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Touro Law Review

Volume 25
Number 4 *Annual New York State Constitutional Issue*

Article 15

December 2012

Court of Appeals of New York - People v. Umali

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Recommended Citation

VanSingel, Andrew J. (2012) "Court of Appeals of New York - People v. Umali," *Touro Law Review*: Vol. 25 : No. 4 , Article 15.
Available at: https://digitalcommons.tourolaw.edu/lawreview/vol25/iss4/15

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COURT OF APPEALS OF NEW YORK

People v. Umali[1]

(decided May 6, 2008)

Isaias Umali was convicted of manslaughter in the first degree for the murder of a security guard at a Manhattan nightclub.[2] The Appellate Division, First Department affirmed the conviction and the New York Court of Appeals granted leave to appeal.[3] Umali claimed that the trial court violated his right to counsel under both the U.S. Constitution[4] and the New York Constitution[5] "when the trial court prohibited his attorney from speaking to him about his testimony during a trial recess."[6] The Court of Appeals held that Umali was not deprived of his right to counsel because "the ban on attorney-client communication was rescinded promptly after [Umali's] protest."[7]

In April 2003, Umali and his friends were at a nightclub in lower Manhattan.[8] Around the same time, a no-smoking law had been enacted, prohibiting smoking in restaurants.[9] Dana Blake, a security guard for the nightclub, spent the night patrolling and enforc-

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[1] 888 N.E.2d 1046 (N.Y. 2008).

[2] *Umali*, 888 N.E.2d at 1048, 1049.

[3] *Id.* at 1049.

[4] U.S. CONST. amend. IV, states, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."

[5] N.Y. CONST. art. I, § 6, states, in pertinent part: "In any trial in any court whatever the party accused shall be allowed to appear and defend in person and with counsel as in civil actions and shall be informed of the nature and cause of the accusation and be confronted with the witnesses against him or her."

[6] *Umali*, 888 N.E.2d at 1048.

[7] *Id.* at 1048.

[8] *Id.*

[9] *Id.*

ing the newly enacted smoking ban. He observed Umali's friends, Jonathan and Alan Chan, smoking.[10] Blake approached the two in an attempt to get them to stop smoking, which resulted in an altercation.[11]

While witness accounts varied as to what exactly happened, most recounted that "Blake grabbed [Jonathan] Chan by the throat and pushed him toward an emergency exit."[12] While Blake was forcing Chan out of the nightclub, Umali "lunged at Blake and stabbed him in his groin with a six-inch long, serrated martial arts knife."[13] During the scuffle, Umali managed to leave the nightclub undetected.[14]

Police officers arrived at the nightclub shortly thereafter and arrested the Chans for assault, based on witness accounts that they were responsible for the stabbing.[15] Meanwhile, Blake was transported to a hospital and underwent surgery for a severed femoral artery, but he died later that day.[16]

After Umali fled the scene, he "wrapped his knife in an article of clothing and threw it in a street drain," and sought help from his friends, the Atienza brothers.[17] Upon arriving at the Atienzas' apartment, the brothers noticed blood stains on Umali's clothes and sug-

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[10] *Id.*

[11] *Umali*, 888 N.E.2d at 1048.

[12] *Id.* Chan was "considerably smaller in stature," compared to Blake, who was over six-feet tall and weighed approximately 350 pounds. *Id.*

[13] *Id.*

[14] *Umali*, 888 N.E.2d at 1048.

[15] *Id.*

[16] *Umali*, 888 N.E.2d at 1048-49. Umali, upon discovering that Blake had died several days later, attempted to commit suicide by "slashing his throat and wrists, but he survived and was placed under psychiatric supervision." *Id.* at 1049.

[17] *Id.* at 1049.

gested that he change clothes.[18] At this point, Umali informed the brothers that "the Chans had been in a fight with an African-American man and that he stabbed the man using a specialized maneuver he had learned in a martial arts class."[19]

The following morning, Umali's fiancée arrived at the Atienza apartment, as Umali did not want to discuss the previous night's events over the phone.[20] It was at this point that Umali informed his fiancée that he stabbed Blake using a "special martial arts method."[21] Shortly thereafter, the Atienzas, Umali's fiancée and another man helped Umali by disposing of his bloody clothing, providing him with new clothes and cleaning his cellular phone.[22] The individuals involved in helping Umali entered into cooperation agreements with the prosecution, which allowed them to "withdraw their guilty please to hindering prosecution if they testified truthfully and, in return, they would receive reduced charges and sentences of probation."[23] Two days after the stabbing, the Chans were released from police custody and Umali "was eventually indicted for two counts of murder in the second degree."[24]

At his trial, Umali testified in his own defense on a Wednesday, where he raised a justification defense, reasoning that the stab-

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[18] *Id.*

[19] *Id.* When asked about his reasoning for the stabbing, one of the brothers pleaded that he acted in self-defense and " 'that [he] did it for the right reason.' " *Id.* at 1048. Umali responded that he was not acting in self-defense, and he had no reason for stabbing the night-club bouncer. *Id.*

[20] *Id.*

[21] *Umali*, 888 N.E.2d at 1049.

[22] *Id.*

[23] *Id.* at n.1.

[24] *Id.* at 1049.

bing of Blake was done to protect Chan from the deadly force of the chokehold.[25] However, his testimony was not finished by the end of the day.[26] This prompted the court to adjourn the trial until the next available day, which was the following Monday.[27] In addition, the court instructed defense counsel "not [to] discuss defendant's testimony with him during the recess."[28]

Defense counsel did not object to the ban until Friday morning, at which time defense counsel asked the court to reconsider the ban, which was previously held improper under *People v Blount*.[29] The trial judge took the objection under advisement, and later that morning rescinded the order.[30] This gave the defense two days to communicate with Umali before he resumed his testimony.[31]

The trial resumed the following Monday, and ultimately the jury convicted Umali of manslaughter in the first degree.[32] This decision was affirmed by the appellate division[33] and the New York Court of Appeals granted leave.[34] Umali argued that his right to counsel was violated when the court prohibited him from discussing his testimony with counsel during the four-day recess and that this error

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[25] *Id.*

[26] Umali, 888 N.E.2d at 1049.

[27] *Id.* The next day was a holiday, and the court was unavailable for trial proceedings on Friday, which was the basis for the trial resuming on Monday. *Id.*

[28] *Id.* Although the attorney was unable to speak with Umali regarding his testimony, the court granted permission to speak to his client regarding collateral matters other than his testimony. *Id.*

[29] *Id.* *See infra* note 94.

[30] *Id.* The court noted that duration of time between the objection on Friday morning and the withdrawal of the order "was no more than three hours." *Id.* at 1050.

[31] *Umali*, 888 N.E.2d at 1049.

[32] *Id.*

[33] *Id.*

[34] *Id.*

was not cured when the court lifted the ban.[35]

Despite the fact that the order was issued on Wednesday, and lifted the following Friday, the court noted that Umali's attorney was present when the order was issued and failed to object until Friday morning, thus the court only considered the deprivation of communication from the time the objection was made until the ban was released.[36]

Accordingly, the court rejected Umail's claim given the fact that "the trial court promptly rescinded [the order] and verified that defense counsel [was] aware they could consult with the defendant about his testimony."[37] Further, the court stated that the time of deprivation was at most three hours, and after the ban was lifted, there were two-and one-half days remaining before the trial would recommence, during which the defense counsel could confer with Umali.[38] Therefore, the court held that the three-hour ban was insignificant considering the amount of time remaining until the trial resumed, and therefore it did not warrant a reversal.[39]

The United States Supreme Court addressed the constitutionality of orders prohibiting attorney-client communication in *Geders v.*

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[35] *Id.* at 1050.

[36] *Umali*, 888 N.E.2d at 1050. Such failure to object would render a claimed deprecation of the constitutional right to counsel unpreserved for appellate review. *Id.* at 1050. In that respect, the court stated that "consequently, in evaluating the defendant's right to counsel argument, we do not consider the length or effect of the prohibition that occurred prior to defense counsel's protest that Friday morning." *Id.* (quoting People v. Narayan, 429 N.E.2d 123 (N.Y. 1981)).

[37] *Id.* at 1050.

[38] *Id.* Additionally, the court noted that the defense counsel never expressed any indication that additional time would be required to prepare for trial on the following Monday as a result of the deprivation. *Id.*

[39] *Id.* at 1050-51.

United States, where the Court held that such a ban violated the defendant's Sixth Amendment right to counsel.[40] In *Geders*, the defendant began testifying in his own defense on a Tuesday, and his attorney "concluded direct examination at 4:55 p.m.," that same day.[41] When the trial recessed for the day, the prosecutor requested that the judge instruct the defendant not to communicate with anyone regarding the case.[42] The trial judge agreed with the prosecutor, over counsel's objection, and told both parties: " 'I think [the defendant] would understand it if I told him just not to talk to [defense counsel]; and I just think it is better that [the defendant] not talk to [defense counsel] *about anything*.' "[43] Despite this contention, the trial judge allowed the defendant to discuss with his attorney matters that were not related to his prior testimony.[44] The trial concluded two days later, resulting in the defendant's conviction.[45]

The circuit court of appeals affirmed the conviction,[46] however, the United States Supreme Court unanimously reversed, holding that "an order preventing [the defendant] from consulting his counsel 'about anything' during a 17-hour overnight recess between his direct-and cross-examination impinged upon his right to the assistance

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[40] 425 U.S. 80, 91-92 (1976).

[41] *Id.* at 82. The defendant in *Geders* was on trial for a botched plan to fly 1,000 pounds of marijuana from Colombia into the United States, and was charged with conspiracy to import a controlled substance, importing a controlled substance, and possession of marijuana, violating 18 U.S.C. § 371, 21 U.S.C. § 952(a), and 21 U.S.C. § 841(a), respectively. *Id.* at 81-82.

[42] *Id.* at 82. This was the same instruction given to every witness that testified before defendant. *Id.*

[43] *Id.* (emphasis added).

[44] *Id.* at 82.

[45] *Geders*, 425 U.S. at 85.

[46] United States v. Fink, 502 F.2d 1, 9 (5th Cir. 1974).

of counsel guaranteed by the Sixth Amendment."[47] The Court fully acknowledged the purpose behind "the rule on witnesses" whereby sequestering witnesses can prevent the possibility of witnesses tailoring their testimony, and can "prevent[] improper attempts to influence the testimony in light of the testimony already given."[48]

However, in *Geders*, the defendant was "not simply a witness; he was also the defendant."[49] The effect of the "rule on witnesses" is considerably different when applied to a testifying defendant than to a nonparty witness.[50] Nonparty witnesses "[have] little, other than [their] own testimony, to discuss with trial counsel; [whereas] a defendant in a criminal case must often consult with his attorney during the trial."[51] Furthermore, the need to consult with an attorney is protected by the Sixth Amendment, which guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."[52]

The Court focused on the time and nature of the recess, which occurred at the end of the defendant's trial, and lasted until the following morning.[53] Although the trial may be over for the day,

> [s]uch recesses are often times of intensive work, with tactical decisions to be made and strategies to be reviewed. The lawyer may need to obtain from his client information made relevant by the day's testimony,

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[47] *Geders*, 425 U.S. at 91.

[48] *Id.* at 87. Obviously, such tailoring of testimony can result in less than candid testimony.

[49] *Id.* at 88.

[50] *Id.*

[51] *Geders*, 425 U.S. at 88.

[52] U.S. CONST. amend. IV.

[53] *Geders*, 425 U.S. at 88.

> or he may need to pursue inquiry along lines not fully explored earlier. At the very least, the overnight recess during trial gives the defendant a chance to discuss with counsel the significance of the day's events.[54]

To combat the threat of improper influence or "coaching" witnesses, which may be the by-product of such recesses, the Court noted that the prosecution is not without resources to cope with such coaching.[55] The prosecution is fully afforded the opportunity to cross-examine the witness, a tool which John Henry Wigmore, arguably the most influential jurist regarding evidence, stated is " '[b]eyond any doubt the greatest legal engine ever invented for the discovery of truth.' "[56] Such "[s]killful cross-examination" can exploit questions of credibility and sincerity if coaching was evident.[57] The judge can also take an active part in reducing such opportunities for coaching witnesses by forcing testimony to continue without any recesses or interruptions.[58] However, the Court concluded that whatever this perceived risk of coaching is, when it is posed against the Sixth Amendment, it must "be resolved in favor of the right to the assistance and guidance

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[54] *Id.*

[55] *Id.* at 89.

[56] Wigmore's coined phrase is frequently cited and is touted from law school evidence classes to the Supreme Court. *See* Lilly v. Virginia, 527 U.S. 116, 124 (1999); Maryland v. Craig, 497 U.S. 836, 846 (1990); Watkins v. Sowders, 449 U.S. 341, 349 (1981); *see also* 5 J. WIGMORE, EVIDENCE § 1367 (Chadburn rev. 1974).

[57] *Geders*, 425 U.S. at 89-90.

[58] *Id.* at 90. The court mentioned that this may not be an appropriate solution in all cases, considering the length of some direct and cross-examinations, and crowded court dockets. *Id.* at 91. However, minor inconveniences, such as delaying recesses and lunch breaks is a reality, and "courts must frequently sit through and beyond normal recess." *Id.*

of counsel."[59]

The holding in *Geders* was strictly limited to overnight bans on communication, and refused to "deal with limitations imposed in other circumstances."[60] Thirteen years later, the Supreme Court decided *Perry v. Leeke*, which addressed the constitutionality of a similar order, which was shorter in duration.[61] In *Perry*, after the defendant concluded "his direct testimony, the trial judge declared a 15-minute recess, and . . . ordered that [the defendant] not be allowed to talk to anyone, *including his lawyer*, during the break."[62] Upon return, defense counsel motioned for a mistrial, which was denied.[63] The judge explained that the defendant " 'was in a sense then a ward of the Court. He was not entitled to be cured or assisted or helped approaching his cross-examination.' "[64] The Supreme Court of South Carolina affirmed the conviction,[65] holding that "*Geders* was not controlling because our opinion in that case had emphasized the fact that a defendant would normally confer with counsel during an overnight recess and that we had explicitly stated that 'we do not deal with . . .

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[59] *Id.* at 91 (citing Brooks v. Tennessee, 406 U.S. 605 (1972)). Justice Marshall further stated that:

> If our adversary system is to function according to design, we must assume that an attorney will observe his responsibilities to the legal system, as well as to his client. I find it difficult to conceive of any circumstances that would justify a court's limiting the attorney's opportunity to serve his client because of fear that he may disserve the system by violating accepted ethical standards. If any order barring communication between a defendant and his attorney is to survive constitutional inquiry, *it must be for some reason other than a fear of unethical conduct.*

Id. at 93 (Marshall, J., concurring) (emphasis added).

[60] *Id.* at 91.

[61] 488 U.S. 272, 274 (1989).

[62] *Id.* (emphasis added).

[63] *Id.*

[64] *Id.* (quoting App. 4-5).

[65] State v. Perry, 299 S.E.2d 324, 327 (S.C. 1983).

limitations imposed in other circumstances.' "[66] The United States Supreme Court granted certiorari,[67] and affirmed the state supreme court decision, which denied counsel from speaking with his client during a recess that is short in duration.[68]

While acknowledging that there is a "thin line" between *Geders* and *Perry*, the Court reasoned *Geders* was different because

> the normal consultation between attorney and client that occurs during an overnight recess would encompass matters that go beyond the content of the defendant's own testimony—matters that the defendant does have a constitutional right to discuss with his lawyer, such as the availability of other witnesses, trial tactics, or even the possibility of negotiating a plea bargain.[69]

It is inevitable that some of the defendant's testimony would be brought up in such conversations.[70] However, when the recess is short in duration, such as the one in *Perry*, it is "appropriate to pre-

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[66] *Perry*, 488 U.S. at 274 (quoting *Geders*, 425 U.S. at 91). The Court further explained:

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

Id. at 274-75.

[67] 485 U.S. 976 (1988). Following the South Carolina Supreme Court decision, the defendant filed a writ of habeas corpus, in which the district court reversed the conviction, relying on *United States v. Allen*, 542 F.2d 630, 633-634 (4th Cir. 1976), which held that "it is always reversible error for a trial court to prevent a defendant and his counsel from conferring during a recess, no matter how brief." Perry v. Leeke, 832 F.2d 837, 839 (4th Cir. 1987). The Court of Appeals reversed this decision, 832 F.2d 837 (4th Cir. 1987) (en banc), which led to the United States Supreme Court grant of certiorari.

[68] *Perry*, 488 U.S. at 285.

[69] *Id.* at 284.

[70] *Id.*

sume that nothing *but* the testimony will be discussed," and the defendant is not afforded the same rights as in *Geders*.[71]

However, the Court cautioned that the existence of a short recess does not demand an automatic prohibition of communication between the defendant and his attorney.[72] Rather, this is a discretionary tool afforded to trial judges, and consultation may be allowed if it is determined to be appropriate.[73] The Court simply took the stance that "the Federal Constitution does not compel every trial judge to allow the defendant to consult with his lawyer while his testimony is in progress if the judge decides that there is a good reason to interrupt the trial for a few minutes."[74]

The Second Circuit also addressed "whether there can be a Sixth Amendment violation when the only attorney-client communication prohibited was communication about the defendant's testimony" in *United States v. Triumph Capital Group, Inc.*"[75] In *Triumph Capital*, the defendant's testimony was not finished by the trial's recess at the end of the day.[76] At this time, defendant's counsel informed the court that he wanted to " 'talk to [the defendant] about his testimony' and that '[he] just want[ed] to make sure that no one

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[71] *Id.* (emphasis added).

[72] *Id.*

[73] *Perry*, 488 U.S. at 287. In the event that discussion between the attorney and defendant is appropriate, the judge may still prohibit discussion of the ongoing testimony. *Id.* at 285, n.8; *see* People v. Stroner, 432 N.E.2d 348, 351 (Ill. 1982) (holding that there is no violation of right to counsel when a judge allowed discussion between defendant and attorney which was limited to matters other than testimony during a half-hour recess).

[74] *Id.* at 284-85.

[75] 487 F.3d 124, 132 (2d Cir. 2007).

[76] *Id.* at 127.

views that as any kind of a violation of the rules.' "[77] The prosecution responded that "such discussions should not be allowed" which led the district court to order, over objection, "that defense counsel not talk with the defendant about his testimony during the evening recess."[78] The court recessed at 5:10 pm, which was when the prosecution "quickly realized that the court order might raise constitutional concerns, and within twenty minutes, informed both the court and defense counsel . . . that it would be researching the propriety of the restriction."[79]

Shortly thereafter, the prosecution motioned to have the order rescinded, relying on a Seventh Circuit decision, which held that an overnight ban on attorney-client communication was unconstitutional.[80] After several unsuccessful attempts, the court was able to reach the defendant's counsel at 8:00 p.m. and rescinded the order via conference call.[81]

The following day, the court recessed in the morning before the defendant's trial resumed, in an attempt to rectify any harm created by the restriction.[82] This recess was "meant to give [the defendant] as much time as he needed to discuss the case with his attor-

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[77] *Id.*

[78] *Id.* at 128.

[79] *Id.*

[80] *Triumph Capital*, 487 F.3d at 128. *See* United States v. Santos, 201 F.3d 953 (2000). The prosecution noted that the second circuit "had not spoken on the issue," yet moved to rescind the order "even though it believed that *Santos* was wrongly decided." *Triumph Capital*, 487 F.3d at 128 n.2.

[81] *Id.* The attorney was unable to contact the defendant until after 9:30 pm that evening, as he was "seeking spiritual guidance" at the time. *Id.*

[82] *Id.*

ney."[83] However, defense counsel argued that any conversations made at that time would not be the equivalent of speaking to his client immediately after his testimony, as the recollection of his testimony was " 'hazy.' "[84] Ultimately, the attorney conferred with his client for forty-five minutes, and claimed that he had sufficient time to proceed.[85]

Despite this affirmation, the defense attorney motioned for a mistrial, which was denied.[86] The court reasoned that the ban on communication, which was approximately three hours in length, was "more analogous to the brief recess and narrowly tailored prohibition in *Perry* than to the overnight denial of assistance of counsel in . . . *Geders*."[87] The circuit court of appeals affirmed, stating that the relationship between *Geders* and *Perry* does not offer a "bright-line" rule for deciding when and what communications are permissive, subjecting each case to " 'an intensely context-specific inquiry, the precise contours of which have yet to emerge.' "[88] However, the court acknowledged that "all of the federal circuit courts that have considered the issue have concluded that under *Perry* and *Geders* a district court may not order a defendant to refrain from discussing his ongoing testimony with counsel during an overnight recess, even if all other

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[83] *Id.*

[84] *Id.* The attorney also argued that he did not take any notes regarding the testimony, assuming he would have been able to communicate with his client during the evening recess. *Id.* The court defended this contention by addressing the fact that counsel never requested a transcript of the testimony which was available. *Id.* at 128-29.

[85] *Triumph Capital*, 487 F.3d at 129.

[86] *Id.*

[87] *Id.*

[88] *Id.* at 131 (quoting Serrano v. Fischer, 412 F.3d 292, 300 (2d Cir. 2005)).

communication is allowed."[89] Alternatively, if the ban only lasted several hours, it would have arguably been deemed trivial and it would not have "meaningfully interfere[d] with the defendant's Sixth Amendment right[] to effective assistance of counsel."[90] However, the court cautioned that the focal point in its determination hinged on the "constitutional quality of the communications affected," rather than the duration of the ban.[91]

New York courts also addressed the validity of attorney-client bans on communication when it decided *People v. Blount*.[92] In *Blount*, the defendant was testifying in his own defense when the trial court recessed for the weekend and "directed defense counsel, over . . . objection, not to discuss the defendant's testimony with the defendant '*at all*.' "[93] The appellate division reversed, and distinguished the case from *Perry*, holding that *Geders* controlled, and that "unrestricted access" to counsel is appropriate in the "context of a long recess."[94] The Second Department succinctly relied on the text of *Ged-*

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[89] *Id.* at 132.

[90] *Triumph Capital*, 487 F.3d at 135. The court explained its basis for a ban on communication which is trivial by looking at:

> [T]he totality of the circumstances, a court order banning communications during a trail recess—even if unjustified—is issued in good faith and does not actually prevent the defendant from communicating, unfettered, with his attorney about the full panoply of trial related issues prior to the trial resuming, nor meaningfully interferes with the quality of advice and counsel the attorney is able to provided during that recess—the fundamental values of the Sixth Amendment that *Geders* protects have not be subverted. In such limited circumstances a restriction may be deemed trivial and judged not to amount to a Sixth Amendment violation.

Id.

[91] *Id.* at 133 (citing United States v. Padilla, 203 F.3d 156, 160 (2d Cir. 2000)).

[92] 552 N.Y.S.2d 441 (App. Div. 2d Dep't 1990).

[93] *Id.* at 441 (emphasis added).

[94] *Id. See also* People v. Hagan, 446 N.Y.S.2d 91, 91 (holding that the following instruc-

ers and recognized, as the Supreme Court did, that discussions about testimony between the defendant and his attorney are inevitable, and such discussions do not compromise the basic right of assistance of counsel.[95]

The court of appeals revisited the constitutionality of such bans on communication several years later when it decided *People v. Joseph*.[96] In *Joseph*, the defendant testified on a Friday afternoon, and at the end of the day, the trial court directed the defendant not to communicate with his attorney regarding his testimony.[97] However, the court allowed communication regarding matters outside of the testimony.[98] Subsequently, the jury convicted the defendant, but his conviction was reversed by the appellate division.[99]

The court of appeals affirmed, holding that the overnight ban on communication violated the defendant's right to counsel under the U.S. Constitution and the New York Constitution.[100] The court relied on *Geders*, emphasizing "the importance for trial preparation of overnight discussion between defendant and client," and further stated that "[i]t is clear that the *critical factor* in determining whether a violation of the right to counsel occurred here is the *length of time* dividing the defendant's access to counsel contemplated by the trial

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tion was in violation of defendant's constitutional right to assistance of counsel: " 'I'm instructing you not to discuss with this witness . . . her testimony in any manner, shape or form, and I do not think that I am depriving her of her right to counsel. She's on the stand. She's being cross-examined, and I'm instructing you not to do it.' ").

[95] *Blount*, 552 N.Y.S.2d. at 442.

[96] 646 N.E.2d 807 (N.Y. 1994).

[97] *Id.* at 808.

[98] *Id.* This is a subtle distinction from *Blount*, where the court "permit[ted] defendant to discuss with his attorney matters . . . other than his own testimony. *Id.*

[99] *Id.*

[100] *Joseph*, 646 N.E.2d at 807.

court's ruling."[101]

The New York Court of Appeals has consistently applied *Geders* and *Perry* in the past, which is evident in *Joseph* and *Blount.* However, in *Umali*, the court of appeals stated that the "circumstances [were] comparable" to *Triumph Capital.*[102] The time of the ban was approximately three hours in each case, however the time to rectify the mistake was two and one-half days for Umali, compared to forty-five minutes in *Triumph Capital.*[103] In light of these circumstances, the court in Umali held that the ban was "insignificant" and therefore a reversal was not warranted.[104]

The holding in *Umali* is quite vexing. The court of appeals seemingly picked what they liked from *Triumph Capital*, abandoned the logic of *Geders*, and covered it up by making the same blanket warning the second circuit made: "[O]ur decision should not be construed as permitting prohibitions on attorney-client communications in all situations where additional time is afforded for attorney-client discussions before testimony resumes" due to the possibility that such restrictions may " 'substantially interfere with [the] right to effective assistance of counsel.' "[105]

Although one can argue that the factors relied on in *Triumph Capital* were completely amorphous, the court made the most sense

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[101] *Id.* at 808-09 (emphasis added). The court distinguished overnight bans from temporary bans on communications that occur during brief recess throughout the day. *See, e.g.*, People v. Enrique, 600 N.E.2d 229 (N.Y. 1992) (upholding a ban on communication that occurred during a lunch recess in the middle of defendant's cross examination).

[102] *Umali*, 888 N.E.2d at 1050.

[103] *Id.*

[104] *Id.*

[105] *Id.* at 1051.

of this difficult issue by predicating its holding based on the "constitutional quality" of the banned communication rather than on the duration of the ban itself, and set forth a well reasoned standard to determine if the ban in question was "trivial."[106] This logic of the second circuit failed to make it into the *Umali* opinion—instead the court did just the opposite—it relied on the time to cure as the determinative factor rather than the quality of the communication that was effected. Conversely, *Triumph Capital* emphasized that defendants' constitutional rights must be respected. The court declined to form a rule which would cure unconstitutional bans by simply providing the defendant additional time to consult with counsel prior to resuming testimony.[107] Granted, the ability to cure is not irrelevant, rather it is a factor that is viewed in "the totality of the circumstances that we must take into account."[108] However, when the Court of Appeals addressed this issue in *Joseph*, the court concluded its opinion by stating that "[i]t is clear that the *critical factor* in determining whether a violation of the right to counsel occurred here is the *length of time* dividing the defendant's access to counsel contemplated by the trial court's ruling," directly contradicting the logic set forth in *Triumph Capital*.[109]

It seems as if the New York courts are in limbo when issues concern the ban on attorney-client communication. *Joseph* and *Blount* correctly interpret *Geders* and *Perry* as the outer limits on

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[106] *Triumph Captial*, 487 F.3d at 133, 134-35.
[107] *Id.* at 134.
[108] *Id.*
[109] *Joseph*, 646 N.E.2d at 809 (emphasis added).

banned communications, ranging from fifteen minutes to seventeen hours. However, the cases that fall in the middle of the spectrum are exposed to the vulnerability of " 'an intensely context-specific inquiry, the precise contours of which have yet to emerge,' " due to this lack of a "bright-line" rule.[110] Cases at the margins involving *Geders* and *Perry* seem to be decided first, and justified in hindsight. The loose tests and amorphous factors can be easily argued in such a way that on any given day no consensus is found.

The court of appeals must respect the logic in *Geders*, which reminded us that skillful cross-examination would combat the threat of witness coaching and disingenuous testimony. Furthermore, the trial judge is in a position to control the flow of the trial, and when to take recesses. Postponing recesses may be a logical alternative, and "convenience occasionally must yield to concern for the integrity of the trial itself."[111]

As long as there is a lack of a bright line rule, the application of *Geders* and *Perry* will continue to plague attorneys and criminal defendants in New York. With respect to bans on attorney-client communications, even the best articulated analysis can be viewed as highly subjective and leave defendants vulnerable.

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[110] *Triumph Capital*, 487 F.3d at 131 (quoting *Serrano*, 412 F.3d at 300).
[111] *Geders*, at 425 U.S. at 91.

RIGHT AGAINST SELF-INCRIMINATION

United States Constitution Amendment V:

No person shall . . . be compelled in any criminal case to be a witness against himself . . . .

New York Constitution article I, section 6:

No person shall . . . be compelled in any criminal case to be a witness against himself or herself . . . .