

Circuit Court for Montgomery County  
Case No.: C-15-CR-21-000161

UNREPORTED  
IN THE APPELLATE COURT  
OF MARYLAND\*

No. 565

September Term, 2023

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SUONG NGUYEN

v.

STATE OF MARYLAND

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Wells, C.J.,  
Beachley,  
Raker, Irma S.  
(Senior Judge, Specially Assigned),

JJ.

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Opinion by Beachley, J.

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Filed: February 9, 2024

\*This is an unreported opinion. This opinion may not be cited as precedent within the rule of stare decisis. It may be cited for its persuasive value only if the citation conforms to Rule 1-104(a)(2)(B).

Suong Nguyen, appellant, was convicted of various sex offenses following a jury trial in the Circuit Court for Montgomery County. On appeal, he raises a single issue, which we have slightly rephrased: Did the trial court err when it instructed Mr. Nguyen that he could not speak with anyone, including his attorney, about the case or his testimony during an overnight recess between his direct examination and his cross-examination? The State concedes that the trial court’s instruction was improper, and that Mr. Nguyen is entitled to a new trial. We agree. Accordingly, we shall vacate the judgments and remand for further proceedings.

### **BACKGROUND**

Mr. Nguyen was charged with various sex offenses in three distinct cases which were consolidated and jointly tried before a jury. The State called numerous witnesses and rested its case on the third day of trial. On the fourth day of trial, the defense called eight witnesses, including Mr. Nguyen as its last witness. After the defense completed its direct examination of Mr. Nguyen, and before cross-examination began, the court recessed for the day and instructed the jury to return the next day by 9:20AM.<sup>1</sup>

After dismissing the jury, the following occurred:

THE COURT: Let the record reflect the jurors have left. I just want to make sure it’s clear that the defendant is -- I’m going to instruct him now that he’s hypothetically sitting in that chair overnight. You’re not going to be, but you’re still on the witness stand. You’re not permitted to talk to anyone about the case or your testimony.

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<sup>1</sup> Although the transcript does not indicate at what time the court dismissed the jury, it does reflect that the court noted that it was a good time to recess “since there’s only about 12 more minutes before we would normally be suspending for the day.”

And that includes your attorney and his paralegal, and no one else in your family, no other witnesses, nobody any more than they could come up here and have a private conversation with you while you're testifying. Okay. So that's the rule I'm going to direct you that you have to abide by that rule.

[DEFENSE COUNSEL]: Your Honor, I'm not certain that the Court can direct that he can't consult with his attorney.

THE COURT: Not about the case, not about his testimony.

[DEFENSE COUNSEL]: Okay.

THE COURT: If you know any rule that would permit you during the time he's on the witness stand to come up and talk to him about the case, I'd like to here [sic]. I mean, you know a lot, and if you know something I don't, I'm always willing to be educated.

[DEFENSE COUNSEL]: I don't know it all, and I may very well be wrong, but I just want to put that on the record.

THE COURT: Yeah. No. I understand. And I understand the importance of being able to confer with your client about the trial. But while he's technically still on the stand, that's where I think the line has to be.

[DEFENSE COUNSEL]: All right. Thank you, Your Honor.

At the conclusion of the trial on July 15, 2022, the jury found Mr. Nguyen guilty of twelve counts, including three counts of sexual abuse of a minor. On July 24, the defense filed a motion for a new trial alleging, among other things, that the court erred in prohibiting any communication between Mr. Nguyen and defense counsel during the overnight recess between his direct and cross examinations. Following a hearing, the court denied the motion. Thereafter, the court sentenced Mr. Nguyen to a total term of 60 years' imprisonment, all but 30 years suspended, to be followed by a five-year term of supervised probation. Mr. Nguyen noted a timely appeal.

## DISCUSSION

Mr. Nguyen asserts that the trial court “committed reversible error by instructing [him], over objection, that he not talk to his attorney about the case during the overnight recess between his direct and cross-examinations.” As noted, the State agrees that the court erred and, therefore, that Mr. Nguyen is entitled to a new trial. Both parties rely on the recent decision of the Supreme Court of Maryland in *Clark v. State*, 485 Md. 674 (2023), as well as the decision of the United States Supreme Court in *Geders v. United States*, 425 U.S. 80 (1976).

We begin by noting our agreement with the State that we should vacate the judgments and remand for a new trial even though the defense arguably waived any error related to the court’s directive to Mr. Nguyen and counsel about communication during the overnight recess. Because Mr. Nguyen would undoubtedly prevail in a post-conviction proceeding, we need not address whether defense counsel preserved the issue for appellate review. *See Bible v. State*, 411 Md. 138, 150–51 (2009) (In light of “[f]airness and the interests of judicial economy[,]” this Court should address an issue if necessary “to avoid an inevitable successful post-conviction proceeding.”).

In *Geders*, the United States Supreme Court addressed an issue strikingly similar to the issue presented in this case. The issue on direct appeal in *Geders* was whether a trial court’s order directing a defendant “not to consult his attorney during a regular overnight recess, called while [the defendant] was on the stand as a witness and shortly before cross-examination was to begin, deprived him of the assistance of counsel in violation of the

Sixth Amendment.” 425 U.S. at 81. The court gave the directive over the objection of defense counsel. *Id.* at 82–83. Following his conviction, the defendant raised the issue on appeal and the Court of Appeals for the Fifth Circuit affirmed the judgment, holding that Geders had failed to claim he was prejudiced by the order. *Id.* at 85–86. The Supreme Court granted certiorari and reversed.

Upon its review, the Supreme Court noted that this was “an overnight recess, 17 hours long.” *Id.* at 88. In multi-day trials such as Geders’s, the Supreme Court observed:

It is common practice during such recesses for an accused and counsel to discuss the events of the day’s trial. Such recesses are often times of intensive work, with tactical decisions to be made and strategies to be reviewed. The lawyer may need to obtain from his client information made relevant by the day’s testimony, or he may need to pursue inquiry along lines not fully explored earlier. At the very least, the overnight recess during trial gives the defendant a chance to discuss with counsel the significance of the day’s events.

*Id.*

The Supreme Court held that the trial court’s order prohibiting Geders “from consulting his attorney ‘about anything’ during a 17-hour overnight recess between his direct- and cross-examination impinged upon his right to the assistance of counsel guaranteed by the Sixth Amendment.” *Id.* at 91. Accordingly, the Supreme Court reversed the judgment. *Id.* at 91–92.

In *Clark*, the Maryland Supreme Court addressed a “no-communication order” prohibiting Clark from consulting with his attorney during an overnight recess in his murder trial. 485 Md. at 679. Like Mr. Nguyen, and the defendant in *Geders*, the directive came at the end of the day after Clark’s direct examination and prior to his return the next

day for cross-examination. *Id.* at 681. Clark was directed not to talk to anybody “about the case[,]” including his attorney and the paralegal assisting defense counsel. *Id.* Clark’s counsel failed to object to the order, and the jury ultimately convicted Clark of manslaughter and other offenses. *Id.* at 682. On direct appeal, this Court declined to consider Clark’s argument that the no-communication order deprived Clark of the effective assistance of counsel after concluding that the issue was not preserved for appellate review and that it would be best addressed in a post-conviction proceeding. *Id.*

In a subsequent post-conviction proceeding, Clark testified but was not asked and did not testify about whether he in fact had wanted to converse with his trial counsel during the overnight recess. *Id.* at 684. The post-conviction court granted relief and ordered a new trial after concluding that the no-communication order conflicted with *Geders* and violated Clark’s Sixth Amendment rights. *Id.* The State’s application for leave to appeal was granted, and a divided panel of this Court reversed the judgment of the post-conviction court after concluding that Clark had failed to show that he was prejudiced by the no-communication order and declining to presume that he was prejudiced. *Id.* at 685. The Maryland Supreme Court granted certiorari and reversed the decision of this Court.

A majority of the Maryland Supreme Court held that, “[g]iven the duration of the order (which covered a lengthy overnight recess) and the scope of the order (which applied to all communications about the case), the order prevented communication between Mr. Clark and trial counsel and constituted the actual denial of the assistance of counsel in violation of the Sixth Amendment and the Maryland Declaration of Rights.” *Id.* at 680.

Prejudice was thus presumed. *Id.* In other words, the defendant was not required to prove he actually suffered prejudice as a result of the order because prejudice was presumed in this instance. *Id.* at 739.<sup>2</sup>

Turning to the case before us, the no-communication order directed to Mr. Nguyen was substantially the same as those under scrutiny in *Geders* and *Clark*, and we agree with the parties that the decisions in those cases are controlling. In ordering Mr. Nguyen not “to talk to anyone about the case or your testimony” during the overnight recess between his direct and cross-examination, the court violated his Sixth Amendment right to counsel. Accordingly, Mr. Nguyen is entitled to a new trial.

**JUDGMENTS OF THE CIRCUIT COURT  
FOR MONTGOMERY COUNTY VACATED.  
CASE REMANDED FOR FURTHER  
PROCEEDINGS. COSTS TO BE PAID BY  
MONTGOMERY COUNTY.**

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<sup>2</sup> Although three Justices dissented, in his dissenting opinion (joined by the other two dissenters), Justice Gould noted that, where defense counsel objects to an order barring communication between a defendant and his counsel during an overnight recess, “there is no question that, under *Geders v. United States*, 425 U.S. 80, 96 S. Ct. 1330, 47 L. Ed. 2d 592 (1976), in a direct appeal, the defendant would automatically be entitled to a new trial.” 485 Md. at 751 (footnote omitted).