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II. Constitutional Law & Civil Rights

II. CONSTITUTIONAL LAW & CIVIL RIGHTS

Perry v. Leeke: *The Constitutional Implications of a Court Order Barring Consultation Between Defendant and Counsel During a Fifteen Minute Trial Recess*

The sixth amendment to the United States Constitution entitles a criminal defendant to the assistance of defense counsel.[1] The Supreme Court of the United States has held that the sixth amendment right to counsel is vital to the reliability of the fact finding process in criminal trials.[2] Accordingly, the Supreme Court has determined that the sixth amendment guarantees an accused the assistance of counsel throughout a criminal prosecution.[3] The Supreme Court has determined that a trial court order barring consultation between counsel and the accused during an overnight recess violates the defendant's sixth amendment right to counsel.[4]

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1. U.S. CONST. amend. VI. The sixth amendment to the United States Constitution provides that "[I]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." *Id.*

2. *See* Herring v. New York, 442 U.S. 853, 862 (1975) (citing as premise of adversary system that partisan advocacy promotes reliable findings of fact). In *Herring* the United States Supreme Court considered whether a New York statute making the opportunity for closing argument subject to judicial discretion contravened the requirements of the sixth amendment. *Id.* at 856-863. In holding that the trial court's power to deny counsel the right to be heard in summation denies an accused his right to assistance of counsel, the Supreme Court emphasized the importance of counsel's role in the adversary fact finding process. *Id.* at 858, 862. The *Herring* Court observed that closing argument aids in the promotion of reliable verdicts by clarifying the issues for the trier of fact. *Id.* at 862. Moreover, the Supreme Court noted summation represents defense counsel's final opportunity to persuade the trier of fact that reasonable doubt exists concerning the defendant's guilt. *Id.*; *see* Powell v. Alabama, 287 U.S. 45, 69 (1932) (finding access to assistance of counsel necessary to integrity of trial); *see also* United States v. Morrison, 449 U.S. 361, 364 (1981) (noting that purpose of sixth amendment right to counsel is to assure fairness in adversary system of criminal justice); Anders v. California, 386 U.S. 738, 743 (1967) (finding that sixth amendment adversarial process requires that criminal defendant have counsel as advocate).

3. *See Powell*, 287 U.S. at 69. In *Powell* three juries in Alabama state courts convicted the defendants of rape. *Id.* at 50. The Supreme Court of Alabama affirmed the convictions and the defendants appealed to the United States Supreme Court. *Id.* On appeal the defendants argued that the state court deprived them of assistance of counsel by failing to appoint counsel prior to trial. *Id.* In reversing the convictions, the Supreme Court in *Powell* held that the due process clause of the fourteenth amendment requires that state trial courts appoint counsel to assist defendants in preparation for state capital cases. *Id.* at 71. Because a layman generally will lack the skill and knowledge of law necessary to adequately prepare a defense and to establish his innocence at trial, the *Powell* court concluded that a criminal defendant requires the assistance of counsel at every step in the criminal proceedings. *Id.* at 69.

4. *See* Geders v. United States, 425 U.S. 80, 91 (1976) (holding that court order barring consultation between defendant and counsel during overnight recess violated defendant's sixth amendment right to counsel); *infra* notes 69-75, 80 and accompanying text (discussing Supreme Court's decision in *Geders*).

Moreover, the Court has concluded that an overnight bar order warrants automatic reversal.[5] In *Perry v. Leeke*[6] the United States Court of Appeals for the Fourth Circuit considered whether a court order barring consultation between counsel and the accused during a fifteen minute trial recess violated the sixth amendment.[7] Further, the court questioned to what degree, if any, the bar order prejudiced the defendant.[8]

In *Perry* a South Carolina grand jury indicted the defendant for murder, kidnapping, and criminal sexual assault.[9] The defense called numerous witnesses at trial, including the defendant, Perry.[10] After Perry completed his direct testimony, the trial judge ordered a fifteen minute recess.[11] During the recess defense counsel sought to speak with Perry, but the trial judge refused to allow the consultation.[12] The jury subsequently found Perry guilty of all three of the charged offenses.[13]

On appeal to the Supreme Court of South Carolina, Perry argued that, by denying him the opportunity to confer with counsel during the fifteen minute recess, the trial court deprived him of his sixth amendment right to assistance of counsel.[14] The state supreme court rejected Perry's argument, holding that the bar order did not unconstitutionally deprive Perry of counsel's assistance.[15] More than four years after his conviction

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5. *See Geders*, 425 U.S. at 88-92 (Supreme Court's automatic reversal in *Geders)*. In *Geders* the Supreme Court did not expressly establish a rule of automatic reversal. *Id.* The Court, however, did reverse the defendant's conviction without inquiring into whether the bar order resulted in prejudice. *Id.*; *infra* note 71 (discussing *Geder* Court's automatic reversal).

6. 832 F.2d 837 (4th Cir. 1987), *aff'd*, 109 S. Ct. 594 (1989).

7. Perry v. Leeke, 832 F.2d 837, 839-845 (4th Cir. 1987), *aff'd*, 109 S. Ct. 594 (1989); *see infra* notes 20-26 and accompanying text (discussing Fourth Circuit's analysis of sixth amendment issue in *Perry*).

8. *Perry*, 832 F.2d at 843-845; *see infra* notes 49-53 and accompanying text (discussing *Perry* court's inquiry into prejudicial effect of trial court's bar order).

9. State v. Perry, 278 S.C. 490, 491, 299 S.E.2d 324, 324 (S.C. 1983). The victim in *Perry* had been sexually assaulted and shot to death. *Id.* at 491.

10. *Perry*, 832 F.2d at 839.

11. *Id.*

12. *Id.* Defense counsel sought to consult with Perry to remind Perry of his rights on cross-examination. *Id.* The trial judge prohibited the consultation and explained to counsel that Perry was not entitled to help or assistance concerning Perry's testimony on cross-examination. *Id.*

13. *Id.*

14. State v. Perry, 278 S.C. 490, 491, 299 S.E.2d 324, 325 (S.C. 1983).

15. *Id.* at 493; 299 S.E.2d at 326. The Supreme Court of South Carolina observed that the United States Supreme Court has held that an order precluding consultation when defendant and counsel normally would confer violates the sixth amendment. *Id.* at 491, 299 S.E.2d at 325; *see* Geders v. United States, 425 U.S. 80, 91 (1976) (holding bar order preventing consultation when accused and counsel normally would confer unconstitutional). The state supreme court in *Perry* attached great significance to the word "normally" and, therefore, determined that, because counsel normally may not confer with the accused between the accused's direct and cross-examination, the trial court did not deprive Perry of

Perry sought a writ of habeas corpus in federal district court.[16] The district court granted relief, holding that any order barring consultation between a defendant and counsel during a trial recess constitutes reversible error.[17] The prosecution appealed the district court's order to the United States Court of Appeals for the Fourth Circuit.[18]

On appeal the Fourth Circuit in *Perry* relied on an earlier Fourth Circuit decision in *United States v. Allen*[19] to conclude that the trial court unconstitutionally prevented the defendant from consulting with counsel during the fifteen minute recess.[20] In *Allen* a jury in the United States District Court for the District of South Carolina convicted the defendant of transporting stolen merchandise.[21] The defendant appealed his conviction to the Fourth Circuit.[22] On appeal the defendant alleged that the trial judge violated the defendant's sixth amendment right to assistance of counsel by forbidding consultation with counsel during two brief trial recesses.[23] The Fourth Circuit in *Allen* held that the trial court's bar order impinged upon the defendant's sixth amendment right to assistance of counsel.[24] The *Allen* court explained that, because the right to counsel is fundamental to a fair trial, absent compelling circumstances, any interfer-

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his sixth amendment right to counsel. *Perry*, 278 S.C. at 492-493; 299 S.E.2d at 325-326.

The dissent in *State v. Perry* observed, however, that the bar order the Supreme Court declared unconstitutional in *Geders* also occurred prior to the prosecution's cross-examination of the defendant. *Id.* at 327; *see Geders*, 425 U.S. at 88-91 (finding overnight bar order occurring between defendant's direct and cross-examination unconstitutional). The dissent maintained that restricting the defendant's right to consult with counsel during any trial recess violates the sixth amendment and warrants automatic reversal. *Perry* at 497, 299 S.E.2d at 328.

16. Perry v. Leeke, 832 F.2d 837, 839 (4th Cir. 1987), *aff'd*, 109 S. Ct. 594 (1989).

17. *Id.* The district court granted relief on the basis of the Fourth Circuit's earlier decisions in United States v. Allen, 542 F.2d 630 (4th Cir. 1976), *cert. denied*, 430 U.S. 908 (1977) and Stubbs v. Bordenkircher, 689 F.2d 1205 (4th Cir. 1982), *cert. denied*, 461 U.S. 907 (1983), both of which held that any order forbidding consultation between defendant and counsel during a trial recess constitutes reversible error. *Perry*, 832 F.2d at 839; *see infra* notes 20-25, 28-29 and accompanying text (discussing Fourth Circuit's decisions in *Allen* and *Stubbs*).

18. *Perry*, 832 F.2d at 839.

19. 542 F.2d 630 (4th Cir. 1976), *cert. denied*, 430 U.S. 908 (1977).

20. *Perry*, 832 F.2d at 839. In *United States v. Allen* the Fourth Circuit considered whether a trial judge may prevent a defendant from consulting with counsel during a brief, routine trial recess. United States v. Allen, 542 F.2d 630, 632-634 (4th Cir. 1976), *cert. denied*, 430 U.S. 908 (1977). The Fourth Circuit in *Allen* concluded that the sixth amendment right to counsel is so essential to a fair trial that courts may never interfere with the accused's access to counsel's assistance during a trial recess. *Id.* at 633. The *Allen* court, however, applied the new rule prospectively because the defendant neither objected to the bar order nor alleged that the order resulted in prejudice. *Id.* at 634; *see infra* notes 21-25, 28-29 and accompanying text (discussing *Allen*).

21. *Allen*, 542 F.2d at 632.

22. *Id.*

23. *Id.*

24. *Id.* at 632-634; *see supra* note 20 (discussing *Allen* court's conclusion that bar order violated constitution).

ence with the defendant's access to counsel's assistance is constitutional error.[25] Consistent with the Fourth Circuit's decision in *Allen*, the *Perry* court held that the South Carolina court's order barring consultation during the fifteen minute trial recess violated the defendant's sixth amendment right to assistance of counsel.[26]

Having found the state court bar order constitutionally impermissible, the Fourth Circuit in *Perry* considered whether the error warranted automatic reversal of Perry's conviction.[27] In *Allen* the Fourth Circuit declined to establish a rule that requires the reviewing court to inquire into prejudice on a case by case basis.[28] Instead, the *Allen* court concluded that any order preventing communication between a defendant and his attorney is presumptively prejudicial and necessitates automatic reversal.[29]

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25. *Allen*, 542 F.2d at 633. In *Allen* the Fourth Circuit noted the prosecution's apprehension that defense counsel improperly might coach the defendant if the trial court permitted consultation during a recess interrupting the defendant's testimony. *Id.* The *Allen* court concluded, however, that unethical conduct usually is unlikely. *Id.* The Fourth Circuit observed, further, that the prosecution can reveal the existence of improper coaching by questioning the accused on whether defense counsel influenced the defendant's testimony. *Id.* The *Allen* court concluded, therefore, that the sixth amendment right to counsel must prevail over the danger of unethical conduct. *Id.*

26. Perry v. Leake, 832 F.2d 839, 839 (4th Cir. 1987), *aff'd*, 109 S. Ct. 594 (1989).

27. *Id.* at 839-845.

28. *Allen*, 542 F.2d at 633. In *Allen* the Fourth Circuit concluded that a rule requiring inquiry into prejudice on a case by case basis would exhaust the resources of reviewing courts. *Id.*

29. *Allen*, 542 F.2d at 633-634. The Fourth Circuit in *Allen* noted that the concurring opinion in *Geders* indicated support for a rule of automatic reversal in all cases when a trial court unconstitutionally deprives the accused of counsel's assistance at a trial recess. *Id.* at 634; *see* Geders v. United States, 425 U.S. 80, 93 (1976) (Marshall, J., concurring) (finding majority's ruling that bar order unconstitutional fully applicable to any order barring consultation at trial recess). In *Geders*, Justice Marshall, joined by Justice Brennan, interpreted the majority opinion to hold that any order forbidding the accused to consult with counsel violates the constitution and that the defendant need not demonstrate prejudice. *Id.* at 93.

In *Stubbs v. Bordenkircher* the Fourth Circuit upheld *Allen* and found that any bar order constitutes reversible error. Stubbs v. Bordenkircher, 689 F.2d 1205, 1206 (4th Cir. 1982), *cert. denied*, 461 U.S. 907 (1983) (upholding *Allen* and finding any bar order reversible error). In *Stubbs* the Fourth Circuit considered whether a trial court's bar order, preventing the defendant from conferring with counsel during a one hour luncheon recess, deprived the defendant of his sixth amendment right to assistance of counsel. *Id.* at 1205-1207. In *Stubbs* a state trial court convicted the defendant of second degree murder. *Id.* at 1205. The defendant sought habeas corpus relief in the West Virginia Supreme Court of Appeals, alleging that the trial court unconstitutionally deprived him of counsel's assistance by forbidding consultation during an hour-long luncheon recess. *Id.* at 1206. The court of appeals denied the defendant's petition without comment. *Id.* at 1206. The defendant then filed his habeas petition in the United States District Court for the Northern District of West Virginia. *Id.* The district court granted relief, holding that any order restricting a defendant's access to counsel constitutes reversible error. *Id.* On appeal to the United States Court of Appeals for the Fourth Circuit, the Fourth Circuit reversed the decision of the district court and affirmed the defendant's conviction. *Id.* at 1207. The Fourth Circuit in *Stubbs* agreed with the district court's determination that any restriction of a defendant's

The Fourth Circuit in *Perry* elected to replace the *Allen* rule mandating automatic reversal with a rule requiring inquiry into prejudice on a case-by-case basis.[30] The *Perry* court reasoned that the United States Supreme Court's decisions in *Strickland v. Washington*[31] and *United States v. Cronic*[32] required the Fourth Circuit to consider the prejudicial effect of the state court's bar order.[33]

In *Strickland* the defendant pleaded guilty in a Florida trial court to three capital murder charges.[34] At the sentencing hearing defense counsel elected not to present evidence of the defendant's character as a mitigating circumstance.[35] The trial court found numerous aggravating circumstances and, therefore, sentenced the defendant to death.[36] The defendant sought appellate relief from his death sentence claiming, *inter alia*, that defense counsel's ineffective assistance at the sentencing hearing violated the defendant's sixth amendment rights.[37] The United States Supreme Court granted certiorari to establish the proper standards for reviewing courts to follow when considering cases involving ineffective assistance of counsel.[38]

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access to counsel's assistance during a trial recess is unconstitutional. *Id.* at 1206. The Fourth Circuit concluded, further, that when a court deprives the defendant of counsel's assistance the defendant need not demonstrate prejudice. *Id.* The *Stubbs* court held, however, that the defendant must show that the defendant desired to consult with counsel and would have consulted with counsel but for the trial court's bar order. *Id.* at 1207. Because defendant Stubbs neither objected to the bar order at trial nor demonstrated that he would have consulted with counsel but for the trial court's restriction, the Fourth Circuit held that the defendant had failed to show any deprivation of his right to assistance of counsel. *Id.* The Fourth Circuit, therefore, affirmed Stubb's conviction. *Id.*; *see also* Bailey v. Redman, 657 F.2d 21, 23-24 (3d Cir. 1981), *cert. denied*, 454 U.S. 1153 (1982) (holding that defendant must demonstrate that trial court's sequestrian deprived him of constitutional right he sought to exercise).

30. *Perry*, 832 F.2d at 841; *see infra* notes 112-113 and accompanying text (discussing Fourth Circuit's determination in *Perry* that courts should inquire into prejudicial effect of bar order).

31. 466 U.S. 668 (1984).

32. 466 U.S. 648 (1984).

33. *Perry*, 832 F.2d at 839-843; *see infra* note 113 and accompanying text (discussing Fourth Circuit's determination that inquiry into prejudicial effect of bar order in *Perry* was proper); *see* Strickland v. Washington, 466 U.S. 668, 687-691 (1984) (inquiring into prejudicial effect of ineffective assistance of counsel); United States v. Cronic, 466 U.S. 648, 666-667 (1984) (requiring that defendant show prejudicial effect of ineffective assistance of counsel).

34. Strickland v. Washington, 466 U.S. 668, 672 (1984). In *Strickland* the state of Florida indicted the defendant for kidnapping and murder. *Id.* The defendant, acting against counsel's advice, waived his right to a jury trial and pleaded guilty to all charges. *Id.*

35. *Id.* at 672-673. In preparation for the sentencing hearing, defense counsel in *Strickland* engaged in a limited investigation of the defendant's background and character. *Id.* The *Strickland* court suspected that counsel decided not to present evidence concerning the defendant's character to prevent the prosecution from cross-examining the defendant and rebutting the defendant's claim of emotional duress. *Id.* at 673.

36. *Id.* at 675. The Florida Supreme Court in *Strickland* upheld the defendant's conviction and death sentence on direct appeal. *Id.*

37. *Id.* at 678.

38. *Id.* at 684.

The Supreme Court in *Strickland* explained that the sixth amendment operates to ensure the accused a fair trial.[39] The *Strickland* Court, therefore, concluded that to succeed on a claim of ineffective assistance of counsel a defendant must demonstrate a reasonable probability that counsel's inadequate performance undermined the reliability of the trial's result and, thereby, deprived the defendant of a fair trial.[40]

In *United States v. Cronic*[41] a jury in United States District Court for the Western District of Oklahoma convicted the defendant of mail fraud.[42] The defendant appealed his conviction to the United States Court of Appeals for the Tenth Circuit.[43] On appeal the defendant argued that defense counsel rendered ineffective assistance and thereby impinged upon the defendant's sixth amendment rights.[44] The Tenth Circuit reversed the conviction, and the prosecution appealed to the United States Supreme Court.[45] As in *Strickland,* the Supreme Court in *Cronic* observed that the sixth amendment protects the right of the accused to a fair trial.[46] Accordingly, the Court in *Cronic*, like the Court in *Strickland*, held that to succeed on a claim of ineffective assistance, the defendant must demon-

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39. *Id.* at 689. A fair trial, the *Strickland* court found, is a trial which produces a reliable outcome. *Id.* at 687.

40. *Id.* at 687-688. The Supreme Court in *Strickland* concluded that, even if counsel's performance was substandard, the defendant had failed to demonstrate that any prejudice resulted from counsel's performance. *Id.* at 698-699. The *Strickland* court found that overwhelming aggravating circumstances supported the trial court's imposition of the death penalty and, therefore, that counsel's errors, if any, were harmless. *Id.* at 700-701.

41. 466 U.S. 648 (1984).

42. United States v. Cronic, 675 F.2d 1127-1128, 1128 (5th Cir. 1982), *rev'd*, 466 U.S. 648 (1984).

43. *Id.*

44. *Id.*

45. United States v. Cronic, 466 U.S. 648 at 650 (1984). In *Cronic* counsel that the defendant had retained withdrew shortly before trial. *Id.* at 649. The district court appointed a younger lawyer who had never participated in a jury trial and allowed new counsel only twenty-five days to prepare for trial. *Id.* at 649, 665. The trial court convicted the defendant, but the United States Court of Appeals for the Tenth Circuit reversed the conviction. United States v. Cronic, 675 F.2d at 1128-1129. The Tenth Circuit did not inquire into counsel's actual performance. *Id.* Instead, the Tenth Circuit inferred ineffective assistance from the circumstances surrounding the defendant's representation, particularly counsel's inexperience and the time the trial court afforded for preparation for trial. *Id.*

46. *Cronic*, 466 U.S. at 658. On appeal the Supreme Court reversed the decision of the Tenth Circuit, finding that the Court of Appeals had failed to inquire into whether defense counsel failed to provide effective assistance. *Id.* at 662-667. The Supreme Court explained that the right to effective assistance of counsel is the right of the accused to have counsel perform in a manner which will put the prosecution's case to a meaningful adversarial test. *Id.* The Supreme Court noted that some circumstances are so likely to result in prejudice that the Court will presume prejudicial effect. *Id.* at 658. The Court rejected, however, the Tenth Circuit's conclusion that the circumstances presented in *Cronic* required the Court to find that counsel was not able to render effective assistance. *Id.* at 663-667. Accordingly, the Supreme Court held that reversal of the trial court was warranted only if the defendant could demonstrate that counsel, in fact, performed so inadequately as to compromise the defendant's right to a fair trial. *Id.* at 666-667.

strate that counsel's deficient performance undermined the reliability of the trial's outcome.[47]

Observing the Supreme Court's emphasis in *Strickland* and *Cronic* on the reliability of a trial verdict, the Fourth Circuit in *Perry* refused to reverse Perry's conviction before inquiring whether the state court's constitutional error contributed to the outcome of Perry's trial.[48] The *Perry* court reasoned that a trial error warrants automatic reversal only if the error is so likely to cast suspicion on the results of the trial that the court must presume prejudicial effect.[49] The frequency of communication between Perry and his defense counsel during the trial and the brevity of the recess at issue led the Fourth Circuit to conclude that the fifteen minute deprivation of Perry's right to counsel's assistance did not require the court to presume prejudice.[50] The court emphasized that defense counsel ably represented Perry throughout the proceeding.[51] Moreover, the

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47. *Id.* at 658. *See* Strickland v. Washington, 466 U.S. 668, 687-688 (1984) (holding that in order to obtain reversal of the lower court conviction defendant must demonstrate reasonable probability that counsel's errors impinged upon defendant's right to fair trial).

48. Perry v. Leeke, 832 F.2d 837, 841-845 (4th Cir. 1987), *aff'd*, 109 S. Ct. 594 (1989).

49. *Id.* at 841-843. The Fourth Circuit in *Perry* rejected a rule of automatic reversal, reasoning that the Supreme Court's analysis of the sixth amendment in *Strickland* and *Cronic* required the *Perry* court to inquire into the prejudicial effect of the state court's bar order. *Id.* In *Strickland* and *Cronic*, the Fourth Circuit observed, the Supreme Court determined that the sixth amendment simply assures the accused a fair trial. *Id.* at 841; *see Strickland*, 466 U.S. at 689 (finding that purpose of sixth amendment is to ensure fair trial); *Cronic*, 466 U.S. at 658 (recognizing that right to counsel affects ability of accused to receive fair trial). The Fourth Circuit concluded that the state court's bar order did not sufficiently implicate the reliability of Perry's conviction and, thereby, Perry's right to a fair trial, to require automatic reversal. *Perry*, 832 F.2d at 842; *see infra* notes 50-52 and accompanying text (discussing Fourth Circuit's conclusion in *Perry* that bar order was not per se prejudicial).

50. *Perry*, 832 F.2d at 843. The Fourth Circuit noted that Perry had the opportunity to consult with counsel during an overnight recess on the evening before his testimony. *Id.* at 841. The *Perry* court observed, further, that the defendant had access to counsel during a luncheon recess immediately prior to this testimony and again during a recess occurring in the midst of his testimony. *Id.* The *Perry* court emphasized that the recess at issue not only was brief but occurred by chance between the defendant's direct and cross-examination. *Id.* at 842. The Fourth Circuit concluded that it would be improper to reverse Perry's conviction automatically simply because the trial court deprived Perry of counsel's assistance during one brief, unanticipated recess. *Id.*; *see infra* notes 51-53, 112-113 and accompanying text (discussing *Perry* court's decision to inquire into prejudicial effect of bar order).

51. *Perry*, 832 F.2d at 841, 843-844. The Fourth Circuit in *Perry* observed that the defendants in *Strickland* and *Cronic* claimed that incompetent counsel represented them at trial. *Id.* at 841; *see Strickland*, 466 U.S. at 675 (discussing defendant's claim that defense counsel rendered ineffective assistance); *Cronic*, 466 U.S. at 650 (same). The *Perry* court asserted that depriving a defendant of adequate assistance throughout trial is far more likely to result in prejudice than the relatively minor deprivation in *Perry*. *Perry*, 832 F.2d at 841. The Fourth Circuit observed that the Supreme Court in *Strickland* and *Cronic*, nevertheless, held inquiry into prejudice proper in cases involving ineffective assistance of counsel. *Id.*; *see Strickland*, 466 U.S. at 687 (holding that defendant must demonstrate prejudicial effect of counsel's ineffective assistance); *Cronic*, 466 U.S. at 666-667 (same). The *Perry* court

Fourth Circuit noted that eleven recesses had occurred during Perry's trial and that the court had permitted Perry and counsel to consult during all but the brief recess at issue.[52] The Fourth Circuit concluded, therefore, that the trial court's constitutional error did not sufficiently implicate the reliability of Perry's conviction to warrant automatic reversal.[53] Having found inquiry into the prejudicial effect of the state court's bar order proper, the Fourth Circuit considered whether the bar order resulted in prejudice to Perry's defense.[54] The *Perry* court relied on the standards the Supreme Court established in *Strickland* and *Cronic* to conclude that Perry had failed to demonstrate that the bar order contributed to Perry's conviction.[55] The sufficiency of defense counsel's performance and overwhelming evidence indicating Perry's guilt led the Fourth Circuit to hold that the trial court's constitutional error did not result in prejudice to the defendant.[56] The *Perry* court found no reason to conclude that any communication that might have taken place during the fifteen minute recess would have altered the outcome of the trial.[57] The Fourth Circuit,

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maintained that it would be incongruous to automatically reverse Perry's conviction because the trial court denied access to counsel during a brief recess but, nevertheless, inquire into prejudice had defense counsel rendered ineffective assistance throughout the proceedings. *Perry*, 832 F.2d at 841. The Fourth Circuit concluded, therefore, that defense counsel's able representation of Perry belied a conclusion that the state court's bar order was presumptively prejudicial. *Id.* at 841-842.

52. *Perry*, 832 F.2d at 842.

53. *Id.* at 842-843. The Fourth Circuit in *Perry* noted that a habeas court serves the limited purpose of focusing upon the fairness of the proceedings at issue. *Id.* at 842-843. The court explained that collateral review and reversal of state convictions undermines the finality of convictions and imposes enormous costs on both the state and federal systems of criminal justice. *Id.* at 843. Further, the court observed that retrials often lack the reliability of the initial trial due to passage of time, lapses of memory, and erosion of evidence. *Id.* The Fourth Circuit explained that Perry's case presented a particular risk of such problems because Perry filed his petition for a writ of habeas corpus more than four years after his original trial. *Id.* While the *Perry* court conceded that prejudicial error would require a retrial regardless of retrial costs and infirmities, the Fourth Circuit concluded that automatic reversal is improper when, as in *Perry*, the error was not presumptively prejudicial. *Id.*

54. *Id.* at 843-845.

55. *See id.* (finding that state court's bar order in *Perry* did not undermine reliability of trial verdict).

56. *Id.* In *Perry* the Fourth Circuit determined that a fair trial is one in which the prosecution's evidence is subject to a sufficient adversarial testing by defense counsel and is presented to an impartial tribunal for the determination of the issues. *Id.* at 843. The Fourth Circuit concluded that the trial court's bar order did not undermine the reliability of the verdict obtained at Perry's trial. *Id.* at 843-845; *see supra* notes 50-51 and accompanying text (discussing Fourth Circuit's conclusion that sufficiency of counsel's assistance and frequent access to counsel indicated that defendant in *Perry* received fair trial); *infra* note 130 and accompanying text (discussing *Perry* court's finding that overwhelming evidence of defendant's guilt supported conclusion that trial error was harmless).

57. *Perry*, 832 F.2d at 843-845. The Fourth Circuit observed that Perry performed well on cross-examination and effectively related his version of events to the jury. *Id.* at 841 n.2, 843. The *Perry* court concluded, therefore, that the state court's bar order did not compromise Perry's ability to present his defense and, thereby, undermine the reliability of the trial verdict. *Id.* at 843-845.

therefore, upheld Perry's conviction.[58] The United States Supreme Court granted certiorari.[59]

While the *Perry* majority inquired into whether the state court's bar order resulted in prejudice, Judge Winter in dissent supported a rule of automatic reversal.[60] The dissent argued that the majority erroneously concluded that the Supreme Court's decisions in *Strickland* and *Cronic* required the Fourth Circuit to consider whether the bar order resulted in prejudice.[61] In *Strickland* and *Cronic*, the *Perry* dissent noted, the Supreme Court determined that once an attorney has assisted a criminal defendant, the Court will presume that counsel has performed with reasonable competency.[62] This presumption, the *Perry* dissent explained, enables the Court to avoid post hoc evaluation of counsel's strategic decisions.[63] The dissent asserted, however, that the Supreme Court's presumption in *Strickland* and *Cronic* that counsel rendered effective assistance applies only when counsel has had the opportunity to perform.[64] In *Cronic*, the *Perry* dissent observed, the Supreme Court recognized that because assistance of counsel is necessary to a fair trial, a deprivation of the right to counsel at a critical stage of the trial requires the Court to conclude that the trial was unfair.[65] The dissent in *Perry* maintained that any trial recess is a critical

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58. *Id.* at 845.

59. Perry v. Leeke, 108 S. Ct. 1269 (1988).

60. *Perry*, 832 F.2d at 845-850; *see infra* notes 61-67 and accompanying text (discussing *Perry* dissent's support for rule of automatic reversal).

61. *Perry*, 832 F.2d at 845-848 (Winter, J. dissenting). Judge Winter, dissenting in *Perry*, argued that the Supreme Court's decisions in *Strickland* and *Cronic* neither modified nor overruled the Fourth Circuit's holdings in *United States v. Allen* and *Stubbs v. Bordenkircher*. *Id.* at 846-850. The dissent noted that unlike *Allen* and *Stubbs*, the defendants in *Strickland* and *Cronic* had full access to counsel. *Id.* at 846. The *Perry* dissent observed that in *Strickland*, the Supreme Court stated that actual denial of assistance of counsel is presumptively prejudicial and warrants automatic reversal. *Id.* at 847.

Judge Murnaghan, also dissenting in *Perry*, supported Judge Winter's opinion and explained that the sixth amendment guarantees the accused the right to effective assistance of counsel. *Id.* at 852. It follows, Judge Murnaghan reasoned, that when the court deprives the defendant of access to his attorney, counsel's assistance is ineffective. *Id.* Judge Murnaghan explained that defense counsel clearly cannot render effective assistance when denied the opportunity to assist at all. *Id.*; *see* Strickland v. Washington, 466 U.S. at 692 (noting that denial of counsel is per se prejudicial).

62. *Perry*, 832 F.2d at 845, 847-848; *see Strickland*, 466 U.S. at 689 (citing presumption of effective assistance of counsel); United States v. Cronic, 466 U.S. 648, 658 (1984) (same).

63. *Perry*, 832 F.2d at 848. The dissent noted the Supreme Court's reluctance in *Strickland* to engage in pervasive post-trial inquiry to determine whether defense counsel performed adequately. *Id.*; *see Strickland*, 466 U.S. at 689-690 (noting that judicial scrutiny of attorney performance must be deferential). In *Strickland* the Supreme Court recognized the difficulty of assessing counsel's performance after a trial. *Id.* at 689. The *Strickland* court explained that there are countless ways to present a defense in any particular case. *Id.* The Supreme Court, therefore, expressed fear that extensive post-hoc evaluation of attorney performance would stifle independent advocacy. *Id.* at 690.

64. *Perry*, 832 F.2d at 847-848.

65. *Id.* at 847. *See Cronic*, 466 U.S. at 659 (presumption that counsel's assistance is

stage of the trial.[66] The *Perry* dissent, therefore, concluded that the state court's fifteen minute deprivation of Perry's right to counsel was per se prejudicial and that the majority should have reversed Perry's conviction.[67]

The Fourth Circuit in *Perry* correctly held that the state court's bar order unconstitutionally deprived the defendant assistance of counsel.[68] While the Supreme Court has not determined whether an order forbidding consultation during a brief routine recess violates a defendant's sixth amendment right to assistance of counsel, the Court's holding in *Geders v. United States*[69] indicates that any restriction of a defendant's access to counsel during a trial recess is unconstitutional.[70] In *Geders* the Supreme Court considered whether an order precluding defendant and counsel from communicating during a seventeen hour overnight recess violated the defendant's rights under the sixth amendment.[71] While the recess and bar

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essential requires court to conclude that trial unfair if the court deprives the accused of counsel's assistance). The Supreme Court in *Cronic* explained that counsel must subject the prosecution's case to sufficient adversarial testing to justify reliance on the outcome of the trial. *Id.* The *Cronic* court observed, therefore, that if a court denies counsel the opportunity to participate fully in criminal proceedings, the court renders the adversary fact finding process presumptively unreliable and makes automatic reversal necessary. *Id.*

66. *Perry*, 832 F.2d at 848-849.

67. *Id.* at 850. The dissent rejected the case-by-case analysis that the majority rule would necessitate. *Id.* at 849. The dissent contended that a per se rule of reversal is easier to administer and best protects the defendant's sixth amendment right to assistance of counsel. *Id.* at 850. In the majority's view, the dissent noted, a dividing line exists above which all deprivations of counsel are per se prejudicial and below which they are potentially harmless. *Id.* at 849. The dissent asserted that divination of that dividing line is virtually impossible without arbitrary selection or time consuming case-by-case inquiry. *Id.*

68. *See infra* notes 69-82 and accompanying text (discussing propriety of Fourth Circuit's holding in *Perry* that bar order violated sixth amendment).

69. 425 U.S. 80 (1976).

70. *See* Geders v. United States, 425 U.S. 80, 91 (1976) (holding order barring consultation between accused and counsel during overnight trial recess violates defendant's right to assistance of counsel); *infra* notes 71-75, 78-81 and accompanying text (discussing Supreme Court's decision in *Geders*).

71. *Geders*, 425 U.S. at 81-91. In *Geders* a grand jury in the Middle District of Florida indicted the accused for illegal importation of a controlled substance into the United States. *Id.* at 81-82. The defendant testified at trial. *Id.* at 82. Following the defendant's direct testimony the trial court recessed for the night. *Id.* The trial judge directed the defendant not to consult with his attorney during the overnight recess. *Id.* The jury subsequently convicted the defendant, and the defendant appealed to the United States Court of Appeals for the Fifth Circuit. *Id.* at 85.

On appeal, the defendant argued that the trial court deprived him of his sixth amendment right to assistance of counsel by forbidding consultation during the overnight recess. *Id.* at 85-86. The Fifth Circuit affirmed the conviction, holding that the defendant's failure to allege that the bar order resulted in prejudice was fatal to the appeal. *Id.* at 86. The United States Supreme Court granted certiorari. Geders v. United States, 421 U.S. 929 (1975).

The Supreme Court in *Geders* held that an order that prevents consultation at a time when defendant and counsel would expect the opportunity to confer contravenes the requirements of the sixth amendment. *Geders*, 425 U.S. at 91. Accordingly, the *Geders* Court held that the trial court's bar order preventing consultation during an overnight recess, a

order in *Geders* took place between the defendant's direct and cross-examination, a juncture at which defendant and counsel normally would not have the opportunity to consult, the *Geders* Court concluded that the seventeen hour deprivation impinged upon the defendant's right to assistance of counsel.[72] The Supreme Court explained that defendant and counsel typically communicate during an overnight recess.[73] Furthermore, the *Geders* Court emphasized that an overnight recess can be vital to the defense as it affords the accused and counsel an opportunity to discuss the day's events and to formulate strategies for the remainder of trial.[74]

In finding the trial court's overnight bar order unconstitutional, the Supreme Court in *Geders* stressed the considerable length of the recess at issue.[75] The length of an order precluding consultation, however, alone should not determine whether the resulting deprivation amounts to an error of constitutional magnitude.[76] Instead, the reviewing court must determine whether the sixth amendment entitles the accused to the assistance of counsel at every trial recess.[77] The Supreme Court in *Geders* observed that a criminal defendant often must consult with counsel during the course of a trial.[78] The *Geders* Court explained that counsel's assistance is necessary to a fair trial because the accused generally lacks familiarity with the intricacies of the law and the process of trial.[79] While noting the trial court's fear that during a recess defense counsel improperly might influence the defendant's testimony, the Supreme Court in *Geders* concluded that the defendant's sixth amendment right to assistance of counsel must prevail over the danger of unethical conduct.[80] Recognizing the

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juncture during trial when defendant and counsel normally would confer, violated the defendant's sixth amendment right to assistance of counsel. *Id.* at 91-92. The Supreme Court reversed the defendant's conviction without inquiring into prejudicial effect of the trial court's bar order. *Id.* at 88-91.

72. *Geders*, 425 U.S. at 88-91.

73. *Id.* at 88.

74. *Id.*

75. *Id.* at 88, 89, 91. In *Geders* the Supreme Court frequently alluded to the length of the deprivation resulting from the trial court's bar order. *Id.* The overnight trial recess lasted seventeen hours. *Id.*

76. *See infra* notes 79-82 and accompanying text (suggesting that length of deprivation of assistance of counsel is inconsequential to issue of constitutionality).

77. *See infra* notes 79-82 and accompanying text (discussing right of accused to assistance of counsel at every trial recess).

78. *Geders*, 425 U.S. at 88.

79. *Id. See* Gideon v. Wainwright, 372 U.S. 335, 344-345 (1963) (finding counsel's assistance necessary to protect constitutional right of accused to fair trial); Powell v. Alabama, 287 U.S. 45, 68-69 (1932) (recognizing that accused requires guiding hand of counsel throughout criminal prosecution); *supra* notes 2-3 and accompanying text (discussing importance of counsel's assistance to reliability of trial verdict).

80. *Geders*, 425 U.S. at 91. The Supreme Court in *Geders* noted that the trial court may use means other than depriving the accused of counsel's assistance to deal with possible improper coaching. *Id.* at 89-91. For instance, the Supreme Court explained, a prosecutor may cross-examine the defendant as to whether coaching took place during the trial recess.

importance of defense counsel's role at trial, the *Geders* opinion suggests that any interference with the defendant's access to counsel's assistance during a trial recess, regardless of the brevity of the recess, violates the constitution.[81] The Fourth Circuit in *Perry*, therefore, properly concluded that the state court's order forbidding consultation during the fifteen minute trial recess deprived Perry of his sixth amendment right to assistance of counsel.[82]

While the Fourth Circuit's conclusion in *Perry* that the bar order violated the defendant's sixth amendment rights accords with Supreme Court precedent, conflicting authority exists concerning the *Perry* court's inquiry into whether the error resulted in prejudice.[83] In *United States v. Bryant*[84] the United States Court of Appeals for the Sixth Circuit did not examine prejudicial effect in considering the constitutionality of a trial court's bar order.[85] In *Bryant* a jury in the United States District Court

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Id. at 89-90. Additionally, the *Geders* court noted, if the trial court suspects that defense counsel will engage in unethical conduct, the court may require that cross-examination of the defendant follow direct examination without interruption. *Id.* at 90.

81. *See id.* at 92-93 (concurring opinion in *Geders* interpreting majority's decision to hold that any order precluding consultation during trial recess is unconstitutional). The Supreme Court in *Geders* expressly limited its holding to an order barring consultation during a seventeen hour overnight recess. *Id.* at 89 n.2, 91. The *Geders* court declined to consider the constitutional implications of an order precluding consultation during a brief routine recess. *Id.* The concurring opinion in *Geders* maintained, nevertheless, that any order barring communication between counsel and the accused violates the constitution. *Id.* at 92-93. The *Geders* concurrence reasoned that a defendant's right to counsel prevails over the danger of improper coaching at trial recess, regardless of the brevity of the recess. *Id.*

82. *Perry*, 832 F.2d at 839.

83. *See* United States v. Conway, 632 F.2d 641, 644-645 (5th Cir. Unit B 1980) (holding order barring consultation requires automatic reversal). In *Conway* the trial court ordered the defendant not to speak with his attorney during a luncheon recess that interrupted the defendant's cross-examination. *Id.* at 643. The Fifth Circuit held that the bar order denied the accused his sixth amendment right to assistance of counsel. *Id.* at 645. The Fifth Circuit reversed the conviction without considering whether the bar order resulted in prejudice. *Id.* at 644-645.

In *Jackson v. United States* the District of Columbia Court of Appeals considered whether a trial court order preventing the defendant from consulting with his attorney during a luncheon recess deprived the defendant of his sixth amendment right to counsel. Jackson v. United States, 420 A.2d 1202, 1205 (D.C. 1979) (deprivation of right to counsel at critical stage requires automatic reversal). After the defendant completed his direct testimony, the trial court called a luncheon recess and instructed the defendant not to communicate with his attorney. *Id.* at 1203. The jury subsequently convicted the defendant of armed robbery, robbery, and assault with a deadly weapon. *Id.* On appeal the Court of Appeals for the District of Columbia held that the trial court's order violated the defendant's right to counsel. *Id.* The court of appeals concluded, further, that any deprivation of the defendant's right to assistance of counsel at a critical stage in the proceedings requires automatic reversal. *Id.* at 1203-1205. The *Jackson* court declined to distinguish *Geders* on the basis of the length of the deprivation, concluding, instead, that any order preventing consultation is presumptively prejudicial. *Id.* at 1204. Accordingly, the *Jackson* court reversed the defendant's conviction. *Id.* at 1203-1205.

84. 545 F.2d 1035 (6th Cir. 1976).

85. United States v. Bryant, 545 F.2d 1035, 1035-1036 (6th Cir. 1976).

for the Southern District of Ohio convicted the defendant of armed bank robbery and possession of unregistered firearms.[86] The defendant appealed to the Sixth Circuit, arguing that the trial court violated the defendant's sixth amendment rights by barring consultation with counsel during a one-hour noon recess.[87] The *Bryant* court observed that the Supreme Court in *Geders* expressly limited its holding to a seventeen hour overnight recess.[88] The Sixth Circuit held, nevertheless, that the *Geders* decision and its rule of automatic reversal applied to an hour-long luncheon recess.[89] Accordingly, the *Bryant* court held that the trial court's bar order unconstitutionally deprived the defendant of counsel's assistance and reversed the conviction without inquiring into whether the error resulted in prejudice.[90]

In contrast to the Sixth Circuit's holding in *Bryant* the decision of the United States Court of Appeals for the Second Circuit in *United States v. DiLapi*[91] is consistent with the Fourth Circuit's inquiry into prejudice in *Perry*.[92] In *DiLapi* a jury in the United States District Court for the Eastern District of New York convicted the defendant of obstruction of justice and conspiracy.[93] The defendant appealed to the Second Circuit.[94] On appeal the defendant argued that the trial court violated the defendant's sixth amendment rights by forbidding consultation with counsel during a five minute recess.[95] While holding that any order precluding communication during a trial recess is constitutional error, the Second Circuit affirmed the conviction.[96] The *DiLapi* court reasoned that reversal of the defendant's conviction was unwarranted because the bar order did not result in even a remote risk of prejudice.[97]

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86. *Id.* at 1035.

87. *Id.*

88. *Id.* at 1036. *See Geders*, 425 U.S. at 89 n.2, 91 (limiting decision to hold order barring consultation during overnight recess unconstitutional to specific facts at bar).

89. *Bryant*, 545 F.2d at 1036. In *Bryant* the Sixth Circuit conceded that the Supreme Court in *Geders* expressly declined to pass on the proper disposition of an order prohibiting consultation during a brief routine recess. *Id.* Reasoning that the sixth amendment entitles the accused to counsel's assistance throughout trial, the *Bryant* court found, nevertheless, that *Geders* applied to an hour-long lunch recess. *Id.*

90. *Id.*

91. 651 F.2d 140 (2d Cir. 1981), *cert. denied*, 455 U.S. 938 (1982).

92. United States v. DiLapi, 651 F.2d 140 (2d Cir. 1981), *cert. denied*, 455 U.S. 938 (1982).

93. *Id.* at 142.

94. *Id.*

95. *Id.* at 142, 147-148.

96. *Id.* at 148-149. In *DiLapi* the defendant urged the Second Circuit to apply *Geders* and reverse without inquiring into prejudice. *Id.* at 148. The Second Circuit agreed that the bar order violated the defendant's right to assistance of counsel but refused to reverse. *Id.* The court reasoned that the error was insignificant and, therefore, harmless. *Id.*

97. *Id.* The Second Circuit in *DiLapi* found the trial error harmless despite the defendant's contention that he needed to speak with counsel concerning a severance the trial court granted to the defendant's co-defendant. *Id.* at 148. The Second Circuit reasoned that the severance had occurred earlier in the day and, therefore, the defendant had full

The Fourth Circuit correctly concluded that the trial error in *Perry* warranted inquiry into prejudice.[98] The Supreme Court has held that not all constitutional errors require automatic reversal.[99] In *Chapman v. California*[100] the Supreme Court determined that in the setting of a particular case, a constitutional infirmity may prove so insignificant to the outcome of the trial that reversal is unnecessary.[101] In *Chapman* a jury in a California state court convicted the defendants of robbery, kidnapping, and murder.[102] On appeal to the California Supreme Court the defendants argued that the prosecution's comments to the jury concerning the defendants' failure to testify violated the fifth amendment.[103] The California Supreme Court conceded the constitutional error but, applying the state constitution's harmless error provision, upheld the convictions.[104] The United States Supreme Court granted certiorari.[105]

The United States Supreme Court in *Chapman* recognized that the prosecution's conduct violated the defendants' rights under the fifth amendment to the United States Constitution.[106] The *Chapman* Court, however, rejected the defendants' contention that denial of a federal constitutional right, no matter how insignificant to the outcome of the trial, requires automatic reversal.[107] Instead, the Supreme Court in *Chapman* held that a constitutional error is harmless if the reviewing court finds beyond a reasonable doubt that the error in question did not contribute to the verdict obtained at trial.[108] The Court cautioned, however,

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opportunity to discuss the matter with his attorney prior to the brief recess in question. *Id.* The *DiLapi* court found no reason to conclude that five additional minutes of communication would have had any bearing on the defendant's cross-examination. *Id.* The Second Circuit noted, however, that it was not deciding whether an order barring consultation would require automatic reversal in subsequent cases. *Id.* at 149. The court indicated, therefore, that in future cases the Second Circuit might presume the prejudicial effect of a bar order that, in the court's opinion, encompasses a greater deprivation of the defendant's sixth amendment right to counsel. *Id.*

98. *See supra* notes 49-53 and accompanying text (discussing Fourth Circuit's inquiry into prejudice); *infra* notes 112-113 and accompanying text (same).

99. *See* Chapman v. California, 386 U.S. 18, 22 (1967) (determining that some constitutional errors may not sufficiently affect substantial rights of defendant to warrant automatic reversal).

100. 386 U.S. 18 (1967).

101. Chapman v. California, 386 U.S. 18, 22 (1967).

102. *Id.* at 19.

103. People v. Teale, 63 Cal. 2d 178, ____, 404 P.2d 209, 220, 45 Cal. Rptr. 729, 740 (1965), *rev'd*, Chapman v. California, 386 U.S. 18 (1967).

104. *Teale*, 63 Cal. 2d at ____, 404 P.2d at 220-221, 45 Cal. Rptr. at 740-741.

105. *Chapman*, 386 U.S. at 20.

106. *Chapman*, 386 U.S. at 21. In *Chapman* the Supreme Court recognized that the state's attorney violated the defendants' fifth amendment rights by making numerous comments to the jury regarding the defendants' failure to testify. *Id.* at 19. *See* Griffen v. State of California, 380 U.S. 609, 613-615 (1965) (holding that comments to jury concerning defendant's failure to testify violates self-incrimination clause of fifth amendment).

107. *Chapman*, 386 U.S. at 22.

108. *Id.* at 24. In the interest of preserving reliable verdicts, the Supreme Court in

that a particular constitutional error may so undermine the reliability of the fact finding process that the reviewing court must presume that the error was prejudicial.[109] In *Geders* the seventeen-hour deprivation of the defendant's sixth amendment right to counsel's assistance was so extreme that the Supreme Court presumed that the error resulted in prejudice to the defense.[110] In contrast, the deprivation at issue in *Perry* lasted only fifteen minutes.[111] The Fourth Circuit properly concluded that the state court's brief restriction of Perry's access to counsel did not so undermine the reliability of the trial verdict to warrant automatic reversal.[112] The

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Chapman found improper a rule requiring automatic reversal for all constitutional errors. *Id.* at 22.

109. *See id.* at 23 (noting that deprivation of certain constitutional rights never constitutes harmless error).

The Supreme Court repeatedly has observed that some constitutional errors are so likely to result in prejudice that automatic reversal is necessary. *See, e.g.*, United States v. Cronic, 466 U.S. 648, 659 (1984) (stating that denial of counsel is reversible error); Davis v. Alaska, 415 U.S. 308 (1974) (holding that denial of right to effective cross-examination requires automatic reversal); Payne v. Arkansas, 356 U.S. 560, 567 (1958) (finding introduction of coerced confession into evidence reversible error); Tumey v. Ohio, 273 U.S. 510, 533 (1927) (holding that subjecting defendant to trial before judge with pecuniary interest in conviction constitutes reversible error).

110. *Geders*, 425 U.S. 80, 91. *See supra* note 75 and accompanying text (discussing length of deprivation of defendant's right to counsel in *Geders*).

111. Perry v. Leeke, 832 F.2d 837, 839 (4th Cir. 1987), *aff'd*, 109 S. Ct. 594 (1989).

112. *Id.* at 841-845; *see* Chapman v. California, 386 U.S. 18, 22 (1967) (finding that some constitutional errors are not so likely to result in prejudice to require automatic reversal).

In *Perry* the dissenting justices insisted that when a court deprives the defendant of assistance of counsel, the constitutional infirmity is presumptively prejudicial. *Perry*, 832 F.2d at 848. The dissenting justices failed to note, however, the Supreme Court's basis for applying harmless error analysis to certain constitutional errors. *See Chapman*, 386 U.S. at 22 (finding some constitutional errors insignificant and unrelated to outcome of trial). The Supreme Court has held that the purpose of the sixth amendment right to counsel is to ensure that the defendant will receive the assistance necessary to a fair trial. *See supra* notes 2-3 and accompanying text (discussing importance of counsel's role in adversary system of criminal justice). Further, the Supreme Court has stated that a fair trial is one which produces a reliable outcome. *See* Rose v. Clark, 478 U.S. 570, 583 (1986) (concluding that interest in fairness is satisfied and reviewing court should affirm judgment if court finds that record of trial established guilt beyond reasonable doubt).

The dissent in *Perry* states that the Supreme Court consistently has held that deprivation of the right to counsel warrants reversal. *Perry*, 832 F.2d at 850. In *Coleman v. Alabama*, however, the Supreme Court found inquiry into harmful effect proper when the trial court unconstitutionally denied the accused assistance of counsel. Coleman v. Alabama, 399 U.S. 1, 10-11 (1970). *See also* Moore v. Illinois, 434 U.S. 220, 232 (1977) (finding violation of defendant's sixth amendment right to counsel subject to harmless error analysis). *But see* White v. Maryland, 373 U.S. 59, 60 (1963) (finding deprivation of accused's right to assistance of counsel reversible error); Hamilton v. Alabama, 368 U.S. 52, 54-55 (1961) (same). The Supreme Court, therefore, does not consider all violations of the sixth amendment right to assistance of counsel presumptively prejudicial. *See Moore*, 434 U.S. at 232 (finding deprivation of right to counsel subject to harmless error analysis); *Coleman*, 399 U.S. at 10-11 (same). The proper inquiry for a reviewing court, the Supreme Court has

Perry court, therefore, correctly inquired into the prejudicial effect of the state court's bar order.[113]

In considering whether the constitutional error in *Perry* resulted in prejudice to the defendant, the Fourth Circuit, by requiring that Perry demonstrate the prejudicial effect of the state court's bar order, improperly applied the standards that the Supreme Court established in *Strickland v. Washington*.[114] Courts properly apply *Strickland* if a defendant claims that counsel's performance was inadequate.[115] *Strickland* should not apply, however, to situations when the court completely deprives the defendant of counsel's assistance.[116] As the dissenting justices in *Perry* explain, the Supreme Court premised the *Strickland* decision upon the fact that counsel assisted the accused.[117] Courts typically presume that counsel's assistance was effective rather than indulge in second-guessing of counsel's tactical decisions.[118] By contrast, when a court denies a defendant access to counsel, counsel has not, in fact, assisted the accused.[119] Because counsel has rendered no assistance whatsoever, the reviewing court cannot presume effective assistance.[120] Furthermore, when a trial court impermissably de-

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held, is whether the constitutional error sufficiently undermined the reliability of the fact finding process to warrant automatic reversal. *See* Chapman v. California, 386 U.S. at 22-23 (holding automatic reversal unnecessary where constitutional error insignificant to outcome of trial); *supra* notes 49-53 and accompanying text (discussing Fourth Circuit's determination in *Perry* that bar order did not sufficiently undermine reliability of trial verdict to require automatic reversal).

113. *See Perry*, 832 F.2d at 841-843; *supra* note 112 and accompanying text (discussing propriety of inquiry into prejudicial effect of certain constitutional errors). The *Perry* court need not have relied exclusively on the Supreme Court's decision in *Strickland v. Washington* as support for rejecting a rule of automatic reversal. *Perry*, 832 F.2d at 841-843; Strickland v. Washington, 466 U.S. 688 (1984). In concluding that *Strickland* compelled inquiry into the prejudicial effect of the state court's bar order, the *Perry* court reasoned that *Strickland* emphasized that the sixth amendment is necessary to the reliability of a trial verdict. *Perry*, 832 F.2d at 841-843; *see Strickland*, 466 U.S. at 689 (finding purpose of sixth amendment to ensure accused fair trial). The Supreme Court, however, has applied harmless error analysis to a variety of constitutional errors and in each instance the court has focused its inquiry on the reliability of the trial verdict. *See* Milton v. Wainwright, 407 U.S. 371, 372-378 (1972) (finding that admission of confession obtained in violation of defendant's sixth amendment rights did not contribute to conviction, and, therefore, was harmless error); Harrington v. California, 395 U.S. 250, 251-254 (1969) (holding violation of defendant's rights under confrontation clause of sixth amendment insignificant to trial verdict and, thus, harmless error); *see also* Brown v. United States, 411 U.S. 223, 230-232 (1973) (finding that erroneous admission of testimony constituted harmless error).

114. *See infra* notes 120-127 and accompanying text (discussing impropriety of standards applied by *Perry* court in considering prejudicial effect of bar order).

115. *See infra* notes 118-126 and accompanying text (discussing *Strickland*'s applicability to cases involving ineffective assistance of counsel).

116. *Id.*

117. *Perry*, 832 F.2d at 848.

118. *Id. See supra* note 63 and accompanying text (discussing basis for presumption of effective assistance).

119. *Perry*, 832 F.2d at 848.

120. *Id.* The *Perry* dissent explained that in *Strickland* the Supreme Court determined

prives a defendant of counsel's assistance, the constitutional error is attributable to the court.[121] Because the government is responsible for the constitutional infirmity, the reviewing court requires that the prosecution either demonstrate lack of prejudicial effect or suffer a reversal of the trial verdict.[122] As the Surpeme Court observed in *Strickland*, however, when defense counsel has rendered ineffective assistance neither the trial court nor the prosecution is responsible for and, thus, able to prevent the constitutional error.[123] Accordingly, the reviewing court places the burden of demonstrating prejudice upon the defendant.[124]

Rather than apply *Strickland*, the Fourth Circuit should have applied the standards for determining prejudice the Supreme Court pronounced in *Chapman v. California*.[125] In *Chapman* the Supreme Court held that when the state or a court commits constitutional error, the prosection bears the burden of demonstrating beyond a reasonable doubt that the error was harmless.[126] Accordingly, the prosecution in *Perry* bore the burden of showing that the state court's bar order did not result in prejudice to Perry's defense.[127] The Fourth Circuit, therefore, erroneously required Perry to demonstrate the prejudicial effect of the bar order.[128]

In concluding that the state court's bar order did not result in prejudice to the defendant, the Fourth Circuit asserted that overwhelming evidence indicated Perry's guilt.[129] The court reasoned that the prosecution at Perry's trial had established the defendant's presence at the scene of the crime.[130] In finding the prosecution's evidence so convincing, however, the Fourth

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that when defense counsel actually assists the accused, the court presumes that counsel performed competently. *Id.* at 847. The Supreme Court in *Strickland* required the defendant to overcome the court's presumption of effective assistance by demonstrating that counsel performed inadequately. *Strickland*, 466 U.S. at 689.

121. *See Strickland*, 466 U.S. at 692-693 (noting government responsibility for deprivation of right to counsel).

122. *See* Chapman v. California, 386 U.S. 18, 24 (1967) (finding that prosecution bears burden of proving constitutional error was harmless).

123. *Strickland*, 466 U.S. at 692-693. The Supreme Court in *Strickland* distinguished cases involving ineffective assistance of counsel from cases involving denial of counsel. *Id.* Actual ineffective assistance of counsel, the *Strickland* court observed, results in a constitutional infirmity attributable to defense counsel. *Id.*

124. *See id.* at 693 (holding that defendant bears burden of proving that counsel's ineffective assistance resulted in prejudice).

125. 386 U.S. 18 (1967). *See supra* notes 99-101, 107-108 and accompanying text (discussing Supreme Court's inquiry into prejudice in *Chapman*).

126. *Chapman*, 386 U.S. at 24. *See supra* notes 98-108 and accompanying text (discussing Supreme Court's harmless error analysis in *Chapman*).

127. *See Chapman*, 386 U.S. at 24 (holding that beneficiary of error bears burden of establishing harmlessness).

128. *Perry*, 832 F.2d at 843-845.

129. *Id.* at 843-844.

130. *Id.* The Fourth Circuit in *Perry* noted that tire tracks from Perry's car and Perry's footprints were found at the scene of the crime. *Id.* at 843. Further, Perry's fingerprint was found on the victim's car. *Id.*

Circuit failed to appreciate the thrust of Perry's defense.[131] Perry did not contest his presence during the events constituting the crimes charged.[132] Rather, Perry presented a duress defense, claiming that he was an unwilling participant in the events leading to his conviction.[133] The deprivation of Perry's right to assistance of counsel occurred just prior to the defendant's cross-examination.[134] Because demonstrating Perry's credibility to the jury was essential to Perry's defense, counsel's assistance during the fifteen minute trial recess might have benefitted Perry's case by improving his performance on cross-examination.[135] The nature of Perry's defense, therefore, required that the Fourth Circuit attach sufficient weight to the ramifications of the trial court's bar order.[136]

The Fourth Circuit, nevertheless, properly may have concluded that the state court's bar order did not contribute to Perry's conviction.[137] The *Perry* court observed that the defendant had access to counsel during a luncheon recess immediately before his direct testimony and again during his direct testimony.[138] Moreover, the Fourth Circuit noted that Perry took full advantage of his rights on cross-examination, resisting the prosecutor's attempt to discredit his story and relating his own version of events to the jury.[139] In effect the Fourth Circuit may have determined, in accordance with *Chapman*, that the constitutional error in *Perry* was harmless beyond a reasonable doubt.[140] However, the Fourth Circuit in *Perry* erred by affirming the defendant's conviction without expressly finding that the

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131. *See infra* note 133 and accompanying text (discussing Fourth Circuit's failure in *Perry* to recognize irrelevance of evidence concerning defendant's presence at scene of crime).

132. *Perry*, 832 F.2d at 844.

133. *Id.* Perry maintained that he was an unwilling participant in the events constituting the offenses charged. *Id.* The tire tracks, footprints, and fingerprints, therefore, were essentially irrelevant to the issues presented at Perry's trial. *Id.* Instead, the truth or falsity of Perry's story was the salient issue. *Id.* It appears, therefore, that the Fourth Circuit erroneously concluded that overwhelming evidence indicated Perry's guilt. *Id.* The *Perry* court failed to point to any evidence attacking the credibility of the defendant's story. *Id.*

134. *Perry*, 832 F.2d at 839.

135. *Id.* at 848-849. Judge Winter, dissenting in *Perry*, maintained that counsel's assistance prior to a defendant's cross-examination may be critical to the defense. *Id.* For instance, the dissent noted, counsel might remind the accused of his rights on cross-examination. *Id.* Further, counsel's ability to calm the defendant may have a significant effect on the demeanor of the accused on the stand. *Id.*

136. *See supra* notes 134-135 and accompanying text (discussing trial court's deprivation of defendant's right to counsel at critical juncture in Perry's trial).

137. *See infra* notes 138-140 and accompanying text (discussing improbability that state court's bar in *Perry* resulted in prejudice).

138. *Perry*, 832 F.2d at 842.

139. *Id.* at 843-844 n.2. The Fourth Circuit observed in *Perry* that the defendant never maintained that counsel failed to explain Perry's rights on cross-examination during the numerous recesses in which the trial court allowed consultation. *Id.* at 843.

140. *Id.* at 844. In *Perry* the Fourth Circuit concluded that the vigor of Perry's representation, the brevity of the bar order at issue, and frequent consultation between Perry and counsel made the danger of prejudicial effect extremely remote. *Id.*

state court's bar order was harmless beyond a reasonable doubt.[141]

On appeal the United States Supreme Court in *Perry* held that the state court's bar order did not violate the defendant's sixth amendment right to assistance of counsel.[142] The Supreme Court in *Perry* admitted the factual similarity between *Geders v. United States* and *Perry v. Leeke*, but distinguished *Geders* by noting that the trial court's bar order in *Geders* precluded the defendant from consulting with counsel during an overnight recess.[143] The *Perry* Court observed that during an overnight recess counsel and the defendant normally confer about matters that go beyond the defendant's testimony.[144] In contrast, the Supreme Court continued, during a short recess in the midst of the defendant's testimony, as in *Perry*, the Court may presume that counsel and the defendant will discuss nothing but the defendant's testimony.[145] The *Perry* Court concluded that a defendant has no constitutional right to consult with counsel in the midst of the defendant's testimony and, therefore, held that the state court's order barring communication between Perry and defense counsel during the fifteen minute recess occurring prior to Perry's cross-examination did not violate the sixth amendment.[146] The Supreme Court in *Perry* reasoned that cross-examination of an uncounseled defendant is more likely to lead to discovery of the truth than cross-examination of a defendant who has consulted with counsel following direct examination.[147] Accordingly, the Supreme Court in *Perry* held that the defendant did not have a constitutional right to consult with counsel during the fifteen minute trial recess and, therefore, affirmed Perry's conviction.[148]

Justice Marshall, dissenting in *Perry*, asserted that the majority opinion improperly concluded that the state court's bar order did not unconstitutionally deprive the defendant of counsel's assistance.[149] Instead, the *Perry*

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141. *See id.* at 838-845 (failing to find that state court's bar order was harmless beyond a reasonable doubt).

142. Perry v. Leeke, 57 U.S.L.W. 4075, 4078 (1989).

143. *Id.* at 4078; *see supra* notes 70-75 and accompanying text (discussing length of deprivation of defendant's right to counsel in *Geders*).

144. *Perry*, 57 U.S.L.W. at 4078; *see* Geders v. United States, 425 U.S. 80, 88 (1976) (noting matters counsel and accused discuss during overnight recess).

145. *Perry*, 57 U.S.L.W. at 4078. In *Perry* the Supreme Court concluded that during a short recess a defendant and counsel will likely discuss the defendant's testimony and, therefore, the trial court should have discretion in considering whether to allow the consultation. *Id.* The *Perry* Court reasoned that cross-examination is more likely to lead to the discovery of truth if defense counsel does not discuss the defendant's testimony with the defendant prior to cross-examination. *Id.* Furthermore, the *Perry* court observed, permitting the defendant to consult with counsel and, perhaps, the opportunity to regain his poise undermines the prosecution's ability to effectively conduct cross-examination. *Id.*

146. *Id.* at 4078.

147. *Id.* The Supreme Court in *Perry* concluded that allowing the defendant to consult with counsel following direct examination but prior to cross-examination would impede the truth-finding function of the trial. *Id.*

148. *Id.*

149. *Id.* at 4079-4082.

dissent maintained that any order precluding consultation between counsel and the accused during a trial recess violates the sixth amendment.[150] The dissent in *Perry* observed that the Supreme Court consistently has held that a criminal defendant has the right to assistance of counsel at every critical stage of the adversary process.[151] Furthermore, the *Perry* dissent noted, the Supreme Court has recognized that the right to counsel enhances the reliability of the truthfinding process by enabling the defendant to put the prosecution's case to a meaningful adversarial test.[152] Finding that any trial recess is a critical stage in the criminal proceeding, the *Perry* dissent concluded that the state court's bar order violated Perry's sixth amendment right to assistance of counsel.[153] Accordingly, the dissent in *Perry* would have reversed the defendant's conviction.[154]

In *Perry* the Supreme Court distinguished the Court's decision in *Geders* on the grounds that, like any other witness, a defendant has no right to consult with counsel while the defendant is testifying.[155] As the *Perry* dissent properly observed, however, Perry did not seek to interrupt his testimony to consult with counsel.[156] Rather, the trial court called the fifteen minute recess.[157] The Supreme Court in *Perry* failed to recognize

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150. *Id.* at 4079; *see* Geders v. United States, 425 U.S. 80, 92 (1976) (Marshall, J., concurring) (finding majority's holding that bar order was unconstitutional fully applicable to any order barring consultation at trial recess). In *Perry* Justice Marshall rejected the majority's determination that *Geders* was distinguishable from *Perry*. *Id.* at 4079-4081. The *Perry* dissent observed that in *Geders* the Supreme Court determined that the proper inquiry was not whether trial recesses normally occur during the defendant's testimony, but whether consultation with counsel normally occurs during trial recesses. *Id.* at 4079; *see Geders*, 425 U.S. at 91 (holding that order barring consultation during overnight recess when counsel and accused normally would confer was unconstitutional). The dissent in *Perry* maintained that the sixth amendment guarantees a criminal defendant the opportunity to consult with counsel at every step in the adversary proceeding, so long as that communication will not impede the progress of the trial. *Perry*, 57 U.S.L.W. at 4079; *see infra* note 151 and accompanying text (discussing right of accused to assistance of counsel at every critical stage in criminal proceeding).

151. *Perry*, 57 U.S.L.W. at 4079; *see* Powell v. Alabama, 287 U.S. 45, 68-69 (1932) (holding that accused has sixth amendment right to counsel at every step in adversary process); *see also* Gideon v. Wainwright, 372 U.S. 335, 345 (1963) (same); Hamilton v. Alabama, 368 U.S. 52, 54 (1961) (same). In *Perry* the dissent maintained that the state court's bar order deprived Perry of counsel's assistance at a critical juncture in Perry's trial. *Perry*, 57 U.S.L.W. at 4082. The dissent in *Perry* noted that the defendant was mildly retarded and suffered from an inability to cope with stressful situations. *Id.* at 4081 n.6. The *Perry* dissent concluded that the order precluding consultation between counsel and the defendant may have impaired Perry's ability to testify truthfully and effectively on cross-examination. *Id.*

152. *Perry*, 57 U.S.L.W. at 4080; *see supra* note 2 and accompanying text (discussing Supreme Court decisions holding that right to counsel is vital to reliability of adversary fact finding process); *supra* note 151 (discussing *Perry* dissent's conclusion that bar order in *Perry* may have adversely affected defendant's ability to testify truthfully).

153. *Perry*, 57 U.S.L.W. at 4079-4082.

154. *Id.*

155. *Id.* at 4077.

156. *Id.* at 4079.

157. *Id.*

that, as the Court previously has observed, a defendant is not like any other witness.[158] The Supreme Court has noted that frequently a defendant must discuss matters with counsel that go beyond the defendant's testimony.[159] The *Perry* majority, nevertheless, distinguished the seventeen hour recess at issue in *Geders* from the fifteen minute recess at issue in *Perry*, reasoning that any discussion that might have taken place during the short recess in *Perry* would have concerned the defendant's pending testimony.[160] The Supreme Court in *Perry*, however, offered no support for the proposition that during a short trial recess a defendant and counsel have nothing to discuss but the defendant's testimony.[161] Accordingly, the Supreme Court in *Perry* did not provide a rational basis for the Court's holding that Perry had no constitutional right to consult with counsel during the fifteen minute trial recess.[162]

The Supreme Court in *Perry* determined that a line of constitutional significance lies somewhere between a seventeen hour deprivation of counsel and a fifteen minute deprivation of counsel.[163] As the dissent in *Perry* observed, however, the *Perry* majority failed to provide a standard of evaluation by which a reviewing court may discern the proper point of demarcation.[164] Consequently, neither trial courts nor appellate courts will have a means for ascertaining whether a bar order of particular duration amounts to a violation of a defendant's sixth amendment right to assistance of counsel.[165]

In *Perry v. Leeke* the Fourth Circuit properly concluded that the state court's order precluding consultation between counsel and the accused

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158. *See* Geders v. United States, 425 U.S. 80, 88 (1976) (noting that, unlike nonparty witness, defendant often must discuss matters with counsel that go beyond defendant's testimony); *supra* notes 70-75 (discussing Supreme Court's decision in *Geders*).

159. *See Geders*, 425 U.S. at 88 (observing matters other than defendant's testimony that counsel and defendant discuss during trial recesses). As the dissent in *Perry* noted, counsel and the accused often consult during trial about matters other than the defendant's upcoming testimony. *Perry*, 57 U.S.L.W. at 4081. The *Perry* dissent properly observed that the Supreme Court failed to express a logical basis for the Court's conclusion that during relatively short trial recesses counsel and the defendant do not discuss matters such as trial tactics or the availability of other witnesses. *Id.*

160. *Perry*, 57 U.S.L.W. at 4078; *see supra* note 145 and accompanying text (discussing Supreme Court's determination in *Perry* that Court may presume that during brief trial recesses occurring in midst of defendant's testimony, counsel and defendant will discuss defendant's testimony).

161. *Perry*, 57 U.S.L.W. at 4077-4078; *see supra* note 159 and accompanying text (discussing *Perry* Court's failure to support the Court's conclusion that Perry and counsel had nothing to discuss during fifteen minute trial recess other than defendant's testimony).

162. *Perry*, 57 U.S.L.W. at 4077-4078.

163. *Id.* at 4077.

164. *Id.* at 4082. In *Perry* the Supreme Court left to the discretion of the trial judge whether to permit consultation between counsel and the accused during a short trial recess. *Id.* at 4078. The *Perry* Court, however, did not provide any guidance for courts to determine whether a trial recess is short or sufficiently long to entail constitutional implications. *Id.* at 4082.

165. *Id.*

during a fifteen minute trial recess violated the defendant's sixth amendment right to assistance of counsel.[166] In reviewing the Fourth Circuit's decision, the Supreme Court in *Perry* departed from prior Supreme Court precedent recognizing that a defendant's right to assistance of counsel at every critical stage in the criminal proceedings is central to a defendant's sixth amendment right to counsel.[167] Moreover, the Supreme Court in *Perry* failed to provide an analytical framework by which reviewing courts can determine the constitutional implications of an order barring consultation between counsel and the accused during a trial recess.[168] Had the Supreme Court in *Perry* concluded that the state court's bar order violated the defendant's sixth amendment right to counsel, the Supreme Court probably would have determined that the constitutional error warranted inquiry into prejudicial effect.[169] Accordingly, the Fourth Circuit in *Perry* properly concluded that the state court's bar order required inquiry into prejudice.[170] In considering the prejudicial effect of the bar order, however, the Fourth Circuit failed to apply the proper standards for determining when a defendant has suffered prejudice.[171] When the court or the prosecution engages in conduct resulting in a constitutional error, the reviewing court should not require that the defendant demonstrate prejudicial effect.[172] Instead, the prosecution should bear the burden of establishing that the error did not undermine the integrity of the jury's verdict and, thereby, impinge upon the defendant's constitutional right to a fair trial.[173]

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166. *See supra* notes 69-82 and accompanying text (discussing propriety of Fourth Circuit's conclusion that state court's bar order in *Perry* was unconstitutional).

167. *See supra* notes 150-152, 158-159 and accompanying text (discussing counsel's role in criminal proceeding); *supra* note 2 and accompanying text (same).

168. *See supra* notes 163-165 and accompanying text (discussing Supreme Court's failure in *Perry* to establish standards by which reviewing courts can determine the constitutional implications of bar orders).

169. *See supra* notes 99-113 and accompanying text (discussing propriety of considering prejudicial effect of order barring consultation between counsel and the accused during short trial recess).

170. *See supra* notes 49-53, 99-113 and accompanying text (discussing *Perry* court's conclusion that bar order required inquiry into prejudice).

171. *See supra* notes 120-127 and accompanying text (discussing Fourth Circuit's flawed analysis of prejudicial effect of bar order).

172. *See supra* notes 125-127 and accompanying text (discussing *Chapman* requirement that beneficiary of error demonstrate harmlessness).

173. *See supra* notes 114-128 (discussing proper standards for determining prejudicial effect of constitutional error).