In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **JACOB TOWNLEY HERNANDEZ,** **Defendant and Appellant.**

Case No. S178823

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

RESPONDENT'S REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

STATUTES

CONSTITUTIONAL PROVISIONS

COURT RULES

ARGUMENT

I. THE TRIAL COURT'S CONSULTATION RESTRICTION REGARDING SPECIFIC ITEMS OF EVIDENCE WAS NOT A COMPLETE DENIAL COUNSEL'S ASSISTANCE. THEREFORE, THE APPELLATE COURT ERRED BY FAILING TO ASSESS THE RECORD FOR ACTUAL PREJUDICE

In the opening brief, respondent argued that the trial court's consultative restriction was not a per se violation of Townley's Sixth Amendment right to effective assistance of counsel and that, accordingly, the Court of Appeal erred by reversing the judgment of conviction without an inquiry into prejudice. We explained that the Court of Appeal should have evaluated the consultative restriction under the two-prong test of *Strickland v. Washington* (1984) 466 U.S. 668 (*Strickland*) to determine whether the trial court's order adversely affected counsel's performance such that Townley had established actual prejudice in terms of the outcome of the trial. Under *Strickland*, "a violation of the Sixth Amendment right to *effective* representation is not 'complete' until the defendant is prejudiced." (*United States v. Gonzalez-Lopez* (2006) 548 U.S. 140, 147.) Alternatively, we argued that even if the trial court's consultative order was a per se Sixth Amendment violation, the Court of Appeal erroneously failed to abide by the principle that constitutional trial error is amenable to review under *Chapman v. California* (1967) 386 U.S. 18 (*Chapman*) for harmlessness.

Townley counters that *Geders v. United States* (1976) 425 U.S. 80 (*Geders*) and *Perry v. Leeke* (1989) 488 U.S. 272 (*Perry*) squarely govern the consultative restriction in this case because those decisions construe the Sixth Amendment's guarantee of the assistance of counsel to encompass the defendant's "'right to *unrestricted* access to his lawyer for advice on a variety of trial-related matters'" during every stage of the proceeding other than a brief trial recess. (Appellant's Answer Br. on the Merits (AABM) at p. 2, quoting *Perry, supra*, 488 U.S. at p. 284, italics in AABM.) He

contends 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." (AABM 18, capitalization and bolding omitted.) On this basis, he argues that a direct governmental interference with attorney-client consultation cannot constitutionally be assessed for prejudice under *Strickland* or *Chapman*, whether or not the consultative restriction is an absolute ban on attorney-client communications or is limited to identifiable items of evidence.

Townley makes several errors beginning with misreading our brief as having conceded a Sixth Amendment violation in his case. (AABM 1.) We did not so concede—as should be clear from the issue respondent raises in this court, which questions whether or not "the defendant must demonstrate probable prejudice to *establish a Sixth Amendment violation* and to obtain reversal of the judgment." (Respondent's Opening Br. on the Merits (ROBM) at p. 1, italics added.) Far from conceding a Sixth Amendment violation, respondent's brief challenged the Court of Appeal's holding that such a violation existed based upon the Court of Appeal's finding of an improperly imposed consultation restriction. In the opening brief, we accepted, for purposes of this litigation, the Court of Appeal's finding that the trial court's consultative restriction was insufficiently tailored and inadequately justified by a sufficient showing of potential danger to prosecution witness Noe Flores. (ROBM 2.) We nowhere conceded that the trial court's failure to formulate a more limited consultative restriction with an adequate showing of need on the record amounted to a Sixth Amendment violation. Indeed, we could hardly have been clearer in stating that we "do not challenge the Court of Appeal's finding that the record fails to support the restriction in this case," but that we do challenge its "holding . . . [of] a per se violation of Townley's right to effective assistance of counsel that required reversal without inquiring

into the impact of the ban on counsel's performance or on the outcome of the trial." (*Ibid.*) Our primary argument in the brief was that whether the error identified by the Court of Appeal amounted to a consultative restriction violating the Sixth Amendment right to counsel turns on the two-prong test of *Strickland.* Under that test, we contended, the Court of Appeal should have required Townley to show that the trial court's act of imposing an insufficiently cabined restriction unaccompanied by adequate justification caused defense counsel's performance to fall below an objective standard of reasonableness and that a different result in the trial was reasonably likely absent counsel's deficient performance. Respondent made clear its view that the Court of Appeal incorrectly found a Sixth Amendment violation without assessing counsel's *actual effectiveness* under the two-prong *Strickland* standard, thus warranting a remand to that court to apply the correct legal standard. Townley's passing off our argument as a concession on this central point is inexplicable.

A second error Townley makes is overstating his claim that the consultative restriction in this case is equivalent to, if not more significant than, the one involved in *Geders*. That argument reflects insufficient attentiveness to the Supreme Court's criteria for determining whether error is "structural."

Application of a structural error rule in the context of an alleged Sixth Amendment violation is exceedingly rare. As set forth in respondent's opening brief, the consultative restriction in *Geders* amounted to a complete denial of counsel at a critical stage of the proceeding. (ROBM 24-25; see *United States v. Cronic* (1984) 466 U.S. 648, 659, fn. 25 (*Cronic*) [citing *Geders* as a case that 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"]; *Perry, supra*, 488 U.S. at p. 280 [citing *Geders* as a case involving

"'[a]ctual or constructive denial of the assistance of counsel altogether'"].) The trial court in *Geders* had ordered counsel not to consult with his client "'about anything'" during a significant midtrial recess. (*Geders*, *supra*, 425 U.S. at p. 91.) In finding a constitutional violation, the Supreme Court emphasized that recesses in a trial "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." (*Id.* at p. 88.)

Perry reasoned that *Geders* involved an "'[a]ctual or constructive denial of the assistance of counsel altogether.'" (488 U.S. at p. 280, quoting *Strickland*, *supra*, 466 U.S. at p. 692.) Citing, among other cases, *Gideon v. Wainwright* (1963) 372 U.S. 335, *Perry* concluded that a rule of automatic reversal under such circumstances is "consistent with the view we have often expressed concerning the fundamental importance of the criminal defendant's constitutional right to be represented by counsel." (488 U.S. at p. 279, fn. omitted.)

Cronic adopted a "presumption" that a trial is unfair if, as in *Geders*, the accused is "denied counsel at a critical stage of his trial." (466 U.S. at p. 659 & fn. 25.) Such circumstances "are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified." (*Id.* at p. 658, fn. omitted.) *Cronic*'s rule of presumed prejudice has been construed narrowly, however. (ROBM at pp. 21-23.)

Holloway v. Arkansas (1978) 435 U.S. 475, relied on by Townley, found structural error where defense counsel labored under an actual conflict of interest. There, the trial court ordered defense counsel, over objection, to simultaneously represent three defendants. Counsel stated that the defendants had conflicting interests and that the conflict would impede counsel's representation. All three defendants testified, and counsel was

unable to cross-examine any of them for fear that he would reveal confidential communications. (*Id.* at pp. 477-481.) The Supreme Court held that a trial court's appointment over the defendant's objection of an attorney with an actual conflict of interest requires automatic reversal. (*Id.* at p. 488.) The court emphasized the pervasive effect of an actual conflict on counsel's performance and the essential impossibility of assessing harmlessness:

> Joint representation of conflicting interests is suspect because of what it tends to prevent the attorney from doing. For example, in this case it may well have precluded defense counsel for Campbell from exploring possible plea negotiations and the possibility of an agreement to testify for the prosecution, provided a lesser charge or a favorable sentencing recommendation would be acceptable. Generally speaking, a conflict may also prevent an attorney from challenging the admission of evidence prejudicial to one client but perhaps favorable to another, or from arguing at the sentencing hearing the relative involvement and culpability of his clients in order to minimize the culpability of one by emphasizing that of another. Examples can be readily multiplied. The mere physical presence of an attorney does not fulfill the Sixth Amendment guarantee when the advocate's conflicting obligations have effectively sealed his lips on crucial matters.

(*Id.* at pp. 489-490.) The court emphasized that assessing the prejudicial effect of such a wide-ranging impact on counsel's "options, tactics, and decisions in plea negotiations would be virtually impossible. Thus, an inquiry into a claim of harmless error here would require, unlike most cases, unguided speculation." (*Id.* at p. 491.) The court's holding did not eliminate the case-specific prejudice inquiry entirely, however. Defendant was still required to show that his counsel labored under an actual conflict of interest that adversely affected counsel's performance. (*Mickens v. Taylor* (2002) 535 U.S. 162, 168-172 & fn. 5 (*Mickens*).)

Satterwhite v. Texas (1988) 486 U.S. 249, emphasized the limited application of the automatic reversal rule in *Holloway* by declining to apply

it where the defendant was subjected to a psychiatric examination without notice to his attorney in violation of the Sixth Amendment right to counsel. The court distinguished the actual conflict in *Holloway* as a Sixth Amendment violation that "affected—and contaminated—the entire criminal proceeding." (*Id.* at p. 257.) By contrast, "the effect of the Sixth Amendment violation [in *Satterwhite*] [was] limited to the admission into evidence of Dr. Grigson's testimony. We have permitted harmless error analysis in both capital and noncapital cases where the evil caused by a Sixth Amendment violation is limited to the erroneous admission of particular evidence at trial." (*Ibid.*)

Again in *Mickens*, *supra*, 535 U.S. 162, the court cautioned against "'unblinkingly'" applying the *Holloway* automatic reversal rule to "'all kinds of alleged attorney ethical conflicts.'" (535 U.S. at p. 174.) The court explained that "[t]he purpose of our *Holloway* and *Sullivan* exceptions from the ordinary requirements of *Strickland*, . . . is . .. to apply needed prophylaxis in situations where *Strickland* itself is evidently inadequate to assure vindication of the defendant's Sixth Amendment right to counsel. [Citation]." (*Id.* at p. 176.)

More recently, the Supreme Court in *Gonzalez-Lopez*, *supra*, 548 U.S. 140, explained that a finding of structural error rests "upon the difficulty of assessing the effect of the error." (*Id.* at p. 149, fn. 4.) In finding the denial of counsel of choice to be a structural defect, the court observed that such an error has

> "consequences that are necessarily unquantifiable and indeterminate . . . ." [Citation.] Different attorneys will pursue different strategies with regard to investigation and discovery, development of the theory of defense, selection of the jury, presentation of the witnesses, and style of witness examination and jury argument. And the choice of attorney will affect whether and on what terms the defendant cooperates with the prosecution, plea bargains, or decides instead to go to trial. In

> light of these myriad aspects of representation, the erroneous denial of counsel bears directly on the "framework within which the trial proceeds," [citation]—or indeed on whether it proceeds at all. It is impossible to know what different choices the rejected counsel would have made, and then to quantify the impact of those different choices on the outcome of the proceedings. Many counseled decisions, including those involving plea bargains and cooperation with the government, do not even concern the conduct of the trial at all. Harmless-error analysis in such a context would be a speculative inquiry into what might have occurred in an alternate universe.

(*Id.* at p. 150.)

Townley makes no meaningful attempt to apply the structural error standard outlined above. Instead, he asserts that the consultative restriction in this case "fits squarely" within the holding of *Geders* and is, in fact, more restrictive than the one involved in *Geders*. (AABM 38, capitalization and bolding omitted.) The factual record refutes his claim. Although Townley disputes the point, it is highly significant to the "structural error" inquiry that the consultative restriction in this case was on discrete, identifiable items of evidence—Flores's sealed declaration and a transcript of his plea bargain with the prosecution. The limited nature of the consultative restriction proves that Townley did not suffer an "'[a]ctual or constructive denial of the assistance of counsel altogether.'" (*Perry, supra*, 488 U.S. at p. 280, quoting *Strickland*, *supra*, 466 U.S. at p. 692.) Townley was not prevented from meeting with his counsel to discuss trial strategy. Nor was he prevented from seeking counsel's advice on "a variety of trial-related matters." (*Perry, supra*, 488 U.S. at p. 284.) The consultative restriction in this case did not limit Townley's ability to confer with his attorney on Flores's identity, on the content of Flores's pretrial statements to police, or on potential defense theories (such as Flores or Carranco being the actual shooter). Counsel was able to investigate the shooting by sharing with an investigator the information from his own

client and the information contained in the police reports, including statements of the other defendants. Finally, Townley and his counsel were free to discuss Flores's actual trial testimony, including lines of impeachment or rebuttal elicited on cross-examination in open court.

The third error Townley makes is that his argument about the prejudicial effect of the consultative restriction does not further his structural error claim. Townley emphasizes the significance of the consultative restriction in this case by pointing to several factors. These include (1) Flores was an important eyewitness to the crime; (2) Flores received a lenient plea deal from the prosecutor; (3) Flores's declaration was necessary, in the prosecutor's view, to keep him from testifying at trial that he was the shooter, thus creating reasonable doubt about Townley's guilt; and (4) Flores's declaration included "at least twenty two distinct details not contained in the police report" (AABM 25), including an admission that on the night of the shooting, he wore a red and black plaid shirt (12 RT 2818-2821, 2893-2894), which was described by witnesses as the shirt worn by the shooter. Townley argues that this admission, along with the fact that Townley was described as a "really white" guy who did not speak Spanish, raised substantial doubts about his identity as the shooter. (AABM 18-25, 69-73.)

Townley's argument amply demonstrates that an assessment of prejudice, both on counsel's performance and on the outcome of the trial, is indeed possible. More importantly, Townley's discussion undercuts entirely the holding of the Court of Appeal that the consultative restriction in this case is structural. His argument shows the only permissible justification for such a finding—that prejudice cannot be evaluated—is not true in Townley's own case. (See AABM at 69-73 [discussing prejudice]; *Gonzalez-Lopez, supra*, 548 U.S. at p. 149, fn. 4 [whether a constitutional

error is deemed structural depends "upon the difficulty of assessing the effect of the error"].)

Thus, by Townley's own argument, the Court of Appeal can and should have assessed from the record defense counsel's ability to impeach Flores on cross-examination using information contained in the sealed declaration and plea transcript provided to counsel for that purpose. It can and should have also assessed the importance of Flores's testimony to the prosecution's case as a whole. Such an assessment could and would include not just the self-selected facts that Townley raises in this court. It would include a great many others. For example, it would include the fact that the jury was instructed that Flores's testimony must be corroborated and viewed with caution (9 CT 1958), that Flores did not identify the shooter, and that other evidence showed Townley to be the shooter, including his possession of the probable murder weapon and the shooter's jacket after the offense, the presence of gunshot residue on his jacket and hands, and his admission to a friend shortly after the shooting that he was "looking at 25 to life." (13 RT 3143.)

Citing *Perry*, Townley argues that the duration of the consultative restriction plays a key role in demarcating the constitutional violation. Thus, the short, 15-minute recess in *Perry*, where defendant was not allowed to consult with his counsel, carried no constitutional implication. (*Perry, supra*, 488 U.S. at pp. 280-281.) Here, by contrast, Townley argues that the consultative restriction was imposed pretrial and has never been lifted, continuing even to this day.[1] (AABM 39, 42.) We agree that a

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[1] Townley is correct that the trial court's sealing order with respect to Flores's declaration and change-of-plea transcript remains in effect, although the Court of Appeal has questioned the justification for such an order on the record of this case. (*People v. Hernandez* (Nov. 9, 2009, H031992) Typed Opn. at p. 6, fn. 3 & pp. 18-19.) The sealing order

(continued...)

consultative restriction may be constitutionally insignificant if it lasts only a short period, or may be cured if the restriction is lifted in time to allow for adequate consultation. As regards the one involved here, however, the prejudice must be assessed based on the substance of the restriction. The fact that the restriction in this case was not lifted does not make it any *more* prejudicial. It simply proves that the trial court took no curative action in this case.

The California decision Townley cites, *People v. Zammora* (1944) 66 Cal.App.2d 166, is readily distinguishable quite apart from its predating both *Strickland* and *Chapman*. There, several defendants were tried together. The seating arrangement ordered by the trial court put the defendants at a distance from their counsel, making it impossible for them to confer with counsel about any topic during trial. The trial court also ordered that the defendants not speak with their counsel during daytime trial recesses (but not evening recesses). (*Id.* at pp. 227-228.) The order in *Zammora* thus effectively prohibited any consultation on defense-related topics while court was in session. It did not involve, as in this case, a limited consultative ban on an identifiable topic or piece of evidence. The Court of Appeal in this case readily acknowledged the distinction between a complete consultative ban and a "topical" ban. (Typed Opn. at p. 11.)

(...continued)
became largely moot respecting the *content* of these documents, including (1) the existence and terms of Flores's plea bargain and (2) the details of his sworn statement, when Flores took the stand and admitted such details on direct and cross-examination. Nevertheless, the sealing order retains its essential purpose, which is closely related to the trial court's justification for the consultative restriction at issue in this case: it has kept the actual documents out of the record, so that they cannot be copied and circulated in the jail or prison populations.

Townley relies on cases from the federal circuits and other states to support his claim that the structural error rule in *Geders* and *Perry* applies to a ban on all consultation during a significant recess, or on the more limited subject of the defendant's testimony. (AABM 35-37, 45-54.) The majority of these cases were discussed in detail in our opening brief. (ROBM 35-40.)

Recently, the Fourth Circuit Court of Appeals refused to apply *Cronic*'s and *Geders*'s rule of automatic reversal to a topical consultative restriction, specifically a protective order under the Classified Information Procedures Act (18 U.S.C. App. 3 § 3) preventing defense counsel from disclosing classified information to defendant Moussaoui personally without the prior approval of the government or, absent such concurrence, the district court. (*United States v. Moussaoui* (4th Cir. 2010) 591 F.3d 263, 267, 283.) The classified information included exculpatory evidence that Moussaoui was not intended to participate in the first wave of terrorist attacks on September 11, 2001. (*Id.* at p. 284-285.) Before the district court had resolved whether Moussaoui personally should be allowed access to such information, and in what form, Moussaoui entered a plea of guilty to the charges. (*Id.* at pp. 284-285.) On appeal, Moussaoui argued that the district court constructively denied him his right to counsel under *Geders* and *Cronic* by restricting defense counsel's ability to discuss the classified exculpatory evidence with him prior to his entry of the guilty plea. (*Id.* at p. 288.) The Court of Appeals rejected this claim, and held instead that the two-part test of *Strickland* applied. (*Id.* at pp. 288-290.) The court observed that the government's interest in protecting classified information during discovery justified the limited restrictions on Moussaoui's consultation with counsel until the CIPA process was complete. (*Id.* at p. 290.) The Court of Appeals further found that "Moussaoui falls well short of demonstrating that his guilty plea was entered under circumstances

amounting to 'no assistance of counsel' at all. [Citation]. . . . [¶] . . . [T]he restrictions on counsel's ability to communicate with Moussaoui regarding pretrial discovery matters were not so onerous as to render counsel effectively absent during the guilty plea proceeding. . . ." (*Id.* at p. 289.) At the time of his plea Moussaoui knew of the existence of the exculpatory information, and knew that he might eventually be allowed access to such information. Nonetheless, Moussaoui made the informed and strategic decision to plead guilty before the classification process was completed. (*Id.* at p. 290.) Accordingly, "Moussaoui has failed to demonstrate the type of complete denial of counsel rising to the level of a constructive denial of counsel under the Sixth Amendment. On the contrary, it appears that counsel was determined to effectively represent Moussaoui, and did so . . . ." (*Ibid.*)

Although the Fourth Circuit's opinion concerns preplea proceedings rather than a trial, it demonstrates that not every consultative restriction on attorney-client communications concerning material evidence implicates *Cronic* and *Geders* error. Rather, the court must look to the substance and scope of the consultative restriction to determine whether a finding of prejudice is warranted. Where the consultative interference does not rise to the level of a "complete" denial of counsel's advice, the test of *Strickland* applies, and defendant must show that the consultative restriction caused counsel's performance to fall below an objective standard of reasonableness, and counsel's omissions were reasonably likely to have affected the outcome of the case. (*Moussaoui, supra*, 591 F.3d at p. 288.)

Recently, this court refused to find a per se violation of the Sixth Amendment right to counsel where a government agent intercepted confidential communications between defendant and an agent of his attorney. Rejecting application of *Cronic*, the court held that the government's interception of confidential communications between the

defendant and his attorney or other agent is not a "'circumstance of [the] magnitude' of a complete denial of counsel that alone is sufficient to establish a denial of his federal right to counsel . . . ." (*People v. Alexander* (July 15, 2010, S053228) 49 Cal.4th 846 [2010 WL 2773398 at *25], not final.) The court concluded that surreptitious state participation in communications between a defendant and his or her attorney or the attorney's agent does not violate the Sixth Amendment unless the record supports "'at least a realistic possibility of injury to [the defendant] or benefit to the State . . . .'" (*Ibid.*, quoting *Weatherford v. Bursey* (1977) 429 U.S. 545, 558.)

Townley argues that the structural error rule of *Geders* and *Perry* applies any time the *government* directly interferes with defense counsel's ability to make independent decisions about conducting the defense, or with attorney-client consultation on trial-related matters during a critical stage of the trial. (AABM 33-34 citing *Perry, supra*, 488 U.S. at p. 279 ["direct governmental interference with the right to counsel is a different matter"]; *Strickland, supra*, 466 U.S. at p. 686 ["Government violates the right to effective assistance when it interferes in certain ways with the ability of counsel to make independent decisions about how to conduct the defense"].) He misreads the case law. *Strickland* distinguished cases of government interference that amounted to a complete denial of counsel at a critical stage. (*Strickland, supra*, 466 U.S. at p. 686, citing *Geders v. United States, supra*, 425 U.S. 80; *Herring v. New York* (1975) 422 U.S. 853; *Brooks v. Tennessee* (1972) 406 U.S. 605; *Ferguson v. Georgia* (1961) 365 U.S. 570; see *Cronic, supra*, 466 U.S. at p. 659, fn. 25 [construing those cases as denial of counsel at a critical stage of proceedings].) *Perry*'s statements about direct government interference (*Perry, supra*, 488 U.S. at p. 279), were likewise made in the context of assessing the complete denial of access to counsel involved in *Geders*. As we have previously explained,

that level of interference did not occur here. "Apart from circumstances of that magnitude . . . there is generally no basis for finding a Sixth Amendment violation unless the accused can show how specific errors of counsel undermined the reliability of the finding of guilt." (*Cronic, supra*, at p. 659, fn. 26, citing *Strickland, supra*, 466 U.S., at pp. 693-696.)

Townley's argument about government interference collides with established precedent (see *Cronic, supra*, 466 U.S. at p. 662, fn. 31), and would expand the structural error doctrine to apply to a large category of trial errors that traditionally have been subject to assessment for prejudice. For example, the trial court limits defense counsel's ability to make independent decisions about conducting the defense whenever it excludes proffered defense evidence. Likewise, the prosecution necessarily interferes with counsel's ability to prepare the defense and to consult with his client any time it withholds material exculpatory evidence from counsel's consideration. Neither of these errors is structural in nature, however. *Cronic* cautioned against applying a presumption of prejudice simply because "the accused can attribute a deficiency in his representation to a source external to trial counsel . . . ." (*Cronic, supra*, 466 U.S. at p. 662, fn. 31.) That circumstance, the court observed, "does not make it any more or less likely that he received the type of trial envisioned by the Sixth Amendment, nor does it justify reversal of his conviction absent an actual effect on the trial process or the likelihood of such an effect." (*Ibid.*) Because discrete, evidentiary-based errors like the consultative restriction imposed in this case are amenable to a prejudice assessment, such assessment must be performed. (Cf. *Satterwhite v. Texas, supra*, 486 U.S. at p. 257 [court will perform a harmless error analysis where the Sixth Amendment violation results in the "erroneous admission of particular evidence at trial"].)

For the reasons stated above, the consultative restriction in this case differs factually and materially from the one imposed in *Geders* and later cases adopting a rule of per se reversal. Accordingly, this court can hold that a prejudice inquiry is both appropriate and necessary, without concluding that "*Geders* error may be reviewed for harmlessness." (AABM 37, fn. omitted.)

II. TOWNLEY'S SIXTH AMENDMENT CLAIM SHOULD BE ASSESSED UNDER THE TWO-PRONG TEST FOR ACTUAL INEFFECTIVENESS SET FORTH IN *STRICKLAND*; BUT EVEN IF *STRICKLAND* DOES NOT APPLY, THE ALLEGED SIXTH AMENDMENT VIOLATION IS AMENABLE TO HARMLESS ERROR REVIEW UNDER *CHAPMAN*

To say that the error in this case is not governed by the *Geders/Perry* rule of automatic reversal does not end the inquiry. This Court must further determine what test to apply to assess prejudice, and which party carries the burden of proof on that issue.

We have argued that the relevant standard is the two-prong test of *Strickland.* (ROBM 13-14, 16-17, 32-41.) To make out a Sixth Amendment violation under *Strickland*, defendant must show that the consultative restriction imposed in this case actually caused counsel's performance to fall below an objective standard of reasonableness, and that absent the restriction, there is a reasonable probability that the result of the proceeding would have been different. (*Strickland, supra*, 466 U.S. at p. 687.) This result follows from *Cronic*, which held that discrete errors in defense counsel's performance, whether caused by counsel's own omission or by an external source, must be assessed under the *Strickland* framework. (466 U.S. at p. 662 & fn. 31, p. 666 & fn. 41.) Here, the thrust of Townley's Sixth Amendment claim is one of actual ineffectiveness—that the trial court's consultative restriction prevented counsel from consulting with his client on defense-related topics, from investigating every angle of

the case, and from conducting complete cross-examination of Flores. These are discrete performance errors "subject to *Strickland*'s performance and prejudice components." (*Bell v. Cone* (2002) 535 U.S. 685, 698.)

Townley's own arguments in favor of imposing a rule of structural error in fact prove the opposite—that the heart of his challenge goes to counsel's actual effectiveness under the constraint of the trial court's ruling. Moreover, in several instances, Townley resorts to making more of the consultative restriction than appears in the record, perhaps sensitive that he is exposing the lack of a rationale for the Court of Appeal's structural error holding.

For example, Townley argues that he was prevented from discussing with his counsel the viability of a defense that Flores, and not Townley, was the shooter. He reasons that "[t]he 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." (AABM 70.) The court's consultative restriction cannot be fairly read as precluding Townley and his counsel's discussion of a theory that Townley was not the shooter, or a discussion about how to prove that defense. Townley knew that Flores had claimed to have stayed in the car. That fact was disclosed in the police reports and in Flores's taped statement provided to Townley and his counsel in discovery. Finally, Townley and his counsel could discuss Flores's trial testimony prior to making a final determination about what defense evidence to present.[2]

Townley contends that the trial court's restriction was ambiguous about whether counsel could discuss information that was contained in the

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[2] Flores testified on May 11, 22, 23, and 24, 2007. (8 CT 1872, 1877, 1879, 1883.) The prosecutor rested her case 12 days later, on June 5, 2007 (9 CT 1910), and the Townley's defense case began on June 7, 2007 (9 CT 1917).

police reports, witnesses' statements, and Flores's own testimony if that information *also* appeared in the sealed declaration. Accordingly, he argues, the consultative restriction effectively limited counsel's communication with his client regarding other pretrial discovery, and even Flores's in-court testimony, to the extent their content overlapped with the declaration's content. (AABM 23-25, 41.)

The record is not reasonably susceptible to such a construction. The trial court made clear its view that the consultative restriction would not hamper defense counsel's representation *precisely because* defense counsel had numerous other items of discovery that he was free to discuss with his client. The court observed that counsel had "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." (3 RT 580-581, italics added.) The court's reference to the "odds and ends" in the sealed declaration, in context, refers to additional details of the witnesses' signed statements *not contained* in discovery. That was sufficiently obvious to counsel for the parties that none sought clarification. Regarding Flores's testimony, the trial court emphasized that "*your clients are going to be sitting in this courtroom when they testify to those things*. If they testify inconsistently with those statements, then I believe at the time of their pleas they were told that the sealing order would be undone. And . . . counsel would be free to cross-examine using those documents." (3 RT 581-582, italics added.) It defies logic to interpret the court's comments to suggest that any aspect of Flores's direct or cross-examination testimony elicited in open court in the defendant's presence could not be discussed. Finally, during Flores's actual testimony, the trial court denied a motion by Carranco's counsel to lift the sealing order respecting Flores's declaration, but emphasized that counsel was free to discuss with his client other

documents provided in discovery: "you've had Mr. Flores's police statement for like a year-and-a-half, your office. You know everything in there. It's 400 pages, and this document is 3 pages long." (8 RT 1923-1924.) This record demonstrates that the consultative restriction applied only to the declaration and plea transcript, and not to any other materials provided in discovery, or to Flores's testimony in open court. Townley's "overlap" theory finds no support in the record.[3]

In the sealed portion of his brief, Townley identifies 22 details included in Flores's sealed declaration that were not in the police report summarizing Flores's statement. He concludes that counsel was not able to discuss these additional details with his client. Townley overlooks, however, that he and defense counsel also had the tape-recorded interview of Flores's police statement. (See ROBM 4, 29 [record citations].) The prosecutor had drafted Flores's declaration from the police statements of Flores and other witnesses. (See 3 RT 552, 565-566.) And the trial court implicitly found that this discovery was comparable in content to the sealed declaration. (3 RT 580-581; 8 RT 1924.) Thus, the relevant comparison is between the content of the sealed declaration and all the discovery materials, not just the police reports. While not all of that discovery appears in the appellate record as currently constituted, it could be reviewed in a habeas proceeding addressing counsel's ineffectiveness.

In any event, while Townley identifies 22 additional details in the sealed declaration, he attributes significance to only one of them—that

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[3] Townley further asserts that the consultative restriction prevented him from developing a defense of intoxication based on Jeanne Taylor's testimony that the person wearing the red and black Pendleton shirt looked like a staggering drunk. (AABM 44, fn. 14; 11 RT 2599-2601.) He does not explain how the consultative restriction, which applied only to Flores, would have hampered investigation of such a defense.

Flores in his declaration stated he was wearing a red and black Pendleton shirt on the night of the shooting, which was the short worn by the shooter. (AABM 71.) This detail was explored extensively on cross-examination in Townley's presence and for the jury's consideration. (12 RT 2818-2821, 2893-2894.) And it amounted to a red herring—as what was involved was a simple error in draftsmanship. Flores testified that Townley wore the red and black plaid shirt, and that he (Flores) wore a black shirt on the night of the shooting. The contrary statement in the declaration was simply wrong. (11 RT 2700-2706; 12 RT 2818-2821, 2893-2894.) This explanation was corroborated by independent evidence. (See ROBM 7, fn. 7 [record citations].) It is thus readily apparent that the significance of these and other disparities alleged by Townley can be assessed in light of the trial record as a whole.[4]

Townley also argues that the consultative restriction must have hampered his ability to discuss with counsel the possibility of entering a plea bargain in light of Flores's sworn statement and plea. (AABM 40.) We will not belabor our point that, whatever the force of this kind of argument in a particular case, it demonstrates that a consultative restriction

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[4] The comparison Townley raises between the content of Flores's declaration and other discovery provided to counsel was never resolved by the Court of Appeal. Townley raised his 22 points of comparison for the first time in his rehearing petition. (*People v. Hernandez* (H031992, filed Aug. 3, 2009).) The Court of Appeal granted rehearing without requesting an answer from respondent (see Cal. Rules of Court, rule 8.268(b)(2) ["A party must not file an answer to a petition for rehearing unless the court requests an answer. . . . A petition for rehearing normally will not be granted unless the court has requested an answer"]), and it reversed its initial unpublished opinion without additional briefing or argument. Its November 9, 2009 opinion does not meaningfully address the 22 details identified by Townley. (Typed Opn. at pp. 19-20.) Under these circumstances, a remand to the Court of Appeal for an assessment of prejudice in the first instance is warranted. (ROBM 45-46.)

can be assessed for prejudice and is not structural. Moreover, the argument fails on an assessment of this record. The record suggests that the prosecutor's last plea bargain offer to Townley and Carranco was made and rejected sometime prior to April 26, 2007, before the trial court's May 3, 2007 consultative restriction. (See 1 RT 45; 3 RT 580.) In any event, "the Constitution does not require the prosecutor to share all useful information with the defendant," prior to his entering (or rejecting) a plea of guilty. (*United States v. Ruiz* (2002) 536 U.S. 622, 629.) The trial court's consultative restriction did not prohibit defense counsel from conveying an offer of settlement to his client or from discussing the pros and cons of accepting such a settlement offer, even absent "complete knowledge of the relevant circumstances." (*Id.* at p. 630.)[5]

Townley argues that the two-prong test of *Strickland* does not apply where counsel's deficiencies are caused by governmental interference rather than counsel's own strategic decisions. (AABM 33-34 citing *Perry, supra*, 488 U.S. at p. 279 ["direct governmental interference with the right to counsel is a different matter"]; *Strickland, supra*, 466 U.S. at p. 686 ["Government violates the right to effective assistance when it interferes in certain ways with the ability of counsel to make independent decisions about how to conduct the defense"].) His argument begs the question whether the consultative restriction in this case had any appreciable effect

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[5] Townley misstates the record in asserting that Flores's declaration "confirmed that Flores would testify and would not exonerate Townley as the prosecutor feared he might do without the declaration." (AABM 40.) Flores's plea agreement with the prosecution required a sworn statement describing the offense, but did not require that he testify as a witness for the prosecution. (3 RT 573; 11 RT 2697-2698; 12 RT 2874-2876, 2884-2885, 2887, 2905.) Moreover, the Court of Appeal rejected Townley's argument that the terms of the plea bargain compelled Flores to testify in a manner consistent with his sworn declaration. If called as a witness, Flores was required only to testify truthfully. (Typed Opn. at pp. 24-25.)

on defense counsel's performance in these areas given the limited scope of the order and the other information available to counsel to discuss with his client. That effect must be established, not presumed, as the Court of Appeal did. (See Typed Opn. at p. 22 ["Without more evidence of good cause for a court order barring defense counsel from discussing the contents of Flores's written declaration with Townley, we conclude that this order unjustifiably infringed on Townley's constitutional right to the effective assistance of counsel"].) Indeed, as detailed above, a review of the record demonstrates that the consultative restriction in this case, although bearing on legitimate defense-related topics, was ultimately nonprejudicial (and in all likelihood trivial) given (1) the limited scope of the restriction, (2) other discovery provided to counsel to discuss with his client, which revealed much of the same information; and (3) the content of Flores's testimony revealed in defendant's presence in open court. (Cf. *United States v. Triumph Capital Group, Inc.* (2d Cir. 2007) 487 F.3d 124, 134-137.)

In any event, we have already explained why Townley's argument misreads *Strickland* to exclude from its scope any situation where a government actor places restrictions on counsel's actual performance. (Arg. I, *ante*, at p. 13.) *Cronic*, decided the same day as *Strickland*, emphasized that "[t]he fact that the accused can attribute a deficiency in his representation to a source external to trial counsel does not make it any more or less likely that he received the type of trial envisioned by the Sixth Amendment, nor does it justify reversal of his conviction absent an actual effect on the trial process or the likelihood of such an effect." (*Cronic, supra*, 466 U.S. at p. 662, fn. 31.) We have cited cases involving court-imposed consultative restrictions on identified items of evidence that use the *Strickland* model to assess the defendant's claimed Sixth Amendment violation. (See *Moussaoui, supra*, 591 F.3d at pp. 288-290; *Schaeffer v. Black* (8th Cir. 1985) 774 F.2d 865, 866-868.) Accordingly, it is

defendant's burden to make out a Sixth Amendment violation by showing that counsel failed to provide constitutionally adequate representation due to the trial court's order, and that counsel's omissions prejudiced the outcome of the trial. (*Gonzalez-Lopez*, *supra*, 548 U.S. at p. 147; *Strickland*, *supra*, 466 U.S. at p. 694.)

Townley argues that he should not be required to file a habeas corpus petition, and to reveal attorney-client privileged information, when the error was not of defense counsel's making. He asks rhetorically, "Why should counsel who repeatedly objected to the unconstitutional order be required to defend his actions in following the order?" (AABM 63.) As in any *Strickland* case, however, the point of the inquiry is not to try counsel, but to assess the merits of the Sixth Amendment claim that the defendant has asserted as grounds to overturn his conviction. To do so, both parties are entitled to investigate whether counsel's performance was deficient in light of the trial court's ruling, and whether those alleged deficiencies prejudiced the case. (See *In re Scott* (2003) 29 Cal.4th 783, 814; *In re Gray* (1981) 123 Cal.App.3d 614, 617.) This court repeatedly has recognized that habeas corpus proceedings are the preferred method for vetting such issues. (*People v. Wilson* (1992) 3 Cal.4th 926, 936; *People v. Pope* (1979) 23 Cal.3d 412, 426) And, contrary to Townley's claim (AABM 63-64), such proceedings do not unfairly disadvantage Townley on possible retrial, as the privilege is waived only for the purposes of litigating the petition. (*People v. Ledesma* (2006) 39 Cal.4th 641, 691-695.)[6]

Finally, even if *Strickland* does not apply to the type of Sixth Amendment violation alleged here, the fact that the error is not "structural"

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[6] Ultimately, however, even if defendant is not required to waive the attorney-client privilege to advance a Sixth Amendment violation based on a trial court's order, that fact does not disprove the applicability of *Strickland*. It simply limits the parties to the record on direct appeal.

means that it must be amenable to harmless error analysis under *Chapman v. California, supra,* 386 U.S. 18. (ROBM 42-45.) The Court of Appeal refused to undertake any harmless error analysis below. That warrants a remand to direct such analysis. (ROBM 45-46.)

Townley argues that prejudice was essentially conceded by the trial prosecutor when she argued that Flores's declaration was critical to her case. (3 RT 555, 574; 12 RT 2933-2934; 14 RT 3256; 21 RT 5023.) The People have never conceded prejudice either at the trial level or on appeal. (See *People v. Hernandez* (H031992), RB at 26-29 [arguing that consultative restriction was harmless].) The prosecutor merely voiced a concern that without a declaration executed under penalty of perjury, Flores would be free to perjure himself and claim to be the shooter after having secured a favorable plea bargain for the lesser offense of assault. These comments were not addressed to the propriety of the trial court's consultative restriction, or to any potential prejudice stemming from that restriction. Of course the possibility that the declaration might have deterred Flores from presenting perjured testimony on behalf of Townley is not a showing of prejudice. "An assessment of the likelihood of a result more favorable to the defendant must exclude the possibility of arbitrariness, whimsy, caprice, 'nullification,' and the like. A defendant has no entitlement to the luck of a lawless decisionmaker [or we add, a perjurious witness], even if a lawless decision cannot be reviewed." (*Strickland, supra*, 466 U.S. at p. 695; accord, *Nix v. Whiteside* (1986) 475 U.S. 157, 175.)

We have asked this court to remand the case to the Court of Appeal for an assessment of prejudice. Ultimately, however, a review of the trial evidence demonstrates that the consultative restriction in this case did not prejudice the outcome of the trial. Compelling evidence demonstrated Townley (and not Flores) to be the shooter. Eyewitnesses described the

shooter as having worn a red and black checkered shirt. Townley's girlfriend confirmed that, on the night of the shooting, Townley wore a black and red Pendleton shirt that she had given him as a gift. (14 RT 3370.) Townley was in possession of the same shirt during an interview with police later that night. (15 RT 3531; 20 RT 4830.) After the shooting, Fritts-Nash saw Townley wiping fingerprints off of the gun and trying to hide it. He commented to Fritts-Nash that he was looking at 25-years to life in prison. Significant amounts of gunshot residue were found on Townley's hands and on his shirt.

Flores's testimony that Townley brought the gun with him when Flores picked Townley up on the night of the shooting was corroborated by Townley's possession of the gun after the shooting and his statements to Fritts-Nash. Flores's testimony that he was the getaway driver, and remained in the car while the other three occupants chased and shot Javier Lazaro, was corroborated by his ownership of the car. To the extent Flores's credibility and bias were at issue, the trial court's consultative restriction did not hamper defense counsel's cross-examination of Flores on his role in the crimes, and his favorable plea bargain. And nothing in the trial court's consultative restriction prevented Townley from presenting a defense that he, and not Flores, remained in the car during the shooting, including Townley's own testimony to that effect.

On this record, there is no reasonable possibility that, absent the trial court's consultative restriction, Townley would have presented a more favorable case challenging his identity as the shooter. Accordingly, the Court of Appeal erred in reversing a conviction where the record reveals that the alleged Sixth Amendment violation was demonstrably harmless. (*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 681.)

CONCLUSION

For the foregoing reasons, respondent respectfully requests that the Court of Appeal's judgment be reversed and the case be remanded to that court for further proceedings.

Dated: August 4, 2010

Respectfully submitted,

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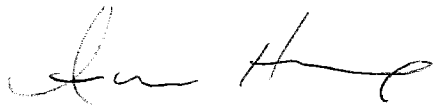

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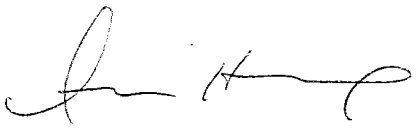
CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S BRIEF uses a 13 point Times New Roman font and contains 7,144 words.

Dated: August 4, 2010

EDMUND G. BROWN JR.
Attorney General of California



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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: ***People of the State of California v. Jacob Townley Hernandez***
Case No.: **S178823**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On August 4, 2010, I served the attached **RESPONDENT'S REPLY BRIEF** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on August 4, 2010, at San Francisco, California.

Esther A. McDonald
Declarant

Esther McDonald
Signature

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