

10-15-1987

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Recommended Citation

Harold Baer Jr., *Sequestering Witnesses: Does the Practice Interfere with Defendants' Constitutional Rights?*, 7 J. Nat'l Ass'n Admin. L. Judges. (1987)
available at <https://digitalcommons.pepperdine.edu/naalj/vol7/iss2/2>

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SEQUESTERING WITNESSES:

DOES THE PRACTICE INTERFERE WITH DEFENDANTS' CONSTITUTIONAL RIGHTS?

Hon. Harold Baer, Jr. 1/

In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense. 2/

Since you're under oath, sir, at this point, you discuss nothing with anyone, not even your lawyer because he's finished with you. As of now, you don't discuss your testimony with anybody, you understand? 3/

In criminal cases, but from time to time in civil cases, too, a court can order lawyers not to consult with their clients. This usually happens when a client is on cross and the court declares a recess or adjourns for the day.

I was never comfortable with this procedure and never understood it, even when, as a young Assistant United States Attorney, I requested this order myself.

Sequestering witnesses has ancient roots and has been accepted procedure for hundreds of years. It is not

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2/ U.S. Const. amend. VI.

3/ Jackson v. United States, 420 A.2d 1202, 1203 (D.C. 1979) (en banc).

uncommon for a witness to be put under "the rule" 4/ in courtrooms today. The problem arises when the witness is the defendant; then, perhaps, there is a conflict with the sixth amendment to the Constitution.

Sequestration is believed to be rooted in the biblical story of Susanna. Susanna, accused of adultery by two elders, was defended by Daniel, who spoke to the assembly: "Are ye such fools, ye sons of Israel, that without examination or knowledge of the truth ye have condemned a daughter of Israel? . . . Put these two aside, one far from another, and I will examine them." 5/ Heard separately, the witnesses gave different stories, and Susanna was vindicated.

A second source of sequestration is found in early Germanic law, which was incorporated into the English common law well before the jury system came into being.

The aim of sequestration has been to prevent one witness from tailoring his testimony to that of another. Sequestering a witness can help ensure candor and, more to the point, "Sequestering a witness over a recess called before testimony is completed serves . . . [to prevent] improper attempts to influence the testimony in light of the testimony already given." 6/

The rule was unchallenged in early cases in the United States, although, as in England, exceptions were made with respect to lawyers who were to be witnesses 7/ and

4/ This section draws heavily on 6 J. Wigmore, Evidence §1837 (Chadbourn rev. ed. 1976). See also 22 English and Empire Digest 498 (1974); 10 Halsbury's Laws of England 417 (3d ed. 1955); 15 Halsbury's Laws of England 439 (3d ed. 1955), 2 J. Taylor, Evidence 956 (11th ed. 1920) 1 J. Greenleaf, Evidence 705 (1897).

5/ Quoted in 6 J. Wigmore, Evidence 455-56.

6/ Geders v. United States, 96 S.Ct. 1330, 1335 (1976).

7/ State v. Brookshire, 2 Ala. 303 (1841); State v. Ward, 17 A.483 (Vt. 1899). See also 2 J. Taylor, Evidence; 1 J. Greenleaf, Evidence.

witnesses who were parties to the action. 8/ This testimony was not automatically forbidden; rather, the decision to allow it was left to the discretion of the courts. 9/

In an interesting, seemingly contradictory, application of the rule, a court in 1891 found that it was not error to permit the district attorney to confer with a prosecution witness even while on the stand--"This is his privilege, and, moreover, may be regarded as his duty"--but "[a defense] witness should not be called from the stand while giving his evidence to be spoken to by counsel. This would be bad practice and subject to great abuse." 10/

Citing no previous case law, the idea that a defendant could be prohibited from consulting with his lawyer was strengthened in a 1922 Michigan case that forbade consultation when a recess interrupted cross-examination. 11/

As a criminal defendant's access to counsel was being limited while he was on the witness stand, a different line of cases that strengthened the right to assistance of counsel was developing.

8/ Georgia Rail and Banking Co. v. Tice, 52 S.E. 916 (Ga. 1905); Hughes v. State, 148 S.W. 543 (Tenn. 1912). See also J. Wigmore, Evidence, which suggests that defendants be required to testify first as a way to avoid the problems likely to ensue if a defendant hears other witnesses before testifying. This was held unconstitutional in Brooks v. Tennessee, 92 S.Ct. 1981 (1972).

9/ Brookshire, 2 Ala. 303; Laughlin v. State, 18 Ohio 99 (1849); Bulliner v. State, 95 Ill. 394 (1849); Bulliner v. State, 95 Ill. 394 (1880); Lassiter v. State, 67 Ga. 739 (1881); Wilson v. State, 52 Ala. 299 (1875). See also 6 J. Wigmore, Evidence 456-57, which states that while sequestering a witness has been discretionary since early English common law, it has never been denied. Wigmore further notes that a few courts consider it a matter of right. See Fed. R. Evid. 615.

10/ Williams v. State, 35 Tex. 355, 356 (1871).

11/ People v. Prevost, 189 N.W. 92 (Mich. 1922).

In Powell v. Alabama, 12/ the Supreme Court held that a defendant had the right to counsel at every step in the proceedings against him. A defendant did not need to show how and to what extent he had been prejudiced by a restriction on his right to consult with counsel.

In Glasser v. United States, the Supreme Court wrote that assistance of counsel was "too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial." 13/

In United States v. Venuto, the Third Circuit recognized the broad discretionary powers of the trial judge in conducting a trial, but found "no justification for imposing a restriction of silence between accused and counsel during [an 18-hour] trial recess" 14/ in a criminal case, and found that, as a result of the restriction, the defendant's sixth-amendment right to assistance of counsel had been denied. At least one jurisdiction expanded the Venuto and Glasser decisions to include civil cases. 15/

The unlimited right of defendants to speak with their lawyers at any time, however, has not been universally accepted. In a California case where the Supreme Court denied certiorari, requiring a defendant to answer questions put to him on cross-examination without conferring with his lawyer was held valid. 16/ A Georgia trial judge was upheld

12/ 53 S.Ct. 55 (1932); State v. Lindsey, 106 N.E.2d 230 (Ind. 1952).

13/ 62 S.Ct. 457, 467 (1942), reh'g denied, in Kretzke v. United States, 62 S.Ct. 629 (1942).

14/ 182 F.2d 519, 522 (3d Cir. 1950). See also Commonwealth v. Werner, 214 A.2d 276 (Pa. Super. Ct. 1965) (extending Venuto to the Pennsylvania state courts).

15/ Thompson v. Atlantic Building Corp., 107 A.2d 784 (D.C. 1954).

16/ People v. Miller, 8 Cal. Rptr. 91 (Cal. Dist. Ct. App. 1960), cert. denied, 81 S.Ct. 755 (1961).

when he refused a request to allow consultation during interrupted testimony. 17/

The Supreme Court has concluded that not all constitutional errors are significant and that "harmless" errors do not require automatic reversal. 18/ That same year, 1967, the Second Circuit narrowed the holding in Venuto to long recesses and held that a defendant-witness could be sequestered, or "put under the rule," during an hour-and-a-half recess. 19/ Although the court was troubled, it would not reverse the conviction because it could "discern no actual harm to the right to effective assistance of counsel." 20/ In another Second Circuit case, a judge who had not been informed that a defendant-witness wished to speak with his lawyer during a recess, was allowed to deny the defendant access to counsel. 21/

In 1974, in United States v. Fink, the Supreme Court considered whether a trial court's order directing a criminal defendant-witness not to consult with his lawyer during a 17-hour overnight recess deprived the defendant of his sixth-amendment rights. The lower court had upheld the conviction because the defendant had not shown prejudice. 22/ The Supreme Court reversed.

Two years later in Ceders, writing for a unanimous Court, Chief Justice Burger recognized the power of the trial judge to control the progress of a trial, including the power to sequester nonparty witnesses. 23/ The Court found, however, "A sequestration order affects a defendant

17/ Emmett v. State, 205 S.E.2d 231 (Ga. 1974).

18/ Chapman v. California, 87 S.Ct. 824 (1967).

19/ United States v. Leighton, 386 F.2d 822 (2d Cir. 1967), cert. denied, 88 S.Ct. 1412 (1968).

20/ Leighton, 386 F.2d 822, 823.

21/ United States v. Crutcher, 405 F.2d 239 (2d Cir. 1968), cert. denied, 89 S.Ct. 1018 (1969).

22/ 502 F.2d 1 (5th Cir. 1974).

23/ 96 S.Ct. 1330.

in quite a different way from the way it affects a non-party witness . . . a defendant in a criminal case must often consult with his attorney during the trial. 24/ The Court noted it was common practice for a defendant to consult with his lawyer during an overnight recess to review the day's events and make tactical decisions. The Court wrote--

To the extent that conflict remains between the defendant's right to consult with his attorney during a long overnight recess in the trial, and the prosecutor's desire to cross-examine the defendant without . . . the risk of improper "coaching," the conflict must, under the Sixth Amendment, be resolved in favor of the right to assistance and guidance of counsel. 25/

The Court referred to sequestration during a short recess with approval 26/ while Justice Marshall, in a concurring opinion joined by Justice Brennan, suggested that the length of the recess was beside the point:

I do not understand the Court's observation as suggesting that as a general rule no constitutional infirmity would inhere in an order barring communication between a defendant and his attorney during a "brief routine recess." In my view, the general principles adopted by the Court today are fully applicable to the analysis of any order barring communication between a defendant and his attorney, at least where that communication would not interfere with the orderly and expeditious progress of the trial. 27/

Not surprisingly, courts have been asked to apply Geders when a judge denied the defendant access to his lawyer during a short recess. In general, courts have followed a Fourth Circuit decision which holds that "a restriction on a defendant's right to consult with his attorney during a brief routine recess is constitutionally

24/ Id. at 1335.

25/ Id. at 1337.

26/ Id. at 1337 n.2.

27/ Id. at 1337.

impermissible. . . ." 28/ The Second Circuit has reaffirmed its earlier position, finding that "it is error to bar a defendant from consulting his counsel during any trial recess," 29/ but declined to reverse the conviction automatically, concluding that some showing of prejudice was necessary. The Fifth Circuit held that "depriving a criminal defendant of the right to consult with counsel during court recesses--regardless of how brief the recesses may be--violates the constitutional right to effective assistance of counsel." 30/ The Sixth Circuit held that an order barring contact during a lunch recess was unconstitutional under Powell, 31/ and the Eighth Circuit noted that it had "grave doubts that even a brief restriction on a defendant's right to confer with counsel can be squared with the Sixth Amendment." 32/

At first blush, these decisions seem to presage a clear trend, but close inspection of recent cases suggests otherwise. Access of defendants to their lawyers during recesses remains limited; although finding error where the court barred a defendant from speaking with his attorney during a brief recess, the Second Circuit refrained from reversing the lower court, holding that there was "not even a remote risk of actual prejudice," 33/ because the defendant had had opportunities to consult with his lawyer during other recesses and neither the defendant nor his lawyer had requested permission to consult. The Third Circuit has said that a defendant must demonstrate a desire to meet with

28/ United States v. Allen, 542 F.2d 630, 634 (4th Cir. 1976), cert. denied, 97 S.Ct. 1179 (1977).

29/ United States v. DiLapi, 651 F.2d 140, 148 (2d Cir. 1981), cert. denied sub nom., Ladner v. United States, 102 S.Ct. 1427 (1982).

30/ United States v. Conway, 632 F.2d 641, 645 (5th Cir. 1980).

31/ United States v. Bryant, 545 F.2d 1035 (6th Cir. 1976).

32/ United States v. Vesaas, 586 F.2d 101, 102 n.2 (8th Cir. 1978).

33/ DiLapi, 651 F.2d 140, 148.

counsel or show that he would have met with counsel to fit within the Geders or Venuto 34/ guidelines. The Fourth Circuit has followed this line of reasoning, too, finding that "it was incumbent upon the petitioner to show that he desired to consult with his attorney, and would have consulted with him but for the restriction placed upon him by the trial judge." 35/

A review of post-Geders state criminal cases reveals a clear pattern of reversals where the recess was overnight or longer and some prejudice was shown. This is so regardless of a timely protest; 36/ conversely, a timely objection obviates the need to show prejudice. 37/

No such unanimity exists when the court has prohibited access to counsel during a brief recess. A minority of states, following the view of Justices Marshall and Brennan, hold that it is reversible error to prohibit a defendant from consulting with his lawyer during a brief recess, and this is so whether or not prejudice was demonstrated and whether or not defendant failed to timely object. 38/ The majority of states, however, take a less expansive view of Geders, finding no reversible error stemming from a short recess in the absence of a showing of prejudice. 39/

34/ Bailey v. Redman, 657 F.2d 21 (3d Cir. 1981), cert. denied, 102 S.Ct. 1024 (1982) (if defendant had timely objected, prejudice need not be established).

35/ Strubbs v. Bordenkircher, 689 F.2d 1205 (4th Cir. 1982), cert. denied, 103 S.Ct. 1879 (1983).

36/ Bailey v. State, 422 A.2d 956 (Del. 1980); Mastracchio v. Houle, 416 A.2d 116 (R.I. 1980).

37/ People v. Noble, 248 N.E.2d 96 (Ill. 1969); State v. Fusco, 461 A.2d 1169 (N.J. 1983).

38/ Jackson v. United States, 420 A.2d 1202 (D.C. 1978) (en banc); People v. Igaz, 326 N.W.2d 420 (Mich. Ct. App. 1982), remanded on other grounds, 341 N.W.2d 467 (Mich. 1983).

39/ Crutchfield v. State, 431 So.2d 244 (Fla. Dist. Ct. App. 1983); People v. Sanders, 472 N.E.2d 1156 (Ill. App.

New York courts, to the limited extent that they have addressed the issue, appear to side with the majority. The New York Court of Appeals recently found no abuse of discretion when the trial court refused to permit a short recess so that the criminal defendant could confer with his lawyer immediately after a ruling that allowed the prosecutor to ask the defendant a question to which a negative answer would have precluded any more inquiry. 40/ The New York appellate courts have not yet ruled on whether the constitutional guarantee to assistance of counsel is consistent with limiting a defendant's access to counsel during a short recess where there is no question or line of questions pending. In New York, to prevail on appeal, there must be a timely protest, and probably some showing of prejudice. 41/

On the civil side, a blanket sequestration order was held to violate a litigant's constitutional right to assistance of counsel. 42/ But denial of a plaintiff's right to consult with counsel during a short recess, while held to be an abuse of discretion and violative of procedural due process, was not reversible error absent timely objection or a showing of prejudice. 43/

Ct. 1984); Lock v. State, 403 N.E.2d 1360 (Ind. 1980); Pope v. State, 440 A.2d 719 (R.I. 1982); State v. Perry, 299 S.E.2d 324 (S.C. 1983).

40/ People v. Narayan, 444 N.Y.S.2d 604 (N.Y. 1981) on remand, 449 N.Y.S.2d 1008 (N.Y. App. Div. 1982), aff'd, 460 N.Y.S.2d 503 (N.Y. 1983).

41/ Narayan, 444 N.Y.S.2d 604 (N.Y. 1981).

42/ Potashnick v. Port City Constr. Co., 609 F.2d 1101 (5th Cir. 1980), cert. denied, 101 S.Ct. 78 (1980) (trial court prohibited defendant from consulting with counsel for seven days); but see, Stocker Hinge Mfg. Co. v. Darnel Indus. Inc., 377 N.E.2d 1125 (Ill. App. Ct. 1978) (overnight recess; must show prejudice).

43/ Cartin v. Continental Homes of New Hampshire, 360 A.2d 96 (Vt. 1976); but see, In re Asbestos Litigation, 492 A.2d 256 (Del. 1985) (lawyer-deponent consultation during recess in deposition prohibited).

This analysis, for me at least, presents some good news and some bad news. The good news is that as a young prosecutor, I was well within the law in seeking to prohibit lawyers from consulting with their defendant-clients while they were on the witness stand during a brief recess. The bad news is that the opinion of Justices Marshall and Brennan in Geders seems the more enlightened view on the subject. Unfortunately, at present, it is the minority view.

CRIME AND HEREDITY

"In our society variation in hair length is largely attributable to the fact that some people have their hair cut shorter than others. In most cases, moreover, men cut their hair shorter than women. This means that if you are born with two X chromosomes your hair usually ends up longer than if you are born with an X and a Y chromosome. In a statistical sense, therefore, the presence or absence of a Y chromosome predicts much of the variation in hair length--let us say 60 percent. But the fact that genes currently predict hair length fairly accurately tells us nothing about society's ability to alter hair length. If men and women became convinced that equal hair length was important, achieving this result would be no harder than making hair length equal among males alone. Likewise, if some zealot decided that shorter (or longer) hair would contribute to human happiness, he would be a fool to abandon his campaign simply because someone pointed out that people's genes currently "explained" 60 percent of the variation in hair length. And if some social scientist read a study showing that genes explained 60 percent of the variation in hair length, he would be an even greater fool to conclude, as many now do, that environmental influences explained only 40 percent. Environmental variation (in the way people have their hair cut) would explain virtually all the variation in hair length, despite the fact that genetic variation explained 60 percent.

Similar problems arise when we try to analyze the effects of genes on crime. . . ."

From "Genes and Crime" by Christopher Jeicks, New York Review of Books, February 12, 1987, pp. 33, 34; a review of two new books on criminology.