In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

JACOB TOWNLEY HERNANDEZ,

Defendant and Appellant.

Case No. S178823

FILED WITH PERMISSION

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

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ISSUE PRESENTED

Whether the trial court's order, precluding counsel from discussing with the defendant a sealed declaration of a testifying prosecution witness and a transcript of that witness's plea-bargain proceedings, amounted to a complete deprivation of the right to counsel under the Sixth Amendment not amenable to harmless error review, or instead implicated the right to "effective" assistance of counsel so that the defendant must demonstrate probable prejudice to establish a Sixth Amendment violation and to obtain reversal of the judgment?

INTRODUCTION

Appellant Townley[1] and three accomplices were charged with attempted murder of Javier Lazaro. Before trial, two accomplices entered plea bargains, under which they were required to provide declarations under penalty of perjury that detailed the offense. The trial court sealed the declarations and the change-of-plea transcripts to prevent proof that the two accomplices had inculpated others in the crime from circulating within the prison system, possibly endangering their lives.

One of those two accomplices, Flores, later testified for the prosecution in a joint trial of Townley and the remaining codefendant. As part of pretrial discovery, Townley's attorney had received sheriff's department reports that summarized two statements by Flores and a copy of a tape-recorded interview with Flores. Townley's counsel also received copies of Flores's plea-bargain declaration and the change-of-plea transcript in Flores's case, for use in counsel's cross-examination of Flores, but counsel was ordered not to show those documents to, or discuss their content with, Townley or anyone else, including a defense investigator.

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[1] For the sake of clarity, we refer to appellant as Townley because that is the name used in the opinion below by the Court of Appeal.

Townley and the codefendant were convicted of attempted premeditated murder, and the jury found that Townley had personally used a gun and personally inflicted great bodily injury.

The Court of Appeal found that the trial court's consultative restriction on Townley's counsel regarding the sealed documents in Flores's case was not narrowly tailored or adequately justified by a sufficient showing of potential danger to Flores, and, accordingly, held the trial court's order was error. Although federal court decisions validate consultative restrictions on confidential topics in appropriate circumstances (see, e.g., *In re Terrorist Bombings of U.S. Embassies in East Africa* (2d Cir. 2008) 552 F.3d 93, 118, 120-128; *Morgan v. Bennett* (2d Cir. 2000) 204 F.3d 360, 365-368; *United States v. Padilla* (2d Cir. 2000) 203 F.3d 156, 158-160), the People do not challenge the Court of Appeal's finding that the record fails to support the restriction in this case. (*People v. Hernandez* (Nov. 9, 2009, H031992) at pp. 20-22 (hereafter "Typed Opn.").)

The People do challenge the Court of Appeal's holding that the consultative restriction amounted to a per se violation of Townley's Sixth Amendment right to effective assistance of counsel that required reversal without inquiring into the impact of the ban on counsel's performance or on the outcome of the trial. As will be shown, the error here does not fall within the limited category of errors warranting a "presumption" of counsel's ineffectiveness; nor is it one of the rare "structural" defects in trial proceedings that is unamenable to harmless-error review. Accordingly, the judgment of the Court of Appeal must be reversed and the matter remanded with directions for the appellate court to determine whether the assumed error adversely affected counsel's performance in a manner that prejudiced the outcome of the trial.

STATEMENT OF THE CASE AND FACTS

A. Procedural Background

Javier Lazaro was innocently out walking when he was chased by three men alighting from a passing car and shot multiple times. Following an investigation, Townley, Ruben Rocha, Jesse Carranco, and Noe Flores were arrested and charged with attempted murder.[2] (Typed Opn. at p. 2.)

On January 25, 2007, the court granted Townley's motion to sever his trial from that of his codefendants. (Typed Opn. at p. 5.)

"Before [Townley's] trial[,] both Flores and Rocha entered into plea agreements in which the prosecution would reduce the charges in exchange for their declarations under penalty of perjury. Flores thereafter pleaded guilty to assault with a firearm subject to a three-year prison term, and the prosecutor dismissed the attempted murder charge against him. Rocha pleaded guilty to assault with force likely to produce great bodily injury, with an expected sentence of two years. On the same date that Flores and Rocha entered their pleas, April 17, 2007, the prosecution filed a motion to reconsolidate the cases against Carranco and Townley, which the court subsequently granted on April 26, 2007." (Typed Opn. at p. 5.)

B. The Trial Court's Challenged Order

Flores entered his guilty plea in a closed proceeding, and the reporter's transcript of the hearing was sealed by an order of the trial court. As a condition of his plea, Flores executed a declaration under penalty of perjury detailing his involvement in the Lazaro shooting. The court sealed the declaration, to be opened only if Flores was called as a witness at trial to testify about any matters covered in the declaration. The trial court

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[2] Townley and Carranco were charged as adults under Welfare and Institutions Code section 707, subdivision (d)(2).

stated that the sealing order was for the protection of Flores, who had been stabbed in jail, to prevent evidence of his cooperation from circulating in the jail or prison populations. (Typed Opn. at pp. 6-7, 21.)[3]

Before trial, Townley's and Carranco's counsel were provided discovery, which included sheriff's department reports that summarized statements by several witnesses, including those made by Flores in two interviews. The defense attorneys also received a copy of the sheriff's tape-recorded interview with Flores. (See 7 CT 1516-1517, 1543-1564 [motion to sever filed by Townley summarizes Flores's interview with sheriff's personnel and includes as exhibits a partial copy of sheriff's report and partial copy of transcript of taped interview with Flores][4]; 8 CT 1743, 1745-1746 [Townley's counsel acknowledges having reviewed sheriff's interview with Flores and summarizes content of interview in a discovery motion]; see 1 RT 45-46; 2 RT 387-388; 3 RT 580-581; 8 RT 1924 [court references the police reports/witness interviews provided in discovery].)

On April 24, 2007, Townley's counsel moved to compel discovery of Flores's sealed declaration. (8 CT 1741-1742.) On or about April 27, 2007, the prosecution provided both defendants' counsel a copy of Flores's sealed declaration, with the understanding that neither the declaration's existence nor its content would be discussed with their clients or others. (3 RT 551-552, 569 [counsel for both defendants acknowledge receipt of document]; 8 CT 1782; 4 RT 761 [counsel for Townley acknowledges

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[3] The same sealing order applied to codefendant Rocha. Rocha, however, was not called as a witness at the trial. Consequently, the appellate claim resolved below concerned only the court's consultative restriction on defense counsel as it related to witness Flores.

[4] On January 14, 2009, the Court of Appeal took judicial notice of the entire sheriff's report. The entire tape-recorded interview with Flores provided to the defense in discovery does not appear in the appellate record.

receipt of document]; Court's Exh. 6A (sealed) [unsigned copy of declaration].)

Counsel for Carranco and Townley jointly moved to vacate the order preventing them from discussing with their clients the declarations of Rocha and Flores. (Aug. CT 34; 3 RT 568, 584.) In a hearing on May 3, 2007, from which Carranco and Townley were excluded (3 RT 549, 584), the court denied the motion, finding that it would be improper to rescind the sealing order without counsel for Flores and Rocha present. (3 RT 580.) The court emphasized that counsel for Carranco and Townley remained free to discuss with their clients the voluminous police reports and witness statements provided in discovery, as the restriction only related to discussing the "odds and ends that are in the signed statements from Mr. Flores and Mr. Rocha." (3 RT 580-581; see also 8 RT 1924.) The court observed that the defendants would be present to hear trial testimony by the witnesses, and that if Flores or Rocha testified inconsistently with their respective declarations, the witness's declaration would be unsealed and available to counsel for cross-examination. (3 RT 581-582.)

On May 4, 2007, counsel received copies of the transcript of Flores's change-of-plea hearing subject to the restriction that counsel not show the transcript to the defendants or defense investigators. (4 RT 758-759, 761; Court's Exhibit 3A [transcript of proceedings on April 17, 2007 (sealed)].)

C. Flores's Trial Testimony

On the second day of trial testimony, May 11, 2007, Flores testified as a prosecution witness. Flores's plea agreement required his sworn declaration describing the offense, but not his testimony. (11 RT 2697-2698; 12 RT 2874-2876, 2884-2885, 2887, 2905.)

At trial, Flores recounted that, around 7:00 p.m. on February 17, 2006, he received a call from his friend, Townley, asking Flores to "do[] a ride." (8 RT 1892-1893; 11 RT 2707-2708; 12 RT 2821-2824, 2832; 20 RT 4856-

4857.) Flores drove his 1992 white Honda Accord to pick up Townley and his girlfriend. (8 RT 1891, 1899; 12 RT 2825.) Townley wore a red and black plaid flannel jacket. (12 RT 2893, 2914, 2917-2918; 14 RT 3370; 17 RT 4287-4288.) In the car, Townley showed Flores a small black handgun. (8 RT 1900-1901, 1903-1904; 12 RT 2831.)

Townley directed Flores to drive to Watsonville, where they picked up Carranco and Rocha, neither of whom Flores had met before. (8 RT 1888-1890, 1905-1908; 11 RT 2705-2706; 12 RT 2832, 2834-2836; 20 RT 4890.) At Carranco's direction, Flores drove to Anthony Gonzalez's apartment on Harper Street, where Carranco and Gonzalez had a private conversation. (8 RT 1912-1914, 1917-1918; 12 RT 2839, 2843-2844, 2847.) Afterward, Carranco told Flores to drive to the Ocean Terrace Apartments, a large complex located at 17th Avenue and Merrill Street, which was known as Sureno gang territory. (8 RT 1912; 12 RT 2850-2851, 2855; 17 RT 4019-4020, 4023; 18 RT 4266.)

They saw a man walking on the sidewalk wearing a blue sweatshirt. (12 RT 2928; 13 RT 3051-3052.) Carranco in a "[k]ind of urgent" voice instructed Flores to "turn around" and "pull over," and Flores did so. (11 RT 2713-2715; 12 RT 2755-2756, 2853.) Carranco grabbed a baseball bat from the front seat of the car and jumped out of the car with Townley and Rocha. (12 RT 2759-2761, 2766-2767, 2826, 2857, 2911.) As Flores waited in the driver's seat with the engine running, he heard what sounded like firecrackers. Carranco, Townley, and Rocha ran back to the car where Carranco "urgently" told Flores to "go." (12 RT 2774, 2776-2780, 2857, 2860, 2915.) Flores sped away and followed Carranco's directions back to Gonzalez's apartment. (12 RT 2780-2781, 2784.)

On May 11, 2007, the trial court conducted a brief hearing in the presence of Flores's counsel during a break in Flores's direct examination. The court ordered that Flores's declaration be provided to both defense

counsel,[5] but reiterated that the declaration remained "subject to the same nondisclosure to clients, to investigators, to other attorneys, it's only to be used by [Townley's counsel] and [Carranco's counsel] for purposes of doing cross-examination of Mr. Flores." (8 RT 1920-1921; see also 8 RT 1923-1924 [court overrules request by Carranco's counsel to unseal Flores's declaration].)

Thereafter, on May 23, 2007, defense counsel used Flores's declaration extensively to cross-examine Flores.[6] Both counsel elicited the fact that the declaration stated that on the night of the crime, Flores wore a red and black plaid shirt, which was described by witnesses as the shirt worn by the shooter. (12 RT 2818-2821, 2893-2894.)[7] Counsel for Carranco brought out Flores's admission in the declaration that he touched the clip of Hernandez's gun, a fact Flores denied at trial. (12 RT 2890.) Counsel also brought out that Flores did not mention in his declaration Carranco directing him where to drive that evening, a detail he provided at trial. (12 RT 2903-2904.) Both counsel asked Flores about his having originally been charged with attempted murder, which carried a maximum term of life in prison, and his pleading guilty to assault with a firearm for a substantially reduced three-year prison sentence. (12 RT 2874-2876, 2884-

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[5] This appears to be the declaration provided to counsel by the prosecutor on April 27, 2007. (8 CT 1782; 3 RT 551, 569; 4 RT 761.)

[6] Flores's declaration was marked as Defense Exhibit B, but was not admitted into evidence. (See 12 RT 2885-2886.)

[7] In response to this inquiry, Flores explained that he had worn a black shirt on the night of the shooting and that the contrary statement in the declaration was wrong. (12 RT 2818-2821, 2893-2894.) Flores's testimony was consistent with other evidence, including Townley's girlfriend's testimony that on the night of the shooting Townley wore a black and red pendleton shirt that she had given him as a gift (14 RT 3370), and evidence that Townley was in possession of a black and red shirt during an interview with police later that night (15 RT 3531; 20 RT 4830).

2885; 13 RT 3041.) Counsel for Carranco brought out that at the time of his plea agreement, Flores had to sign a declaration under penalty of perjury that set forth the circumstances surrounding the shooting. (12 RT 2886-2887.) Counsel for Carranco elicited on cross-examination that the declaration included these provisions: (1) "I understand that I have to acknowledge to the Judge in open court and under oath the contents of this declaration are true at the time I enter my plea"; and (2) "I understand that if called as a witness I must tell the truth." (12 RT 2908-2909.) Notwithstanding the permissible use by both counsel during Flores's cross-examination of information in the plea-bargain documents, the documents themselves remained under seal during trial. The trial court instructed the jury, "[Y]ou're entitled to know some of the circumstances involving Mr. Flores's plea in this case because it goes to an issue of his credibility, and it's one of the factors that you'll be told you can consider in weighing his credibility." (12 RT 2876-2877.) It further instructed that "[t]he declaration of Noe Flores that you heard about in this case was a part of his plea agreement with the District Attorney's office." (21 RT 5071.)

D. Further Prosecution Evidence

The man wearing the blue sweatshirt, 29-year-old Javier Lazaro, lived at the Ocean Terrace Apartments. He was not a gang member. (6 RT 1279-1281.) Lazaro was walking towards his apartment around 9:00 p.m., when he noticed an older white Honda stop in the street, and heard a heated exchange and someone say "come" in Spanish. Lazaro ignored the commotion and kept walking. (6 RT 1283-1287, 1306-1309; 7 RT 1505-1506; 11 RT 2650-2651.) Three or four men jumped out of the car, ran towards him, and in Spanish demanded to know whether he was a Norteno or a Sureno. Lazaro fled, terrified. (6 RT 1312, 1316-1317; 7 RT 1508, 1512.) Something hit him, and he fell. (6 RT 1297, 1300-1301.)

Lazaro was shot five times, and he sustained injuries to his right hand, his right knee, his left thigh, his back, and his abdomen. The bullet that entered his back fractured his rib and bruised his lung. Two bullets were not surgically removed and remained in his body. (11 RT 2513-2528, 2532, 2536.) He did not see who had shot him. (6 RT 1312, 1316-1317; 7 RT 1508, 1512.)

Ginger Weisel and David Bacon witnessed the attack. Weisel saw three men quickly approach Lazaro, call out "mother-fucking scrap," and demand to know where Lazaro was from. Lazaro responded that he did not "claim" anything and was simply going home. One man approached within three feet of Lazaro and shot him six to eight times in rapid succession. Lazaro fell to the ground as the man continued to shoot. The other two men stood within two to seven feet of the shooter. (11 RT 2650-2653, 2679, 2682, 2691-2692; 20 RT 4864-4865.) The shooter wore a red and black plaid shirt and was approximately five feet nine inches tall. (11 RT 2653-2655, 2668, 2671; 14 RT 3363-3365.)[8]

Bacon was driving his car when he heard what sounded like firecrackers. He turned around and saw a man standing in a shooting position, with his arm outstretched and pointed towards the ground. Bacon saw muzzle flashes and heard five or six shots in rapid succession. Bacon was about 50 percent certain the shooter wore a plaid jacket. A second person stood within 20 feet of the shooter acting as a "lookout." (7 RT 1526-1534, 1538, 1540-1541; 8 RT 1782-1784, 1797, 1799.)

Randi Fritts-Nash was drinking at the Harper Street apartment when Townley, Flores, Carranco, and Rocha returned. (14 RT 3230, 3285-3289,

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[8] Townley was about five feet seven inches tall. Carranco was about five feet six inches tall. Rocha was about five feet nine inches tall. Flores was between five feet six inches and five feet seven inches tall. (20 RT 4837, 4844, 4846; 21 RT 5067-5069.)

3292-3294.) She heard a car pull up and, shortly thereafter, a tap on the window. Gonzalez went to the window and spoke briefly with someone outside. The voices outside sounded anxious and fearful, and Fritts-Nash overheard the words "hit" and "scrap." She could not say who uttered them. (13 RT 3111-3118; 14 RT 3282-3283, 3298-3300, 3550-3551; 16 RT 3874; 17 RT 4022.) Minutes later, Townley, Carranco, Flores, and Rocha entered the apartment. (12 RT 2790-2792, 2864-2865; 13 RT 3121-3123.) Fritts-Nash recounted that Townley wore a red and black plaid jacket and that he referred to the Watsonville Nortenos at one point in the conversation. (13 RT 36123-3124, 3129-3130; 14 RT 3304.) After Carranco and Gonzalez conversed in hushed tones, Carranco and Rocha left in a white sport utility vehicle. (12 RT 2793-2796, 2798, 2800, 2866-2867; 13 RT 3126-3127, 3138-3139; 14 RT 3305-3308, 3311, 3342-3343.)

Not long after, police arrived at the Harper Street apartment, which was a known gang hangout. (15 RT 3510-3513.) As police spoke to people in the living room, Townley and Fritts-Nash remained in Gonzalez's bedroom. (13 RT 3137; 14 RT 3313.) Townley removed a small black gun from his pocket and wiped it down for fingerprints. He told Fritts-Nash that he needed to hide the gun and that he was "looking at 25 to life." He secreted the gun in one shoe and a small velvet bag of bullets in the other. When Fritts-Nash asked if he shot someone, Townley rolled his head in a circular fashion and did not deny it. (13 RT 3140-3146; 14 RT 3317-3324.)

In a later search, police found a .25-caliber handgun and 20 live rounds of .25-caliber ammunition on Townley. (9 RT 2063-2068, 2072; 11 RT 2577.) Five gunshot casings recovered at the crime scene were the same caliber and manufacturer as those found in Townley's shoe. (17 RT 4029, 4032, 4047.) Townley's hands and the sleeves of his red and black plaid jacket tested positive for gunshot residue, with the largest

concentration on the right hand and the right shirt sleeve. (9 RT 2069-2070; 13 RT 3066-3069, 3073-3077, 3080.)

E. Defense Case

Townley did not testify. He called Lori Kaminski as an expert in gunshot residue. (21 RT 5036.) She explained various ways a person can come into contact with gunshot residue without actually firing a gun. She opined that it is unreliable to conclude that a person fired a gun based solely on the presence of gunshot residue on that person's hands or clothing. (21 RT 5036, 5039-5040, 5042-5043, 5047-5048, 5052, 5061, 5065.)

F. Verdict and Appeal

A jury convicted Townley of willful, premeditated, and deliberate attempted murder with personal use of a gun and personal infliction of great bodily injury. (9 CT 2004, 2024-2030.) He was sentenced to life imprisonment for attempted murder and to 25 years to life for the firearm enhancement. (12 CT 2884-2885, 2887.)

On appeal, Townley claimed a violation of his Sixth Amendment right to consult his attorney. The claim was based on the trial court's order prohibiting defense counsel from disclosing to Townley the contents or existence of the declaration executed by Flores and the change-of-plea transcript prepared in Flores's case.

Pursuant to an order of the Sixth District on April 15, 2008, the plea transcripts of Flores and Rocha, and copies of their declarations were provided to appellate counsel, but remain under seal. (Court's Exhibits 3A, 4A, 5A, 6A; RT 761.)

The Court of Appeal reversed. It declared that the trial court's consultation restriction on Townley's attorney with respect to the sealed documents in Flores's case was not narrowly tailored or adequately justified by concerns for witness safety. (Typed Opn. at pp. 18-22.) It held

the order violated Townley's Sixth Amendment right to the "effective assistance of counsel." (Typed Opn. at p. 22.)

The Court of Appeal refused to apply the two-prong test of ineffective assistance set forth in *Strickland v. Washington* (1984) 466 U.S. 668 (*Strickland*), and therefore never determined that the order had an adverse effect on counsel's performance that resulted in actual prejudice. In rejecting such an analysis, it observed that "'"[a]ctual or constructive denial of the assistance of counsel altogether" [citation], is not subject to the kind of prejudice analysis that is appropriate in determining whether the quality of a lawyer's performance itself has been constitutionally ineffective.'" (Typed Opn. at p. 22, quoting *Perry v. Leeke* (1989) 488 U.S. 272, 280 (*Perry*).) Nor did the appellate court conduct harmless error analysis after finding the constitutional violation. (Typed Opn. at pp. 22-24.) Instead, the Court of Appeal held that the order impinging the consultative aspect of counsel's representation was a "structural" defect requiring automatic reversal. (Typed Opn. at pp 23-24.)[9]

In light of this conclusion, the court did not reach Townley's claims of prosecutorial misconduct and improper judicial comment. (Typed Opn. at p. 24.)

Responding to a separate claim in the event of retrial, the Court of Appeal held that it was proper to withhold from the defense previous draft versions of Flores's declarations, which the witness had declined to sign. The court found that the unsigned declarations were not relevant

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[9] Carranco separately appealed his judgment. (*People v. Carranco*, Case No. H032412.) Carranco's and Townley's appeals were not consolidated for briefing or decision. Carranco joined in Townley's claimed Sixth Amendment violation without offering additional briefing. On February 24, 2010, the Court of Appeal reversed Carranco's conviction in an unpublished opinion adopting its analysis in this case. On April 5, 2010, the People filed a petition for review. (Case No. S181567.)

impeachment evidence. (Typed Opn. at pp. 26-27.) Alternatively, on an assumption that Flores's unsigned prior draft declarations were material evidence favorable to Townley, the Court of Appeal held that the defense's lack of access to Flores's draft declarations was harmless beyond a reasonable doubt: "The jury was fully informed of the details of the plea bargain between Flores and the prosecution. He was cross-examined on the discrepancy between his testimony and his declaration, including the statement in the declaration that he had been wearing a 'red and black Pendleton shirt' on the night of the shooting. In addition, the court instructed the jury that Flores's declaration was part of his plea agreement with the prosecution. The withholding of the earlier versions offered to Flores was not prejudicial to Townley." (Typed Opn. at p. 27.)

This Court granted the People's petition for review.

SUMMARY OF ARGUMENT

The Sixth Amendment right to effective assistance of counsel exists to ensure the defendant's right to receive a fair trial. (*United States v. Cronic* (1984) 466 U.S. 648, 658 (*Cronic*).) "Absent some effect of challenged conduct on the reliability of the trial process, the Sixth Amendment guarantee is generally not implicated." (*Ibid.*) Accordingly, in the mill-run of cases, *Strickland* calls for a determination of "'actual ineffectiveness'" under the facts of the particular case. (*Strickland*, *supra*, 466 U.S. at p. 686.) To make out such a constitutional violation, the defendant must show that counsel's performance fell below an objective standard of reasonableness and that counsel's failure so affected the adversary process as to undermine confidence in the result of the trial.

In rare and narrowly defined circumstances, a Sixth Amendment violation is shown, and reversal is mandated, absent an individual assessment of counsel's performance or the effect thereof on the outcome of the case. Such circumstances include where "counsel was either totally

absent, or prevented from assisting the accused during a critical stage of the proceeding." (*Cronic*, *supra*, 466 U.S. 659, fn. 25.) In *Geders v. United States* (1976) 425 U.S. 80, 91 (*Geders*), the Court reversed a conviction without an assessment of prejudice where the trial court denied the defendant access to counsel altogether during a 17-hour recess in the middle of the defendant's trial testimony.

Unlike in *Geders*, the trial court's order preventing Townley and his counsel from consulting about a part of the evidence—namely Flores's declaration and change-of-plea transcript—did not result in an "'[a]ctual or constructive denial of the assistance of counsel altogether.'" (*Perry*, *supra*, 488 U.S. at p. 279, quoting *Strickland*, *supra*, 466 U.S. at p. 692.) Counsel was not prevented from meeting with Townley, from discussing defense strategy, or from investigating the case. Townley and his counsel knew of Flores's identity and received discovery of his pretrial statements to sheriff's personnel. Counsel received the sealed documents for use in cross-examining Flores, and was free to discuss that testimony with his client. Accordingly, the Court of Appeal erred in deeming the limited consultative restriction in this case to be a structural defect akin to a complete denial of counsel.

Neither the United States Supreme Court nor this Court has considered what test applies to a consultative ban on attorney-defendant communication regarding specified topics or items of evidence. *Cronic* holds that discrete errors in defense counsel's performance, whether caused by counsel's own omission or by an external source, must be assessed under the *Strickland* framework. (466 U.S. at p. 662 & fn. 31, p. 666 & fn. 41.) Applying that framework, to establish a constitutional violation, it was defendant's burden to show that, as a result of the consultative restriction, "counsel's performance was deficient" and that "the deficient performance prejudiced the defense." (*Strickland*, *supra*, 466 U.S. at p. 687.)

Ultimately, however, even if prejudice need not be shown to make out a Sixth Amendment violation where the trial court erroneously interferes with attorney-client communications on a relevant defense topic, that conclusion does not require per se reversal as the appellate court held. Any Sixth Amendment error in this case should remain subject to proof by the state that the error was harmless beyond a reasonable doubt. Because the consultative restriction on specified items of evidence did not undermine the adversarial framework of the trial and can be quantitatively assessed for prejudice in the context of the trial record as a whole, the appellate court erred in dispensing with harmless-error review.

ARGUMENT

I. THE LIMITATION PLACED ON TOWNLEY'S CONSULTATION WITH HIS COUNSEL REGARDING SPECIFIC ITEMS OF EVIDENCE DID NOT DENY COUNSEL'S ASSISTANCE ALTOGETHER AND DID NOT WARRANT REVERSAL OF THE CONVICTION WITHOUT AN ASSESSMENT OF PREJUDICE

A. Overview of Structural Error

Arizona v. Fulminante (1991) 499 U.S. 279 (*Fulminante*) divided constitutional error into two classes: "'trial error'" which "occurred during the presentation of the case to the jury," the effect of which may "be quantitatively assessed in the context of other evidence presented in order to determine whether [the error was] harmless beyond a reasonable doubt" (*id.* at pp. 307-308), and "structural defects," which "defy analysis by 'harmless-error' standards" because they "affec[t] the framework within which the trial proceeds" and are not "simply an error in the trial process itself" (*id.* at pp. 309-310). Structural errors "'infect the entire trial process,' [citation], and 'necessarily render a trial fundamentally unfair,' [citation]. Put another way, these errors deprive defendants of 'basic protections' without which 'a criminal trial cannot reliably serve its

function as a vehicle for determination of guilt or innocence . . . and no criminal punishment may be regarded as fundamentally fair.' [Citation.]" (*Neder v. United States* (1999) 527 U.S. 1, 8-9 (*Neder*).)

Because it is difficult or impossible to assess the prejudicial effect of structural error on the ultimate fairness of the trial (*United States v. Gonzalez-Lopez* (2006) 548 U.S. 140, 149, fn. 4 (*Gonzalez-Lopez*)), such errors "defy analysis by 'harmless error' standards." (*Fulminante, supra,* 499 U.S. at pp. 309-310.) An error may also qualify as structural where prejudice is essentially irrelevant to safeguarding the constitutional right at issue, such as where the defendant is denied his right to self-representation. (*Gonzalez-Lopez, supra,* at p. 149, fn. 4.)

Included in the list of "structural defects" are the total deprivation of the right to counsel at trial (*Gideon v. Wainwright* (1963) 372 U.S. 335), the denial of the right of self-representation (*McKaskle v. Wiggins* (1984) 465 U.S. 168, 177-178, n. 8), the denial of the right to counsel of choice (*Gonzalez-Lopez, supra*, 548 U.S. at p. 152), the denial of the right to a public trial (*Waller v. Georgia* (1984) 467 U.S. 39, 49, fn. 9), the denial of the right to an impartial judge (*Tumey v. Ohio* (1927) 273 U.S. 510), the existence of racial discrimination in the selection of the grand jury (*Vasquez v. Hillery* (1986) 474 U.S. 254) or the petit jury (see *Batson v. Kentucky* (1986) 476 U.S. 79, 100), and the denial of the right to trial by jury by giving a defective reasonable doubt instruction (*Sullivan v. Louisiana* (1993) 508 U.S. 275). (See also *Neder, supra*, 527 U.S. at p. 8 [listing structural error cases].)

B. Sixth Amendment Right to Counsel Cases

The Sixth Amendment guarantees that "[i]n all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defence." This guarantee includes the right to counsel of choice for nonindigent defendants (*Gonzalez-Lopez, supra*, 548 U.S. at p. 144) and the "'right to the effective

assistance of counsel'" (*Cronic*, *supra*, 466 U.S. at p. 654, quoting *McMann v. Richardson* (1970) 397 U.S. 759, 771, fn. 14).

"[T]he right to effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial. Absent some effect of challenged conduct on the reliability of the trial process, the Sixth Amendment guarantee is generally not implicated." (*Cronic*, *supra*, 466 U.S. at p. 658.) Accordingly, with respect to violations of the Sixth Amendment's right to effective assistance of counsel, a defendant must establish both deficient performance and prejudice to make out the constitutional violation. (*Strickland*, *supra*, 466 U.S. at p. 687; *Cronic*, *supra*, 466 U.S. at p. 658.) As the United States Supreme Court recently explained:

> Having derived the right to effective representation from the purpose of ensuring a fair trial, we have, logically enough, also derived the limits of that right from that same purpose. See *Mickens* [*v. Taylor* (2002) 535 U.S. 162], 166. The requirement that a defendant show prejudice in effective representation cases arises from the very nature of the specific element of the right to counsel at issue there—*effective* (not mistake-free) representation. Counsel cannot be "ineffective" unless his mistakes have harmed the defense (or, at least, unless it is reasonably likely that they have). Thus, a violation of the Sixth Amendment right to *effective* representation is not "complete" until the defendant is prejudiced. See *Strickland*, *supra*, at 685.

(*Gonzalez-Lopez*, *supra*, 548 U.S. at p. 147.) A defendant challenging the constitutional adequacy of counsel's performance under *Strickland* must show that (1) counsel's performance was deficient, and (2) a "reasonable probability that but for counsel's [deficient performance] the result of the proceedings would have been different" sufficient to undermine confidence in the outcome of the trial. (*Strickland*, *supra*, 466 U.S. at p. 694.)

In rare and narrowly defined circumstances, a Sixth Amendment violation is shown, and reversal is mandated, absent an individual

assessment of prejudice in the particular case. The complete denial of counsel at trial in violation of the Sixth Amendment is a "structural defect[] in the constitution of the trial mechanism" that "def[ies] analysis by 'harmless error' standards." (*Fulminante*, *supra*, 499 U.S. at p. 309; see *Gideon v. Wainwright*, *supra*, 372 U.S. 335; *Cronic*, *supra*, 466 U.S. at p. 659.)

Likewise, the erroneous denial of counsel of choice is a structural defect not amenable to review for prejudice. The right to counsel of one's choice does not exist to ensure a fair trial. Therefore, an erroneous order denying a defendant his counsel of choice violates the Sixth Amendment, and "[n]o additional showing of prejudice is required to make the violation 'complete.'" (*Gonzalez-Lopez*, *supra*, 548 U.S. at p. 146, fn. omitted.) Nor is such a violation amenable to traditional "harmless error" review. The erroneous deprivation of the right to counsel of choice affects "myriad aspects of representation," including investigation and discovery, development of the theory of defense, plea bargaining, jury selection, evidence presentation, and jury argument, in ways that are "'necessarily unquantifiable and indeterminate.'" (*Id.* at p. 150, internal citation omitted.)

C. *Cronic* and the Presumption of Prejudice Cases

Cronic, *supra*, 466 U.S. 648 "recognized a narrow exception to *Strickland*'s holding that a defendant who asserts ineffective assistance of counsel must demonstrate not only that his attorney's performance was deficient, but also that the deficiency prejudiced the defense." (*Florida v. Nixon* (2004) 543 U.S. 175, 190.) There, the Court "held that a Sixth Amendment violation may be found 'without inquiring into counsel's actual performance or requiring the defendant to show the effect it had on the trial,' *Bell v. Cone*, 535 U.S. 685, 695 (2002), when 'circumstances [exist] that are so likely to prejudice the accused that the cost of litigating

their effect in a particular case is unjustified,' *Cronic*, *supra*, at 658." (*Wright v. Van Patten* (2008) 552 U.S. 120, 124.)

Cronic recognized several categories of "presumed" prejudice delineated in the Court's prior precedent. First, prejudice is presumed where counsel is either totally absent or is prevented by government action from assisting the accused at a "critical stage" of the proceeding. (*Cronic*, *supra*, 466 U.S. at pp. 659 & fn. 25.) As examples, the court cited *Geders v. United States*, *supra*, 425 U.S. at p. 91 (order preventing defendant from consulting with his counsel "'about anything'" during a 17-hour overnight recess), *Herring v. New York* (1975) 422 U.S. 853, 865 (trial judge's order denying counsel the opportunity to make a summation at close of bench trial), *Brooks v. Tennessee* (1972) 406 U.S. 605, 612-613 (law requiring defendant to testify first at trial or not at all deprived accused of "the 'guiding hand of counsel' in the timing of this critical element of his defense"), *Hamilton v. Alabama* (1961) 368 U.S. 52, 55 (denial of counsel at arraignment), *White v. Maryland* (1963) 373 U.S. 59, 60 (per curiam) (denial of counsel at preliminary hearing), *Ferguson v. Georgia* (1961) 365 U.S. 570, 596 (statute retaining common law incompetency rule for criminal defendants, which denied the accused the right to have his counsel question him to elicit his statements before the jury), and *Williams v. Kaiser* (1945) 323 U.S. 471 (failure to appoint counsel upon defendant's request prior to entry of defendant's guilty plea).[10]

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[10] At least two categories of error that *Cronic* deemed reversible without an assessment of prejudice have since been held to be subject to harmless-error review. *Delaware v. Van Arsdall* (1986) 475 U.S. 673, 682-683, rejected the view that *Davis v. Alaska* (1974) 415 U.S. 308 requires automatic reversal where the trial court erroneously limits cross-examination. "*Davis* plainly rests on the conclusion that on the facts of that case, the error might well have contributed to the guilty verdict. *Davis* should not be read as establishing, without analysis, a categorical exception

(continued...)

Second, a presumption of prejudice is warranted when "there [is] a breakdown in the adversarial process" (*Cronic*, *supra*, 466 U.S. at p. 662) such that "counsel entirely fails to subject the prosecution's case to meaningful adversarial testing" (*id.* at p. 659). In commenting on this category of "presumed" prejudice, the Supreme Court has clarified that "the attorney's failure must be complete." (*Bell v. Cone* (2002) 535 U.S. 685, 697.) The category is reserved for "situations in which counsel has entirely failed to function as the client's advocate." (*Florida v. Nixon*, *supra*, 543 U.S. at p. 189.)

Third, the court will presume prejudice "where counsel is called upon to render assistance under circumstances where competent counsel very likely could not." (*Bell v. Cone*, *supra*, 535 U.S. at p. 696, citing *Cronic*, *supra*, 466 U.S. at pp. 659-662.) As an example, *Cronic* cited *Powell v. Alabama* (1932) 287 U.S. 45, where six days before a capital murder trial, the trial judge appointed "all the members of the bar" for purposes of arraignment. On the day of trial, a lawyer from Tennessee appeared on behalf of persons "interested" in the defendants, but announced that he was unprepared and therefore unwilling to represent the defendants on such short notice. The Supreme Court reversed the convictions without an evaluation of counsel's performance at trial. (287 U.S. at pp. 56-60.) It held that under the circumstances presented, the likelihood that counsel

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(...continued)
to the harmless-error rule." (*Van Arsdall*, *supra*, at p. 683.) *Coleman v. Alabama* (1970) 399 U.S. 1, 10-11 clarified that the denial of counsel at the preliminary hearing is subject to harmless error review under *Chapman v. California* (1967) 386 U.S. 18. (Compare *White v. Maryland*, *supra*, 373 U.S. 59 [finding reversible error without an assessment of prejudice where the defendant, without the assistance of counsel, entered a guilty plea at the preliminary hearing, and his initial plea was later introduced into evidence against him at trial].)

could have performed as an effective adversary was so remote as to have made the trial inherently unfair. Another example was *Holloway v. Arkansas* (1978) 435 U.S. 475, where defense counsel was ordered, over his objection, to simultaneously represent three codefendants with divergent interests. (*Id.* at pp. 478-480.) The *Holloway* Court presumed that the conflict, "which [the defendant] and his counsel tried to avoid by timely objections to the joint representation" (*id.* at p. 490), undermined the adversarial process, both because joint representation of conflicting interests is inherently suspect and because counsel's conflicting obligations to multiple defendants "effectively sea[l] his lips on crucial matters" and make it difficult to measure the precise harm arising from counsel's errors. (*Id.* at pp. 489-490.)

In setting forth these categories of presumed prejudice, *Cronic* cautioned that "[a]part from circumstances of [the magnitude listed], there is generally no basis for finding a Sixth Amendment violation unless the accused can show how specific errors of counsel undermined the reliability of the finding of guilt. [Citations.]" (466 U.S. at p. 659, fn. 26.)

Most cases discussing *Cronic* have emphasized the narrowness of its application. As this Court observed in *In re Visciotti* (1996) 14 Cal.4th 325, "[N]otwithstanding the broad language in the *Cronic* opinion [citation] to the effect that when 'counsel entirely fails to subject the prosecution's case to meaningful adversarial testing,' the right to competent counsel has been denied and the result of the trial is presumptively unreliable, the actual application of *Cronic* has been much more limited. Defendants have been relieved of the obligation to show prejudice only where counsel was either totally absent or was prevented from assisting the defendant at a critical stage." (*Id.* at p. 353.)

The Supreme Court "illustrated just how infrequently the 'surrounding circumstances [will] justify a presumption of ineffectiveness'

in *Cronic* itself." (*Florida v. Nixon*, *supra*, 543 U.S. at p. 190.) There, the Court declined to apply the presumption of prejudice to the facts before it: the defendant's counsel was young; his principal practice was real estate; it was his first jury trial; and he had only 25 days to prepare for trial on complex fraud charges. (466 U.S. at pp. 663-666.) The Court rejected an "inference that counsel was unable to discharge his duties" (*id.* at p. 658) and instead demanded that the defendant make out a claim of ineffective assistance of counsel by pointing to specific errors and demonstrating prejudice (*id.* at pp. 666-667 & fn. 41).

Bell v. Cone, *supra*, 535 U.S. 685 refused to apply a presumption of prejudice where the defendant claimed his counsel failed to "mount some case for life" after the prosecution introduced evidence in the sentencing hearing and gave a closing statement. (*Id.* at p. 697.) There, the Court observed that "[w]hen we spoke in *Cronic* of the possibility of presuming prejudice based on an attorney's failure to test the prosecutor's case, we indicated that the attorney's failure must be complete." (*Id.* at pp. 696-697.) "[R]espondent's argument is not that his counsel failed to oppose the prosecution throughout the sentencing proceeding as a whole, but that his counsel failed to do so at specific points." (*Id.* at p. 697.) "The aspects of counsel's performance challenged by respondent—the failure to adduce mitigating evidence and the waiver of closing argument—are plainly of the same ilk as other specific attorney errors we have held subject to *Strickland*'s performance and prejudice components." (*Id.* at pp. 697-698.)

Mickens v. Taylor (2002) 535 U.S. 162 "confirmed that claims of Sixth Amendment violation based on conflicts of interest are a category of ineffective assistance of counsel claims that, under *Strickland*, *supra*, 466 U.S. at page 694, generally require a defendant to show (1) counsel's deficient performance, and (2) a reasonable probability that, absent counsel's deficiencies, the result of the proceeding would have been

different." (*People v. Doolin* (2009) 45 Cal.4th 390, 417.) There, the Court refused to apply a presumption of prejudice "'unblinkingly'" to all kinds of attorney interference. (*Mickens*, *supra*, 535 U.S. at p. 174.) A defendant is "spared . . . the need of showing probable effect upon the outcome" only where "assistance of counsel has been denied entirely or during a critical stage of the proceeding." (*Id.* at p. 166.) "[O]nly in 'circumstances of that magnitude' do we forgo individual inquiry into whether counsel's inadequate performance undermined the reliability of the verdict." (*Ibid.*, quoting *Cronic*, *supra*, 466 U.S. at p. 659, fn. 26.)

Florida v. Nixon, *supra*, 543 U.S. 175 described *Cronic* as a "narrow exception to *Strickland*'s holding that a defendant who asserts ineffective assistance of counsel must demonstrate not only that his attorney's performance was deficient, but also that the deficiency prejudiced the defense." (*Id.* at p. 190.) A presumption of prejudice is "reserved for situations in which counsel has entirely failed to function as the client's advocate." (*Id.* at p. 189.) There, the court declined to presume prejudice where counsel conceded his client's guilt in a capital case. (*Id.* at p. 190.)

Wright v. Van Patten, *supra*, 552 U.S. 120 refused to apply a presumption of prejudice where counsel appeared for the defendant by speaker phone, rather than in person. The Court reasoned: "Our precedents do not clearly hold that counsel's participation by speaker phone should be treated as a 'complete denial of counsel,' on par with total absence. Even if we agree with Van Patten that a lawyer physically present will tend to perform better than one on the phone, it does not necessarily follow that mere telephone contact amounted to total absence or 'prevented [counsel] from assisting the accused,' so as to entail application of *Cronic*. The question is not whether counsel in those circumstances will perform less well than he otherwise would, but whether the circumstances are likely to

result in such poor performance that an inquiry into its effects would not be worth the time." (*Id.* at p. 125.)

D. *Geders* and *Perry*—The Right to Consultation

The Sixth Amendment right to counsel guarantee includes "'the opportunity for a defendant to consult with an attorney and to have him investigate the case and prepare a defense for trial.'" (*Kansas v. Ventris* (2009) __ U.S. __ [129 S.Ct. 1841, 1844-1845], quoting *Michigan v. Harvey* (1990) 494 U.S. 344, 348.) *Geders*, *supra*, 425 U.S. 80 held that a trial court's order preventing the defendant from consulting his counsel "'about anything'" during a 17-hour recess in the middle of the defendant's trial testimony violated the defendant's right to the assistance of counsel guaranteed by the Sixth Amendment. (*Id.* at p. 91.) The 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. Our cases recognize that the role of counsel is important precisely because ordinarily a defendant is ill-equipped to understand and deal with the trial process without a lawyer's guidance.

(*Id.* at p. 88.) The Court reversed the defendant's conviction without inquiry into the actual prejudice, if any, that resulted from the defendant's denial of access to his lawyer during the overnight recess. (*Id.* at pp. 91-92.)

Perry, *supra*, 488 U.S. 272 deemed *Geders* error—the complete denial of counsel concerning all matters during an overnight recess in the trial—to be an error that "is not subject to the kind of prejudice analysis that is appropriate in determining whether the quality of a lawyer's performance itself has been constitutionally ineffective." (*Id.* at p. 280,

citing *Cronic*, *supra*, 466 U.S. at p. 659 & fn. 25.) *Perry* went on to hold that the order in that case forbidding defense counsel from consulting with his client during a 15-minute recess in the defendant's testimony, did not amount to constitutional error at all. (*Id.* at pp. 280-281.)

Later Supreme Court cases have affirmed that *Geders* established a rule of per-se reversal. In doing so, however, those cases describe the deprivation of counsel as complete. (See, e.g., *Bell v. Cone*, *supra*, 535 U.S. at p. 696, fn. 3 [noting that cases where prejudice was presumed "involved criminal defendants who had actually or constructively been denied counsel by government action," including the order in *Geders* "preventing defendant from consulting his counsel '"about anything"' during a 17-hour overnight recess . . ."]; *Mickens v. Taylor*, *supra*, 535 U.S. at p. 166 [we have presumed prejudice where "assistance of counsel has been denied entirely or during a critical stage of the proceeding," citing *Cronic*, *Geders*, and *Gideon*]; *Portundo v. Agard* (2000) 529 U.S. 61, 69 [*Geders* held that defendant's "sequestration for an extended period of time denies the Sixth Amendment right to counsel"]; *Lockhart v. Fretwell* (1993) 506 U.S. 364, 378 & fn. 2 [prejudice is presumed where "counsel is prevented from offering assistance during a critical phase of the proceedings" as in *Geders* where "attorney-client consultation [was] prevented during overnight recess"]; *Strickland*, *supra*, 466 U.S. at p. 686 [government violates the Sixth Amendment right to effective assistance by placing a "bar on attorney-client consultation during overnight recess"].)

United States v. Morrison (1981) 449 U.S. 361 summarized the rule derived from cases like *Gideon* and *Geders* as follows: "Cases involving Sixth Amendment deprivations are subject to the general rule that remedies should be tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests. Our relevant cases reflect this approach." (*Id.* at p. 364.) "The premise of our prior cases

is that the constitutional infringement identified has had or threatens some adverse effect upon the effectiveness of counsel's representation or has produced some other prejudice to the defense. Absent such impact on the criminal proceeding, however, there is no basis for imposing a remedy in that proceeding, which can go forward with full recognition of the defendant's right to counsel and to a fair trial." (*Id.* at p. 365.)

E. Because Townley Did Not Suffer a Total Deprivation of the Right to Counsel, He Must Satisfy the Two-Prong Test of *Strickland* in Order to Establish a Sixth Amendment Violation

As the Court of Appeal acknowledged, the consultative ban in *Geders* involved a "total ban, though limited temporally, on attorney-client communication, not what we may call a topical ban." (Typed Opn. at p. 11.) Unlike in *Geders*, the trial court's order in this case did not restrict counsel's access to Townley or order him not to consult with Townley "'about anything'" during a significant portion of the trial. (*Geders*, *supra*, 425 U.S. at p. 91.) Rather, it prohibited defense counsel from conferring with Townley on a discrete topic—Flores's declaration and change-of-plea transcript.

While acknowledging that no United States Supreme Court or California Supreme Court authority addressed "an order preventing an attorney from talking with a defendant about a part of the evidence" (Typed Opn. at p. 11), the Court of Appeal concluded that such a ban violated the rule in *Geders* and effectively denied Townley access to counsel. (Typed Opn. at pp. 11-12, 18-22.) In so concluding, the court did not evaluate the potential effect of the trial court's order on counsel's performance. Rather, it summarily concluded that "[w]ithout more evidence of good cause for a court order barring defense counsel from discussing the content of Flores's written declaration with Townley, we conclude that this order unjustifiably infringed on Townley's constitutional right to the effective assistance of

counsel." (Typed Opn. at p. 22.) Likewise, the court refused to consider the potential impact of the trial court's ruling on the outcome of the trial. It reasoned: "*Strickland*'s citation to *Geders* 'was intended to make clear that "[a]ctual or constructive denial of the assistance of counsel altogether" [citation], is not subject to the kind of prejudice analysis that is appropriate in determining whether the quality of a lawyer's performance itself has been constitutionally ineffective.'" (Typed Opn. at p. 22, quoting *Perry*, *supra*, 488 U.S. at p. 280.) "We need not wander far afield to determine whether the United States Supreme Court meant what it said in *Perry*. . . . The Attorney General's attempts to minimize the impact of the restriction in this case of 'counsel's ability to confer with his client on one very limited topic' do not alter our conclusion that on this topic – the written declaration of an accomplice who was a significant witness at trial – Townley was deprived by court order of the effective assistance of counsel. It follows that Townley is entitled to reversal without making a showing of prejudice resulting from this error." (Typed Opn. at p. 24.)

The Court of Appeal erred by deeming any interference with counsel's communications on defense-related topics to be a structural defect. Only those errors that "affec[t] the framework within which the trial proceeds" (*Fulminante*, *supra*, 499 U.S. at pp. 307-310) or are virtually impossible to assess for prejudice (*Gonzalez-Lopez*, *supra*, 548 U.S. at p. 149, fn. 4), will so qualify. Contrary to the Court of Appeal's holding, "[i]t does not necessarily follow . . . that every deprivation in a category considered to be 'structural' constitutes a violation of the Constitution or requires reversal of the conviction, no matter how brief the deprivation or how trivial the proceedings that occurred during the period of deprivation." (*Gibbons v. Savage* (2d. Cir. 2009) 555 F.3d 112, 120 [discussing unjustified, temporary closure of the courtroom during jury voir dire]; *People v. Bui* (2010) 183 Cal.App.4th 675 [same].) "Not every restriction

on counsel's time or opportunity to investigate or to consult with his client or otherwise to prepare for trial violates a defendant's Sixth Amendment right to counsel." (*Morris v. Slappy* (1983) 461 U.S. 1, 11.) Whether the court will presume prejudice in a given circumstance "*turns on the magnitude of the deprivation of the right to effective assistance of counsel.*" (*Roe v. Flores-Ortega* (2000) 528 U.S. 470, 482, italics added.)

As set forth above, the rule in *Cronic* presumes prejudice only under the most egregious conditions. *Bell v. Cone*, *supra*, 535 U.S. 684 explained that the state's action must result in the actual or constructive "'complete denial of counsel.'" (*Id.* at p. 696.) Short of "complete" interference, the two-prong test set forth in *Strickland* applies. As this Court observed in *People v. Rundle* (2008) 43 Cal.4th 76, "[T]he presumption of prejudice is a prophylactic measure established to address 'situations where *Strickland* itself is evidently inadequate to assure vindication of the defendant's Sixth Amendment right to counsel.'" (*Id.* at p. 173, quoting *Mickens*, *supra*, 535 U.S. at p. 176, *Rundle* disapproved on another ground in *People v. Doolin*, *supra*, 45 Cal.4th at p. 421.)

That level of interference was not shown here. Counsel was not prevented from meeting with Townley, from discussing defense strategy, from investigating the case, or from cross-examining Flores. Townley and his counsel knew Flores's identity and his status as a former codefendant in the case. Nothing in the trial court's consultation restriction prevented counsel from asking Townley what, if anything, he knew about Flores or from investigating Flores's background. (Cf. *Roviaro v. United States* (1957) 353 U.S. 53, 60-61 [when an informant is a material witness on the issue of guilt, the prosecution must disclose his or her identity or incur a dismissal]; *Alvarado v. Superior Court* (2000) 23 Cal.4th 1121, 1148-1152 [court erred in allowing witness to testify anonymously at trial].)

Although defense counsel could not discuss the content of Flores's sealed declaration or plea agreement with Townley or a defense investigator, the denial of discovery of witness statements does not itself establish a Sixth Amendment violation. Thus, for example, in federal court "[a] criminal defendant is entitled to rather limited discovery, with no general right to obtain the statements of the government's witnesses before they have testified. Fed. Rules Crim. Proc. 16(a)(2), 26.2" (*Degen v. United States* (1996) 517 U.S. 820, 825.) "A restriction on defense counsel that prevents him from revealing what is possibly Jencks material does not materially interfere with counsel's duty to advise a defendant on trial-related matters." (*Harris v. United States* (D.C. App. 1991) 594 A.2d 546, 549; accord, *United States v. Brown* (9th Cir. 1970) 425 F.2d 1172, 1174; *United States v. Washabaugh* (9th Cir. 1971) 442 F.2d 1127, 1129.) The Court of Appeal contrasted the federal rule with the broader discovery provisions in California, which entitle a defendant to pretrial disclosure of "'[r]elevant written . . . statements of witnesses . . . whom the prosecutor intends to call at the trial.'" (Typed Opn. at p. 17, quoting Pen. Code, § 1054.1, subd. (f).) It nowhere explained, however, why a statutory discovery violation would amount to a Sixth Amendment deprivation of the right to effective assistance of counsel.

In any event, defense counsel had other discovery items at his disposal which included sheriff's department reports that summarized two interviews of codefendant Flores and a copy of the tape-recorded sheriff's interview with Flores. (See 7 CT 1516-1517, 1543-1564; 8 CT 1743, 1745-1746; 1 RT 45-46; 2 RT 387-388.) These statements were not subject to the consultation restriction imposed by the court on counsel. (See 3 RT 580-581; 8 RT 1924.) In his pretrial statement, Flores maintained that he drove three men—Jake, Little Huero, and Listo—around in his car, that he stopped in a residential neighborhood, and that the three men jumped out.

Flores heard popping noises, and then the three men returned to the car and told him to drive. He did not witness the shooting, but did see Jake (Townley) in possession of a gun prior to the shooting. (See 7 CT 1545-1548.) The trial court found that this discovery was sufficiently comprehensive to enable defense counsel to adequately consult with Townley and to prepare a defense. (See 3 RT 580-581; 8 RT 1924.)

In addition, defense counsel was given Flores's sealed declaration and his change of plea transcript in sufficient time for the effective use of both records by counsel conducting cross-examination of that witness. (8 CT 1782; 3 RT 551, 569; 4 RT 758-759; Statement of the Case and Facts, *ante*, at pp. 7-8 [summarizing cross-examination].)[11] Impeachment through

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[11] The Court of Appeal asserted that it was "unclear from the record what happened with the reporter's transcripts of the change-of-plea hearings." (Typed Opn. at p. 7, fn. 4.) We perceive no ambiguity. At a hearing on May 4, 2007, the trial court provided counsel with copies of the plea transcripts in order to explain its denial of an in limine motion. (4 RT 757-758.) When Carranco's counsel asked if the transcripts could be unsealed, the court initially responded, "No. I'm not saying that. I'm telling you what's in it. It may not be . . . unsealed. In fact, it shouldn't be delivered to you at this time because it contains references to the factual statement. And you're not parties to that proceeding. . . . [So] you need to give those back to the court reporter." (4 RT 758.) The prosecutor stated her understanding that "the Court had ordered the . . . copies of the transcript would be made available with the same understanding and under the same conditions as were the declarations." (4 RT 759.) The court replied, "I think I did . . . ." It then ruled, "So you can keep those. You can't show those to your client. You can't show them to anybody else. Only you may see them, and there's no reason why any investigator would have to look at them, so it's really physically only the two of you Counsel may look at those documents." (4 RT 759-760.) In context, the court's reference to "those" documents appears clearly to reference the change-of-plea transcripts. Defense counsels' extensive cross-examination of Flores regarding the terms of his plea agreement further dispels any ambiguity that counsel had access to the relevant plea transcripts. (See 12 RT 2874-2876, 2884-2887.)

cross-examination is a legal endeavor, and defense counsel did not require consultation with his client to perform that task effectively. (See *United States v. Abu Ali* (4th Cir. 2008) 528 F.3d 210, 254 [defendant was not denied his right of confrontation where counsel cleared pursuant to the Classified Information Procedures Act was allowed full access to classified documents and allowed to cross-examine the government's witness concerning these matters, but could not to reveal their content to the defendant].) Ultimately, however, Townley witnessed Flores's testimony himself. He was not restricted in his ability to discuss any of that testimony with his attorney. Notably, cross-examination of Flores revealed that he had admitted in his declaration to having worn a red and black Pendleton shirt, which was described by witnesses as the shirt worn by the shooter. (12 RT 2818-2821, 2893-2894.) The court order did not prevent Townley and his counsel from discussing the significance of that admission once it was revealed in Flores's testimony. (12 RT 2818-2821, 2893-2894.)[12]

As this record demonstrates, Townley did not suffer an "actual or constructive denial of the assistance of counsel altogether" as a result of the court's limited consultation restriction. Nor did counsel entirely fail to subject the prosecution's case to meaningful adversarial testing. The trial court's order limited counsel's ability to confer with his client on one very limited topic—the sealed declaration and plea transcript of Flores—not on

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[12] The Court of Appeal queried whether the trial court's sealing order could have been construed by a cautious defense counsel to apply to Flores's testimony itself. (Typed Opn. at p. 20.) There is no support in the record for such a construction. The court's pretrial sealing order was limited to Flores' declaration and change of plea transcript. (3 RT 551, 569; 4 RT 758-760; 8 RT 1921.) The court affirmed that counsel could use the documents to impeach Flores on cross-examination. (8 RT 1921.) It defies logic to interpret the court's sealing order to apply to Flores's direct or cross-examination testimony elicited in open court in the defendant's presence.

Flores himself, not on Flores's testimony, and not on lines of rebuttal or impeachment of Flores's testimony. Counsel was able to discuss with Townley the content of Flores's statement to sheriff's personnel, potential defense theories (such as Flores or Carranco having been the actual shooter), and Flores's actual trial testimony. Counsel was able to investigate the shooting by sharing with an investigator information from his own client and information contained in the sheriff's investigative reports, including the statements of the other defendants. And counsel was able to use the sealed documents to cross-examine Flores at trial. Accordingly, the test of *Strickland* applies, and Townley must show (1) the trial court's order adversely affected counsel's performance, causing it to "[fall] below an objective standard of reasonableness"; and (2) "a reasonable probability that, but for counsel's [objectively deficient performance], the result of the proceeding would have been different," sufficient to undermine confidence in the outcome of the trial. (*Strickland*, *supra*, 466 U.S. at pp. 688, 694.) [13]

This is true despite the fact that interference with counsel came from an external source, rather than from counsel's own omission. "The fact that

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[13] In his answer to the petition for review, Townley alleged as a separate claim of error that the trial court's consultative restriction infringed on his constitutional right to the ancillary services because it "precluded counsel from showing the declaration to, or discussing the declaration with . . . the investigator." (Answer at pp. 13-14.) In *Corenevski v. Superior Court* (1984) 36 Cal.3d 307, 319-320, this Court observed that the right to effective assistance of counsel includes the right to ancillary services necessary in the preparation of a defense. Because the services of an investigator exist to ensure counsel's effectiveness at trial, Townley's claim of interference with investigative services would be governed by the same analysis set forth above. Under *Strickland*, he would be required to show how the order "precluded counsel from investigating and preparing to rebut or exploit any of the factual assertions in the declaration" (Answer at p. 13) and that the alleged interference with counsel's investigation prejudiced the outcome of the trial. The claim, therefore, requires no separate analysis and provides no independent basis for reversing the trial court's judgment.

the accused can attribute a deficiency in his representation to a source external to trial counsel does not make it any more or less likely that he received the type of trial envisioned by the Sixth Amendment, nor does it justify reversal of his conviction absent an actual effect on the trial process or the likelihood of such an effect." (*Cronic*, *supra*, 466 U.S. at p. 662, fn. 31.) In *Cronic*, the court refused to adopt a "presumption of prejudice" simply because defense counsel labored under an "'external constraint'" imposed by the trial court's decision to give counsel only 25 days to prepare for trial. (*Ibid*; accord, *Burdine v. Johnson* (5th Cir. 2001) 262 F.3d 336, 345 [*Cronic* "directly dispelled" the argument that "the cause of a Sixth Amendment deficiency should control whether a presumption of prejudice was warranted"]; but see *Perry*, *supra*, 488 U.S. at p. 279 [observing that "direct governmental interference with the right to counsel is a different matter"].) Where, as here, the trial court restricts attorney-client communications over counsel's objection, there is clearly no "tactical basis" for counsel's omission. Nonetheless, the reviewing court must consider whether the court's order so impaired counsel's ability to communicate with the defendant or otherwise prepare the defense as to amount to deficient performance, and if so, whether defendant was prejudiced in the sense that counsel's omissions "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." (*Strickland*, *supra*, 466 U.S. at p. 686.)

This conclusion is born out by examining other types of government interference which do not merit a presumption of prejudice. *People v. Jenkins* (2000) 22 Cal.4th 900 emphasized that where a defendant claims the conditions of his confinement denied him the effective assistance of counsel under the Sixth Amendment, he must show that "the conditions of [his] confinement so interfered with his ability to communicate with counsel or assist in the defense" that actual prejudice resulted. (*Id.* at p.

1002-1003.) There, the court was assured that despite various interferences, "substantial attorney-client contact was ensured." (*Id.* at p. 1005.)

People v. Noriega (2010) 48 Cal.4th 517 [2010 WL 1267136, *3] held that the trial court's erroneous substitution of one appointed counsel for another did not violate the Sixth Amendment absent a showing that replacement counsel was constitutionally ineffective under *Strickland.*

Where the government improperly interferes with the attorney-client relationship and thereby obtains information about trial strategy, such interference does not amount to a Sixth Amendment violation absent a showing of prejudice. (*Weatherford v. Bursey* (1977) 429 U.S. 545, 551-558; *United States v. Danielson* (9th Cir. 2003) 325 F.3d 1054, 1069 [construing *Weatherford*].) "[M]ere government intrusion into the attorney-client relationship, although not condoned by the court, is not itself violative of the Sixth Amendment right to counsel. Rather, the right is only violated when the intrusion substantially prejudices the defendant." (*United States v. Irwin* (9th Cir. 1980) 612 F.2d 1182, 1186-1187, fn. omitted; accord, *Williams v. Woodford* (9th Cir. 2002) 306 F.3d 665, 683.) Where the interference with counsel involves a particular piece of evidence obtained by the prosecution, courts have "put the burden on the defendant to show prejudice [in order to make out a constitutional violation]. . . . 'Placing the burden on the defendant in such cases makes good sense, for the defendant is in at least as good a position as the government to show why, and to what degree, a particular piece of evidence was damaging.' [Citation]." (*Danielson, supra,* 325 F.3d at p. 1070; accord, *Clark v. Wood* (8th Cir. 1987) 823 F.2d 1241, 1249-1250; *United States v. Steele* (6th Cir. 1984) 727 F.2d 580, 586-587; *People v. Memro* (1995) 11 Cal.4th 786, 835-836 [to demonstrate a Sixth Amendment violation of his right to counsel based on the government's seizure and review of privileged documents, defendant was required to show demonstrable prejudice, or

substantial threat thereof]; see also *People v. Ervine* (2009) 47 Cal.4th 745, 766 [summarizing cases].)

Indeed, had the prosecution team in Townley's case failed to disclose altogether the documents made subject to the court's consultation restriction, the claim of error would have been governed by *Brady v. Maryland* (1963) 373 U.S. 83. *Brady* requires, as a component of establishing a due process violation, that the defendant demonstrate the materiality of the withheld evidence by showing a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different, i.e., the Sixth Amendment prejudice standard of *Strickland*. (*Kyles v. Whitley* (1995) 514 U.S. 419, 433-436; see *United States v. Bagley* (1985) 473 U.S. 667, 682-683 (opn. of Blackmun, J.).) Notably, *Cronic* cited *United States v. Agurs* (1976) 427 U.S. 97, a *Brady* prosecutorial misconduct case, to support its conclusion that "external constraints" imposed by the government on defense counsel do not justify reversal of a conviction absent an adverse effect on the outcome of the trial or the likelihood of such an effect. (*Cronic, supra*, 466 U.S. at p. 662, fn. 31.) It would be illogical to treat the error here—limited and merely delayed nondisclosure to the defendant personally—as fundamentally more serious and pervasive, so as to trigger automatic reversal, than *Brady* error that involves complete nondisclosure to the entire defense yet does not warrant reversal without an inquiry into probable prejudice.

The Court of Appeal looked to federal circuit court authority to expand the automatic-reversal rule in *Geders* to "topical" consultative bans on attorney-client communication. However, the federal cases reveal disagreement, not resolution, of the question before this Court.

Schaeffer v. Black (8th Cir. 1985) 774 F.2d 865, 866-868, held that an order preventing counsel from discussing a prison investigative report with

his client had to be assessed under the two-prong test of *Strickland*, including whether there was a reasonable probability of a different result. The court was "unpersuaded" that the alleged error warranted a presumption of prejudice under *Cronic*. The court observed that the challenged order did not cause a "breakdown of the adversarial process" and that "external constraints" on counsel's performance do not, standing alone, warrant a presumption of prejudice. (*Id.* at pp. 866-868.) "Since no showing of likelihood of actual prejudice related to failure to disclose the report has been shown, we conclude that appellant's claim of ineffective assistance of counsel fails . . . ." (*Id.* at pp. 867-868)[14]

United States v. Triumph Capital Group, Inc. (2d Cir. 2007) 487 F.3d 124 held that the trial court's overnight ban on counsel's communication with the defendant about his testimony did not violate the Sixth Amendment on the facts of that case. There, the court concluded that "a restriction on communication that lacks justification, like the one here, may be sufficiently insignificant that it does not amount to a constitutional violation." (*Id.* at p. 134.) In finding no Sixth Amendment violation, the court considered, among other things, that that the overnight ban did not bar all communication, only discussion of the defendant's testimony, and that

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[14] In his answer to the petition for review, Townley asserts that the Eighth Circuit changed course in *Moore v. Purkett* (8th Cir. 2001) 275 F.3d 685 and adopted a position directly contrary to the People's argument. (Answer at p. 8.) He misreads the case. *Moore* involved a trial court order prohibiting the defendant, who had only limited writing skills, from talking quietly with his counsel during the trial. Such a ruling restricted consultation on all defense-related topics while court was in session. (*Id.* at pp. 687-689.) It did not involve, as in *Schaeffer* and this case, a limited consultative ban on an identifiable topic or piece of evidence. As the Court of Appeal acknowledged, "[t]he same distinction applies to *Jones v. Vacco* (2d Cir. 1997) 126 F.3d 408," where the trial court restricted all communication between the defendant and his attorney during an overnight recess. (Typed Opn. at p. 11.)

defendant and his counsel were given as much time as they required to consult on any topic the following day. The Second Circuit found *Geders* not applicable because the order in the case before it did not "prevent the defendant from communicating, unfettered, with his attorney about the full panoply of trial related issues . . . nor meaningfully interfere[] with the quality of advice and counsel the attorney is able to provide . . . ." (*Id.* at p. 135.)

United States v. Sandoval-Mendoza (9th Cir. 2006) 472 F.3d 645, 651-652, and *United States v. Santos* (7th Cir. 2000) 201 F.3d 953, 965-966, held that the trial court's order prohibiting the defendant and his attorney from discussing the defendant's testimony (but not other topics) during an overnight recess in cross-examination violated the Sixth Amendment. Other reversible trial error in each case, however, made it unnecessary for those courts to determine whether the error was structural or subject to harmless error analysis under *Chapman v. California*, *supra*, 386 U.S. 18. *Santos* expressed some reservation on the subject, observing that the per se rule of reversal set forth in *Perry* "is in some tension with the narrowing of the scope of automatic reversal in recent decisions by the Supreme Court" and was not clearly applicable to the more limited order imposed in that case. (201 F.3d at p. 966.) *Sandoval-Mendoza* likewise observed that, although *Geders* implied a rule of automatic reversal, that case "preceded many recent Supreme Court decisions requiring prejudice as well as constitutional error for reversal." The court ultimately declined to decide whether "an overnight prohibition of communications regarding the defendant's testimony is structural error . . . ." (472 F.3d at p. 652, fn. omitted.)

Cobb v. United States (4th Cir. 1990) 905 F.2d 784 considered a trial court's order prohibiting the defendant from discussing his cross-examination testimony with his attorney during a weekend recess. The

court held that the order deprived the defendant of his Sixth Amendment right to consult with counsel and that the error was reversible per se under *Geders*. (*Id.* at p. 791.) The court declined to distinguish the facts before it from *Geders* because the court order "left Cobb free to discuss with his attorney any matters not related to his ongoing cross-examination . . . ." (*Id.* at p. 792.) It reasoned, "To remove from Cobb the ability to discuss with his attorney any aspect of his ongoing testimony effectively eviscerated his ability to discuss and plan trial strategy. . . . [¶] We have no difficulty in concluding that the trial court's order, although limited to discussions of Cobb's ongoing testimony, effectively denied him access to counsel. Accordingly, his convictions must be reversed." (*Id.* at p. 792.)

Mudd v. United States (D.C. Cir. 1986) 798 F.2d 1509, 1512, likewise applied the rule of automatic reversal in *Geders* to a trial court's order prohibiting defense counsel from speaking to his client about the client's testimony over a weekend recess. (*Id.* at p. 1510.) That case, which predated *Perry*, adopted a rule that "a trial court may not place a blanket prohibition on all attorney/client contact, no matter how brief the trial recess." (*Id.* at p. 1511.) The court observed that there were "obvious, legitimate reasons [defendant] may have needed to consult with counsel about his upcoming cross-examination." (*Id.* at p. 1512.) The court concluded that such an order "can have a chilling effect on cautious attorneys, who might avoid giving advice on non-testimonial matters for fear of violating the court's directive." (*Ibid.*) The court further held that

> a *per se* rule [of reversal] best vindicates the right to the effective assistance of counsel. To require a showing of prejudice would not only burden one of the fundamental rights enjoyed by the accused, see *Powell*, 287 U.S. at 68-69, but also would create an unacceptable risk of infringing on the attorney-client privilege. [Citation.] The only way that a defendant could show prejudice would be to present evidence of what he and counsel discussed, and what they were prevented from

> discussing, and how the order altered the preparation of his defense. Presumably the government would then be free to question defendant and counsel about the discussion that *did* take place, to see if defendant nevertheless received adequate assistance. [¶] We cannot accept a rule whereby private discussions between counsel and client could be exposed in order to let the government show that the accused's sixth amendment rights were not violated.

(*Id.* at p. 1513.)

A review of these cases refutes Townley's claim that federal authority uniformly applies the *Geders* rule of per se reversal to "any order banning discussion of any substantive topic regarding the charges for which the defendant is on trial." (Answer at p. 4.) Although *Mudd* and *Cobb* so hold, the rationale for imposing a rule of per se reversal to a ban on attorney-client communications regarding a specified topic or item of evidence does not withstand scrutiny. It is not inimical to justice that "private discussions between counsel and client . . . be exposed" (*Mudd, supra*, 798 F.2d at p. 1513), so that the reviewing court can determine whether defendant was denied his Sixth Amendment right to effective assistance of counsel. On the contrary, courts have long recognized that a defendant who alleges constitutionally ineffective assistance waives the attorney-client privilege to the extent necessary to resolve the claim. (*In re Scott* (2003) 29 Cal.4th 783, 814; *Bittaker v. Woodford* (9th Cir. 2003) 331 F.3d 715, 716 (en banc) [discussing waiver of privilege on federal habeas].)

Both the *Mudd* court and the appellate court in this case voiced concern that restricting attorney-client communication on a specified topic or item of evidence may have a "chilling effect" on counsel's performance as a whole, and that "any ambiguity in the sealing order could well encourage defense counsel to err on the side of caution to avoid the risk of 'inviting the judge's wrath, and possibly even courting sanctions for contempt of court, in disobeying the judge's instruction.'" (Typed Opn. at p.

20, quoting *United States v. Stantos*, *supra*, 201 F.3d at p. 966; accord, *Mudd*, *supra*, 798 F.2d at p. 1512.) However, any ambiguity in the trial court's order is easily corrected by defense counsel's objection and request for clarification. (See *People v. Scott* (1994) 9 Cal.4th 331, 351; *In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133-1134 [discussing Code of Civil Procedure section 634].) Notably, defense counsel in this case did not state any confusion over the scope of the court's consultative restriction.

This Court has declined to presume a "chilling effect" on counsel's performance even in cases of egregious and pervasive government interference in the attorney-client relationship. *People v. Ervine*, *supra*, 47 Cal.4th 745 held that the defendant was not deprived of his federal or state constitutional right to effective assistance of counsel where jail personnel entered the defendant's cell while he was in court and reviewed confidential attorney-client information. In that case, there was no evidence that the jail personnel had shared the information with any member of the prosecution team. This Court refused to presume prejudice from the interference in attorney-client communications, noting that "the record contains no evidence that defendant was prejudiced in the preparation of his defense." (*Id.* at p. 770.) It further rejected the defendant's argument that "'[a]n inevitable consequence' of the intrusion by the sheriff's department was an 'enduring fear' concerning the privacy of his communications with counsel, which impaired his federal right to the effective assistance of counsel. Under our case law, however, a defendant's inability to consult with counsel or to assist in his defense must appear in the record. [Citation.] Here, defendant not only fails to identify any instance in which his relationship with counsel was impaired (or, indeed, to claim that more direct methods of communicating with his attorney were inadequate), but he was offered the opportunity, at the time the trial court denied his motion

to dismiss, to renew his claim of error and submit additional evidence, but never did so. Because his claim still is not supported by any reference to the record, we must reject it. [Citation.]" (*Id.* at p. 769.)

Ervine distinguished *Barber v. Municipal Court* (1979) 24 Cal.3d 742, where an undercover government agent posing as a codefendant infiltrated confidential meetings between the defendants and their attorneys, and then communicated privileged information to his supervisors. There, the Court held that the defendant was deprived of his constitutional right to the effective assistance of counsel under the federal and state constitutions. The court did not presume prejudice, however, but instead noted that "the record demonstrated that the petitioners had been prejudiced in their ability to prepare their defense in that they had become '[d]istrustful of each other and fear[ful] that any one of them might also be an undercover police officer' and thus refused to participate or cooperate in their defense, which 'resulted in counsel's inability to prepare adequately for trial.'" (*Id.* at p. 756.)

Accordingly, the Court of Appeal erred in finding that the consultative restriction in this case "unjustifiably infringed on [Townley's] constitutional right to the effective assistance of counsel" (Typed Opn. at p. 22) without inquiring into the effect of the order on counsel's actual performance or on the outcome of the trial. Because the surrounding circumstances do not justify a presumption of ineffectiveness, Townley's Sixth Amendment claim cannot be "sufficient without inquiry into counsel's actual performance at trial." (*Cronic*, *supra*, 466 U.S. at p. 662.) Further, "Counsel cannot be 'ineffective' unless his mistakes have harmed the defense (or, at least, unless it is reasonably likely they have). Thus, a violation of the Sixth Amendment right to effective representation is not 'complete' until the defendant is prejudiced." (*Gonzalez-Lopez*, *supra*, 548 U.S. at p. 147.)

F. Even if the Consultative Restriction Imposed in this Case Does Not Come Within the *Strickland* Test for "Effective" Assistance of Counsel, It Is Nonetheless "Trial Error" and Is Amenable to Harmless Error Review

Even if an erroneous interference with counsel's ability to confer with his client on a subject relevant to the defense constitutes a kind of violation of the Sixth Amendment that is not governed by *Strickland*, that conclusion does not require per se reversal as the Sixth District held. (Typed Opn. at p. 22.) Any Sixth Amendment error in this case should remain subject to proof by the state that the error was harmless beyond a reasonable doubt.

The high court has "applied harmless-error analysis to a wide range of errors and has recognized that most constitutional errors can be harmless." (*Fulminante*, *supra*, 499 U.S. at p. 306.) In *Delaware v. Van Arsdall*, *supra*, 475 U.S. 673, the Court emphasized that "[s]ince *Chapman*, we have repeatedly reaffirmed the principle that an otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt." (*Id.* at p. 681.) "The harmless-error doctrine recognizes the principle that the central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence [citation], and promotes public respect for the criminal process by focusing on the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error. [Citation.]" (*Ibid.*)

Gonzalez-Lopez, *supra*, 548 U.S. 140 held that an erroneous order denying defendant his counsel of choice violates the Sixth Amendment, and that "[n]o additional showing of prejudice is required to make the violation 'complete.'" (*Id.* at p. 146, fn. omitted.) Nonetheless, the Court considered whether the error was subject to review for harmlessness under *Arizona v.*

Fulminante, *supra*, 499 U.S. 279, and ultimately concluded that it was not. (*Id.* at pp. 148-151.)

United States v. Morrison, *supra*, 449 U.S. 361, assumed, without deciding, that the defendant's Sixth Amendment right to counsel was violated when federal agents interviewed her without counsel present. The Court further assumed that prejudice was not a necessary prerequisite to establishing the constitutional violation. (*Id.* at p. 364.) Yet, the Court held that the constitutional violation could be harmless and that "absent demonstrable prejudice, or substantial threat thereof, dismissal of the indictment is plainly inappropriate, even though the violation may have been deliberate." (*Id.* at p. 365, fn. omitted.)

Citing *Morrison*, the high court in *Rushen v. Spain* (1983) 464 U.S. 114 observed that the defendant's rights to be present and represented by counsel during all critical stages of the proceedings "are subject to harmless error analysis, see, e.g., *United States v. Morrison*, 449 U.S. 361, 364-365 (1981) (right to counsel); *Snyder v. Massachusetts*, 291 U.S. 97, 114-118 (1934) (right to presence), unless the deprivation, by its very nature, cannot be harmless. See, e.g., *Gideon v. Wainright*, 372 U.S. 335 (1963)." (*Id.* at p. 119, fn. 2.)

Contrary to the Sixth District's opinion, neither *Geders* nor *Perry* answers the question whether an interference with attorney-client communication *short of an absolute ban on all consultation* is "structural" error and reversible per se. The factors guiding that inquiry prove that the alleged constitutional error in this case is not "structural" and is amenable to harmless error review.

First, the consultative ban on identifiable items of evidence—the sworn statement and plea bargain transcript of a testifying prosecution witness—did not bear directly on the "framework within which the trial proceeds . . . ." (*Fulminante, supra*, 499 U.S. at p. 310.) It was not

equivalent to the total deprivation of the right to counsel at trial (*Gideon v. Wainwright, supra,* 372 U.S. 335), the denial of the right to a public trial (*Waller v. Georgia, supra,* 467 U.S. 39), the denial of the right to an impartial judge (*Tumey v. Ohio, supra,* 273 U.S. 510), or the denial of the right to trial by jury by the giving of a defective reasonable-doubt instruction (*Sullivan v. Louisiana, supra,* 508 U.S. 275).

Second, Townley's right to consult with counsel is not on par with those rights that exist independent of the fair trial guarantee, such that prejudice becomes "irrelevant" to the constitutional inquiry. (*Gonzalez-Lopez, supra,* 548 U.S. at p. 149, fn. 4.) Such is the case with the defendant's right to self-representation. Because its exercise "usually increases the likelihood of a trial outcome unfavorable to the defendant, its denial is not amenable to 'harmless error' analysis." (*McKaskle v. Wiggins, supra,* 465 U.S. at p. 177, fn. 8.) By contrast, "the right to effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial. Absent some effect of challenged conduct on the reliability of the trial process, the Sixth Amendment guarantee is generally not implicated." (*Cronic, supra,* 466 U.S. at p. 658.) An alleged violation of that right is thus suited to harmless-error analysis.

Third, it is neither impossible nor particularly burdensome to assess the prejudicial effect of a consultative ban on attorney-client communications involving specified items of evidence. (*Gonzalez-Lopez, supra,* 548 U.S. at p. 149, fn. 4.) In *Gonzalez-Lopez*, the Court found the erroneous deprivation of the right to counsel of choice to be reversible per se. That error affects "myriad aspects of representation," including investigation and discovery, development of the theory of defense, plea bargaining, jury selection, evidence presentation, and jury argument in ways that are "'necessarily unquantifiable and indeterminate.'" (*Id.* at p.

150, citation omitted.) Here, by contrast, the reviewing court may consider the trial record as a whole to determine whether the restrictive order involving discrete items of evidence altered counsel's ability to impeach and rebut Flores's testimony at trial. It can also determine whether the error was trivial to counsel's representation in light of other discovery that revealed Flores's identity and the content of his pretrial statements to sheriff's personnel. It could also consider the significance of Flores's testimony to the conviction, including the fact that Flores did not identify the shooter at trial and that other independent evidence showed Townley to be the shooter, including his admission to a friend shortly after the shooting that he was "looking at 25 to life," his possession of the shooter's jacket and the probable murder weapon, and the presence of gunshot residue on his jacket and hands.

Structural error is "the exception and not the rule," so much so that there exists a "strong presumption" constitutional errors can be assessed for harmlessness. (*Rose v. Clark* (1986) 478 U.S. 570, 578-579; accord, *People v. Marshall* (1996) 13 Cal.4th 799, 851 ["There is a strong presumption any error falls within the latter category, and it is the rare case in which a constitutional violation will not be subject to harmless error analysis"].) The Court of Appeal failed to perceive that harmless error analysis is not "impossible" on this record. (*Gonzalez-Lopez*, *supra*, 548 U.S. at p. 150.) Its duty was to assess whether and how the trial court's limitation on client consultation affected the outcome of the trial, measured against the standard for harmlessness set forth in *Chapman v. California*, *supra*, 386 U.S. 18. Its failure to do so violates United States Supreme Court precedent and warrants reversal.

G. Remand is Warranted

Should this Court hold that a prejudice inquiry is mandated in this case, either under the *Strickland* test or as a component of a harmless error

inquiry under *Chapman*, remand is appropriate to allow the Court of Appeal to pass on that question in the first instance.

In the Court of Appeal, Townley argued that the trial court's limitation on his consultation with counsel was "structural error, reversible per se." (AOB 42.) He alternatively argued that prejudice was shown on the record under either the state standard set forth in *People v. Watson* (1956) 46 Cal.2d 818 or the federal standard announced in *Chapman*, *supra*, 386 U.S. 18. (AOB 42-45.) The People countered that the consultative restriction did not materially impede defense counsel's performance (RB 20-23) and that it did not prejudice the outcome of the trial in any event (RB 24-29). The Court of appeal declined to apply *Strickland* or *Chapman* and instead found a Sixth Amendment violation that was reversible per se without considering whether the trial court's order had an adverse effect on counsel's performance or on the outcome of the trial. (Typed Opn. at pp. 22-24.)

Under similar circumstances, this Court has deemed "it appropriate to remand the matter to the Court of Appeal to afford that court an opportunity in the first instance to entertain and resolve the question of prejudice" under the principles announced by the Court. (*People v. Cox* (2000) 23 Cal.4th 665, 677 (2000); accord, *People v. Breverman* (1998) 19 Cal.4th 142, 178-179; *People v. Cahill* (1993) 5 Cal.4th 478, 510.) If the Court of Appeal determines that the trial court's consultative restriction does not require reversal, it may then proceed to address the additional claims of error raised on appeal (see Typed Opn. at p. 24). (*Cox*, *supra*, at pp. 677-678; *Cahill*, *supra*, at p. 510.)

II. THE TRIAL COURT CORRECTLY HELD THAT PREVIOUS, UNSIGNED VERSIONS OF THE DECLARATION PROFFERED BY THE PROSECUTOR TO FLORES WERE NOT DISCOVERABLE

In his answer to the petition for review, Townley presented as an additional issue for review whether the trial court violated his statutory right to discovery and his constitutional right to due process by denying his motion to compel production of unsigned, draft declarations that the prosecutor had sent to Flores in anticipation of his plea agreement. (Answer at pp. 14-16; Cal. Rules of Court, rule 8.500(a)(2).) Because this Court did not limit the issues in its grant of review, we address Townley's claim.[15]

Prior to trial, Carranco filed a motion requesting discovery of unsigned, draft declarations that the prosecutor had sent to Flores[16] in anticipation of his plea agreement. Townley joined in the discovery request. (3 RT 568.) Defendants argued that the documents qualified as prior statements of a witness under Penal Code section 1054.1 and material exculpatory evidence under *Brady v. Maryland*, *supra*, 373 U.S. 83. (Aug. CT 29-30; 3 RT 552-554.) The trial court observed that the draft statements were "never signed by anybody, [or] acknowledged as being correct" and thus were "not evidence of anything." (3 RT 552.) The prosecutor stated that "[a] creature of my head is not discoverable. I think that's the purest form of work product." (3 RT 554.) "My—my perception about what I think happened on February 17th, it doesn't have anything to do with anything." (3 RT 555.) The prosecutor acknowledged receiving communications from Flores's counsel about the proposed declaration

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[15] Footnote 13, *ante*, addresses the other issue Townley presented in his answer.

[16] Defendants also sought pretrial discovery of draft declarations sent to Rocha. Because Rocha did not testify, we limit our discussion to the discovery request involving Flores's plea agreement and declaration.

which suggested some of its contents were incorrect or unnecessary. (3 RT 558.) The court observed that the plea deal reached by Flores and the prosecutor could be explored by counsel on cross-examination. (3 RT 559.) The court concluded, however, that "under 1054 and following sections of the [Penal] Code that [the draft declarations] are not discoverable because they are not evidence. Cases under *Brady* say the same thing. . . . The blank document prepared by an attorney who is, in fact, the opposing attorney, in the context which the document arises which is never signed by the witness is not evidence of anything." (4 RT 754-755.) Accordingly, the court denied the discovery motion. (4 RT 756.) The court likewise disallowed questions by Carranco's counsel to Flores during cross-examination about who had drafted the declaration and the content of the initial drafts. (12 RT 2887-2888.)

The Court of Appeal rejected Townley's claim of error:

> We find no error in this ruling. Even discounting the People's position that the prosecutor's suggested version represented her work product, we nonetheless agree with the [trial] court that the unsigned declaration was not relevant or material evidence. This case does not present facts similar to those in [*People v. Westmoreland* (1976) 58 Cal.App.3d 32], where the prosecutor remained silent while the witness falsely testified that he had not been offered the opportunity to plead guilty to a lesser offense. Here there was no attempt to mislead the jury or any arrangement that was not disclosed to the defense. Flores was not promised leniency beyond the negotiated disposition of his case. And here the witness did not agree to any version of the document except the one he signed. That was the relevant evidence that was material to Flores's credibility, and on that document defense counsel were permitted to cross-examine the witness.

(Typed Opn. at pp. 26-27.)

The Court of Appeal's conclusion was correct. "[S]tatements of witnesses . . . constitute material of a nonderivative or noninterpretative

nature." (*People v. Williams* (1979) 93 Cal.App.3d 40, 63-64; accord, *Thompson v. Superior Court* (1997) 53 Cal.App.4th 480, 486.) The draft declaration authored by the prosecutor and never signed by Flores was not the latter's statement. Hence, it was nondiscoverable under Penal Code section 1054.1, subdivision (f), which authorizes discovery of "[r]elevant written or recorded statements of witnesses or reports of the statements of witnesses whom the prosecutor intends to call at the trial."

The cases relied upon by Townley are distinguishable. (Answer at pp. 14-15.) *Rowland v. Superior Court* (2004) 124 Cal.App.4th 154 held that the defense is required to disclose any unrecorded oral statements of defense witnesses communicated to defense counsel by a third party investigator. (*Id.* at p. 166.) *People v. Lamb* (2006) 136 Cal.App.4th 575 held that an expert witness's notes about his interviews with witnesses and his calculations about the cause of an accident are discoverable as a statement by the expert in connection with the case. (*Id.* at p. 580.) *Thompson v. Superior Court, supra*, 53 Cal.App.4th 480 held that "raw written notes of witness interviews, other than attorney work product, are 'statements' as defined in [the discovery statutes] and thus must be disclosed by both sides." (*Id.* at p. 485.) By contrast, the unsigned draft declaration in this case did not reflect a "statement" by Flores, but rather the "thought processes" of the prosecutor. (*Id.* at p. 488 [drafts expressing the report writer's thought processes, impressions, or opinions are protected work product].)

Unlike the Court of Appeal, we see no reason to "discount" the prosecutor's argument that the draft declaration was protected work product. The draft declaration here was the product of the prosecutor's distillation of the police reports and witness statements, and encompassed her conclusions about the crime. (3 RT 555, 565-566.) The prosecutor did not speak directly with Flores in drafting the declaration, and the proposed

declaration, in its original form, was neither endorsed nor adopted by Flores. Code of Civil Procedure section 2018.030, incorporated by reference into Penal Code section 1054.6, "absolutely protects from discovery writings that contain an 'attorney's impressions, conclusions, opinions, or legal research or theories.'" (*Rico v. Mitsubishi Motors Corp.* (2007) 42 Cal.4th 807, 814 (*Rico*), quoting Code Civ. Proc., § 2018.030.) "The protection extends to an attorney's written notes about a witness's statements." (*Id.* at p. 814.) "When a witness's statement and the attorney's impressions are inextricably intertwined, the work product doctrine provides that absolute protection is afforded to all of the attorney's notes." (*Ibid.* [notes drafted by paralegal and edited by attorney, summarizing a strategy session with designated defense experts, was work product].)

This draft declaration was not even prepared by the witness's counsel, but rather by counsel for an adverse party engaged in plea bargaining. It was not a verbatim record of a statement by Flores, not a product of consultation by the prosecutor with Flores, and not a statement attested as true by Flores. It reflected the prosecutor's thoughts and impressions of the case. As such, it was protected work product. (*Rico*, *supra*, 42 Cal.4th at p. 815; Pen. Code, § 1054.6.)

Townley contends that the prosecutor waived the work product privilege by showing the draft versions of the declaration to Flores and his counsel. "Waiver . . . occurs by an attorney's 'voluntary disclosure or consent to disclosure of the writing to a person other than the client who has no interest in maintaining the confidentiality of the contents of the writing.' [Citation.]" (*McKesson HBOC, Inc. v. Superior Court* (2004) 115 Cal.App.4th 1229, 1239.) Here, the prosecutor released the draft declarations to Flores as a part of the confidential plea negotiations, and the existence of the sealing order demonstrates Flores's interest in maintaining

confidentiality over both the plea negotiations and the declaration. The prosecutor promptly asserted an attorney work product privilege as against Carranco's and Townley's discovery request. (3 RT 554-555.) Accordingly, there was no waiver of the work product privilege. (See *Rico*, *supra*, 42 Cal.4th at p. 815, fn. 8.)

Townley also argues that the draft declarations were in effect a discussion with Flores about the possibility of leniency in exchange for favorable testimony and were thus discoverable under *Brady v. Maryland*, *supra*, 373 U.S. 83 and *People v. Westmoreland* (1976) 58 Cal.App.3d 32. The Court of Appeal correctly rejected this argument. The terms of the plea agreement with Flores were set forth in the sealed declaration and on the record at Flores's change of plea hearing. Counsel for Townley and Carranco were provided with copies of these documents and were allowed to cross-examine Flores on the subject of his plea agreement. (See 12 RT 2884-2890, 2905-2908.) Specifically, both counsel asked Flores about his having originally been charged with attempted murder, which carried a maximum term of life in prison, and his pleading guilty to assault with a firearm for a substantially reduced three-year prison sentence. (12 RT 2874-2876, 2884-2885; 13 RT 3041.) Counsel for Carranco brought out that at the time of his plea agreement, Flores had to sign a declaration under penalty of perjury that set forth the circumstances surrounding the shooting. (12 RT 2886-2887.) Counsel for Carranco elicited on cross-examination that the declaration included these provisions: (1) "I understand that I have to acknowledge to the Judge in open court and under oath the contents of this declaration are true at the time I enter my plea"; and (2) "I understand that if called as a witness I must tell the truth." (12 RT 2908-2909.)

Unlike the documents provided to counsel, the prosecutor's draft versions of the declaration had no tendency to establish Flores's bias or an

inconsistency with Flores's trial testimony. He did not draft them, sign them, or otherwise adopt them as his.

This case is thus unlike *People v. Westmoreland*, *supra*, 58 Cal.App.3d 32, where a prosecution witness testified falsely in response to a question whether he had been offered the opportunity to plead guilty to a lesser offense. Despite knowing the witness gave a misleading answer on cross-examination, the prosecutor in *Westmoreland* remained silent and failed to correct the testimony. (*Id.* at pp. 41-46.) The Court of Appeal concluded that the "prosecutor's failure to clarify Robison's misleading testimony amounted to the withholding of material evidence pertaining to the credibility of a key prosecution witness' testimony . . . ." (*Id.* at p. 46.) Here, by contrast, the terms of the plea agreement were fully disclosed. There is no evidence that Flores made knowingly misleading statements about the deal. No due process violation has been shown.

Ultimately, however the Court of Appeal concluded that any error in failing to discover the prior draft material was "harmless beyond a reasonable doubt. [Citation.] The jury was fully informed of the details of the plea bargain between Flores and the prosecution. He was cross-examined on the discrepancy between his testimony and his declaration, including the statement in the declaration that he had been wearing a 'red and black Pendleton shirt' on the night of the shooting. In addition, the court instructed the jury that Flores's declaration was part of his plea agreement with the prosecution. The withholding of the earlier versions offered to Flores was not prejudicial to Townley." (Typed Opn. at p. 27.) Assuming the appellate court applied the correct harmless error standard, its conclusion was correct, and Townley is not entitled to relief on this claim.

CONCLUSION

For the reasons stated, the Court of Appeal erred in reversing the judgment based on its finding a Sixth Amendment violation. Accordingly, respondent respectfully requests that the Court of Appeal's judgment be reversed and the case be remanded to that court for further proceedings.

Dated: May 10, 2010

Respectfully submitted,

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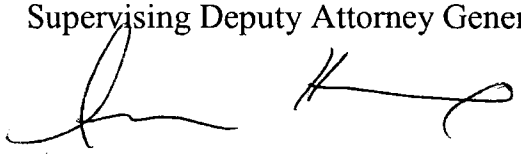

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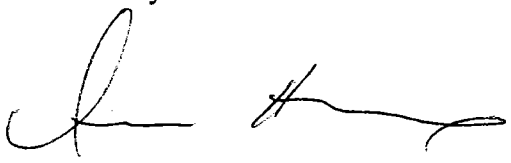
CERTIFICATE OF COMPLIANCE

I certify that the attached **RESPONDENT'S OPENING BRIEF ON THE MERITS** uses a 13 point Times New Roman font and contains 15,407 words.

Dated: May 10, 2010

EDMUND G. BROWN JR.
Attorney General of California



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DECLARATION OF SERVICE BY U.S. MAIL

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

I declare:

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

On May 10, 2010, I served the attached **RESPONDENT'S OPENING BRIEF ON THE MERITS** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on May 10, 2010, at San Francisco, California.

Esther A. McDonald
Declarant

Esther McDonald
Signature

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