatory testimony, and prevented

Appellant from giving his input on cross-examination regarding this version of events. The trial court's order thus violated Appellant's Sixth Amendment "right to unrestricted access to his lawyer for advice on a variety of trial-related matters" recognized as structural error, reversible per se, in *Perry*, 488 U.S. at 284. (*See also Holloway v. Arkansas* (1975) 435 U.S. 475, 490 [reversal required without showing of prejudice where trial court's order "effectively sealed [counsel's] lips on crucial matters"].)

Contrary to the state's assertion, the trial court's exceedingly lengthy restrictions on consultation regarding the declaration containing the proposed testimony of the state's key witness affected the structure of the trial in the same way as the short consultation ban in *Geders* and in much the same way as other traditional structural errors that affect "myriad aspects of representation" such as denial of the right to counsel of choice (*see United States v. Gonzalez-Lopez* (2006) 548 U.S. 140, 150), the denial of self-representation (*McKaskle v. Wiggins* (1984) 465 U.S. 168, 177 fn.8) or the forced representation of multiple defendants. (*Holloway*, 435 U.S. at p. 490.) As the *Perry* Court recognized, during a lengthy recess, the defendant has a right "to unrestricted access to his lawyer for advice on a variety of trial-related matters" including "the availability of other witnesses, trial tactics, or even the possibility of negotiating a plea bargain" even if "such discussions will inevitably include some consideration" of

testimony which the court otherwise might see fit to ban. (*Perry*, 488 U.S. at pp. 283-284, citing *Geders*, 425 U.S. at p. 88 [emphasis added].)

Therefore, 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 it prevented discussion of what evidence could or might come into the record 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 p. 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 & fn.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, and thus explicitly rejected the state's suggestion that a restriction on consultation with counsel is like an ineffectiveness claim.[18]

The state's contention that there is a split among the federal circuits on this issue is inaccurate and misleading. (Govt. Brief at pp. 35-36). 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 discuss or even cite *Geders*. Because the *Schaeffer* Court never considered the Supreme Court's decisions in *Geders* or *Perry*, the *Schaeffer* Court's decision is not authority interpreting the reach of either decision. "[C]ases are not authority for propositions not considered." (*Silverbrand v. County of Los Angeles* (2009) 46 Cal.4th 106, 127 [internal quotations omitted]; *see Webster v. Fall* (1925) 266 U.S. 507, 511 ["Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents."].)

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[18] The state's citation to *People v. Noriega* (2010) 48 Cal.4th 517 (*see* Govt. Brief at p. 34) is inapposite, as that case concerned 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.

Moreover, the report that was the subject of the gag order in *Schaeffer* had been found to be "irrelevant" to the defense. (*Id.* at 867 & fn.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 v. Purkett* (8th Cir. 2001) 275 F.3d 685 688-689.) *Schaeffer* thus creates no split of authority on the meaning of *Geders* and *Perry*–which are both cases it does not cite. Indeed, no court has ever cited *Schaeffer* for the proposition which the state now claims it supports.[19] 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.

This Court must thus adopt the unbroken chain of authority holding that a lengthy prohibition on a defendant's consultation with counsel regarding trial-related matters is structural error, reversible per se.

G. Assuming *Arguendo* That A Showing Of Prejudice Were Required, The Record, Including The Prosecutor's Repeated Concessions About The Importance Of The Declaration Which Was The Subject Of The Gag Order, Demonstrates That The Error Was Prejudicial.

Finally, even if it were incumbent on Appellant to demonstrate

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[19] The Eighth Circuit's only case addressing *Geders* does not even discuss or acknowledge *Schaeffer*; this is a further indication that the state's interpretation of *Schaeffer* is unsupportable. (*Moore*, 275 F.3d at 688-689.)

prejudice, the record here clearly demonstrates the constitutional error was prejudicial. At the outset, although the record was not constitutionally insufficient to demonstrate guilt, there were substantial doubts raised regarding Appellant Townley's guilt. As explained above, witnesses described the three assailants, including the shooter, as dark-skinned, hispanic males who spoke Spanish with a Mexican accent. Witnesses described Flores, Rocha and Carranco as hispanic, and Flores conceded he spoke Spanish. By contrast, Townley was consistently described as a "really white" guy who did *not* speak Spanish. The only witness who claimed that Townley left the car was Flores, whose testimony was the subject of the declaration which could not be discussed with Townley. Such accomplice testimony is historically viewed with special suspicion. (*See* CALCRIM 334; *Lilly v. Virginia* (1999) 527 U.S. 116, 132 [plurality opinion]).

Moreover, the declaration contained at least twenty-two details not contained in prior discovery, which made discussions of the discovery with the defendant even more perilous for counsel. In order to avoid accidentally disclosing a forbidden detail, counsel would necessarily avoid 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.[20]

Furthermore, the declaration included Flores's key statement swearing that on the night of the shooting, Flores "was wearing a red and black Pendleton shirt." (11RT 2700-06, 2817-21). This was, of course, the shirt worn by the *shooter*. Flores's declaration thus provided key evidence suggesting that *Flores* was wearing the shirt identified as the shooter's shirt, that *Flores*–not Townley–was the third hispanic male who got out of the car, and that *Flores*, not Townley, was the shooter. But the court's gag order wholly prevented counsel from discussing with his client a defense based on proving that *Flores* was the shooter who got out of the car, while Townley remained in the car. This defense might well have suggested that Flores (who was older than Townley), foisted upon Townley the role of hiding or destroying the gun and shirt, while Flores took off with Rocha and Carranco in Oso's car (as witnesses confirmed). This defense might also

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[20] 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 reversed without granting the Appellant's Motion for Judicial Notice of Mr. Dudley's Public Reproval in State Bar No. 06-O-10112. If this Court believes an assessment of prejudice is required, Appellant has asked this Court to take notice of these records. (*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].)

have argued that Flores later deflected attention from himself during police interrogation by casting himself as merely the unwitting driver. Nor, moreover, could counsel discuss or develop this defense with his investigator.

Further, as noted above, the restriction on frank discussion between counsel and the defendant regarding Flores's proposed testimony contained in the declaration with the defendant and investigator, likely led to failure to develop other defenses, such as an intoxication defense built upon Julie Defresne's description of the shooter as looking like a staggering drunk person. It also prevented discussions about plea bargaining.[21]

Moreover, the prosecutor's repeated concessions about the importance of the declaration to the state's ability to prove Townley's guilt demonstrates prejudice. Indeed, although a constitutional error (if not structural) would require the state to prove harmlessness beyond a

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[21] The error in interfering with Townley's ability to communicate with counsel was even more acute here, because Townley was 17-years old at the time of the crime, and suffers from a low IQ (25RT 6009-10), and thus already had a diminished understanding of the trial process:

> [D]elinquent youths, ages 15 to 17 with low IQ scores, showed significantly poorer understanding [of legal information] than average 12-year-olds.

T. Grisso "Juvenile Competency to Stand Trial: Questions in an Era of Punitive Reform" available at http://www.abanet.org/crimjust/juvjus/12-3gris.html.

reasonable doubt (*see Chapman v. California* (1967) 386 U.S. 18, 23), the prosecutor's statements essentially conceded prejudice even under the less stringent standard of *People v. Watson* (1956) 46 Cal.2d 818, 836 (error requires reversal if there is a reasonable probability of a different result); the prosecutor stated that the declaration was necessary to prevent any testimony from Flores suggesting he had the gun or was the shooter which "would probably *create reasonable doubt*" as to Townley's guilt, and would create "at minimum, a *strong possibility of a hung jury*." (3RT 574 [emphasis added]; *see* 12RT 2933-34, 14 RT 3256, 21RT 5023.)

Finally, the deliberations were lengthy, comprising more than two-and-a-half days. (*See People v. Cardenas* (1982) 37 Cal.3d 897, 907 [twelve-hour deliberation is a "graphic illustration" of the closeness of a case]; *Gibson v. Clanon* (9th Cir. 1980) 633 F.2d 851, 855 fn.8 [nine-hour deliberation over two-and-a-half days indicates case was close].)

Prejudice has thus been essentially conceded by the prosecution and is otherwise plain from the record. This Court should either hold in accordance with every other case that addresses the issue, that the *Geders* error here requires reversal without a showing of prejudice as argued above, or hold that the ample evidence of prejudice in this record makes it unnecessary to resolve the question.

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II. THE TRIAL COURT'S 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 Hernandez*, Slip Op. at pp. 26-27; *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. (3RT 551-556, 565-568).

The Sixth District wisely rejected the state's argument that the versions of the declaration and corrections were work-product.

(*Hernandez*, Slip Op. at p. 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.) As this Court has made clear "[b]ecause privileges prevent the admission of relevant and otherwise admissible evidence, they should be narrowly construed." (*People v. Sinohui* (2002) 28 Cal.4th 205, 212 [internal quotations omitted].) The state offers no authority to support its novel position that the state can maintain its work-product privilege for a document after sending it to a defendant during plea negotiations. Such a rule would undermine discovery of witness statements in both criminal and civil contexts, because it would apply not only to proposed declarations of potential witnesses, but also to *any question* posed to *any potential witness*; any question of a witness is devised out of the mind of the questioner, but its utterance to a witness waives the privilege.

The Sixth District, however, incorrectly ruled that Appellant Townley had not shown that the prior versions of the declarations were relevant and that Appellant had not proven prejudice. (*Hernandez*, Slip Op. at pp. 26-27.) Certainly, Appellant can posit hypothetical situations where the prior versions of the declarations would prove not only relevant, but critical to the defense–such as evidence that Flores insisted on including the statement that he was the one wearing the red and black Pendleton shirt. If

true, this would obviously eviscerate the state's theory that inclusion of this statement was a drafting error, and would have raised a reasonable doubt as to Townley's guilt.

Because the state refused to produce the notes, drafts and correspondence, however, neither the trial court nor Appellant have ever seen them. It is unclear, moreover, that the Attorney General has seen them. Thus, any assertion by the state or the Court of Appeal regarding the prejudice of withholding this correspondence between Flores and the prosecutor cannot be adequately assessed at this juncture. Neither this Court, the trial court, the Court of Appeal, Appellant or the Attorney General have ever been in any position to show relevance or prejudice.

The trial court's error was in holding the documents were not discoverable without reviewing them.[22] The appropriate remedy is thus 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].)

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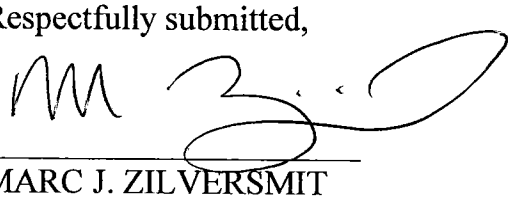
[22] The trial court had wisely urged the prosecutor to turn over the documents and not risk reversal on this issue (3RT 563-567); but the prosecutor declined, and the court eventually ruled as the prosecutor asked. (4RT 754-756).

CONCLUSION

For these reasons, this Court should reverse the convictions.

Dated: June 11, 2010

Respectfully submitted,



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CERTIFICATE OF COMPLIANCE

I, Marc J. Zilversmit, hereby certify that the attached Appellant's Answer Brief on the Merits is proportionately spaced, has a typeface of 13 points, and contains 17,498 words.

Dated: June 11, 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 BRIEF ON THE MERITS

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:

ATTN AMY HADDIX, ESQ
Deputy Attorney General
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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 June 11, 2010 at San Francisco, California.

Marc J. Zilversmit