IN THE
SUPREME COURT OF MARYLAND

SEPTEMBER TERM, 2022

NO. 25

DAMIEN GARY CLARK,

Petitioner,

v.

STATE OF MARYLAND,

Respondent.

ON WRIT OF CERTIORARI TO THE
APPELLATE COURT OF MARYLAND

BRIEF OF RESPONDENT

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INTRODUCTION

In *Geders v. United States*, 425 U.S. 80, 91 (1976), the Supreme Court held that a trial court's directive that "prevent[ed] [the defendant] from consulting his counsel 'about anything' during a 17-hour overnight recess between his direct- and cross-examination" infringed the defendant's Sixth Amendment right to the assistance of counsel. The Court later clarified, in *Perry v. Leeke*, 488 U.S. 272 (1989), that when a defendant is deprived of attorney consultation during such a significant recess, it amounts to an "'[a]ctual or constructive denial of the assistance of counsel altogether,'" *id.* at 280 (citation omitted), and so the defendant need not further show prejudice, *i.e.*, show that the result of trial "would have been different had he been given an opportunity to confer with his lawyer during the . . . recess." *Id.* at 276.

Geders and *Perry*, however, did not address what it takes to show that a deprivation of attorney-client consultation actually happened as a result of a trial court's directive. In both cases, defense counsel strenuously objected to the trial court's limitation on consulting with their clients during the recess at issue. *Id.* at 274; *Geders*, 425 U.S. at 82–83. Neither case involved a situation

where trial counsel and the defendant weren't going to communicate during the recess anyway. And, because the defense attorneys in *Geders* and *Perry* both objected, neither case involved a claim of ineffective assistance of counsel for failing to object.

In this case, in contrast, defense counsel did not object when the judge *sua sponte* directed the defendant, Petitioner Damien Gary Clark, not to discuss the case with counsel during an overnight recess in the midst of Clark's trial testimony. And, in subsequent postconviction proceedings, Clark's counsel explained why he did not object: he had amply prepared Clark to testify, Clark was "doing good on the witness stand," and he "didn't think there was anything for us to talk about that evening." (E. 73–74). Clark, for his part, did not testify that there was anything he had intended to consult with counsel about, nor that he would have communicated with his lawyer but for the trial court's directive.

Clark claims his trial counsel rendered ineffective assistance by not objecting, nevertheless, to the judge's instruction. But the Appellate Court joined a near-unanimous body of authority from other federal and state courts in concluding that "although an order to the defendant not to discuss his or her testimony with

anyone during an overnight recess is improper, it does not, by itself, constitute a deprivation of the right to counsel" under *Geders*. *State v. Clark*, 255 Md. App. 327, 345 (2022). Rather, to show that the directive deprived the defendant of the Sixth Amendment right to counsel, "there must be some evidence that there was an actual deprivation of counsel." *Id.* In other words, if no objection is made, there must be some "other evidence that the defendant would have met with counsel but for the instruction," such that "the instruction actually prevented the defendant and defense counsel from communicating." *Id.* at 341–42. There was no such evidence here.

Without any showing that Clark was actually deprived of consultation with counsel, the Appellate Court explained, Clark's ineffective-assistance claim was subject to ordinary *Strickland* requirements: it was his burden to prove that there was a reasonable likelihood that, but for his attorney's alleged deficiency in not objecting, "the result of the trial would have been different." *Id.* at 346. As the Appellate Court correctly held, Clark failed to do so. Its decision should be affirmed.

STATEMENT OF THE CASE

Clark went to trial in February 2019 before a jury in the Circuit Court for Howard County for the second-degree murder of James Fallon, the attempted second-degree murder of Warner Jackson, and other offenses. Clark had stabbed both men in an altercation at a convenience store, killing Fallon and seriously injuring Jackson.

Clark pursued a claim of self-defense and testified on his own behalf. He completed his direct testimony at the end of the fourth day of trial, with the State's cross-examination set to begin the next day. At that juncture, the trial judge *sua sponte* directed Clark not to "talk to anybody about the case this evening even [trial counsel]." (E. 23). As noted, there was no objection.

Clark's self-defense strategy was partly successful in that, consistent with a finding of imperfect self-defense, the jury acquitted him of second-degree murder and first-degree assault of Fallin, and instead found him guilty of voluntary manslaughter and second-degree assault. It also found him guilty of attempted second-degree murder and second-degree assault of Jackson.

(Tr. 2/19/2019 at 9–14).[1] Clark was sentenced to 50 years' incarceration. (Tr. 5/20/2019 at 53).

On direct appeal, the Appellate Court affirmed in an unreported opinion. *Clark v. State*, No. 486, Sept. Term 2019 (filed June 29, 2020) (E. 30–63). Pertinent here, the Appellate Court held that, by making no objection at trial, Clark failed to preserve for appeal a claim that the trial judge erred under *Geders* when he directed Clark not to communicate with counsel. (E. 42–44). The Appellate Court further declined to consider on direct appeal a claim by Clark that counsel's failure to object constituted ineffective assistance as a matter of law. (E. 44).[2]

Clark then sought postconviction relief. (E. 5–6). The circuit court held a postconviction hearing on July 29, 2021, at which it received testimony from Clark and his trial counsel. (E. 5).

On September 28, 2021, the court issued a Statement of Reasons in which it found that Clark's trial counsel rendered

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[1] To the extent not included in the joint record extract, the transcripts are cited by date.

[2] Clark filed a petition for a writ of certiorari *pro se* in this Court, but voluntarily withdrew it. *See Damien Gary Clark v. State*, No. COA-PET-197-2020. (*See also* E. 6).

ineffective assistance in two respects: by failing to object under *Geders* to the directive not to communicate during the overnight recess; and by failing to file a timely motion for a new trial. (E. 4, 92–94, 100). The circuit court granted a new trial as relief on the *Geders* issue and noted that, but for that relief, it would have granted the opportunity to file a belated motion for a new trial. (E. 94, 100, 101). It denied Clark's postconviction claims in all other respects. (E. 95–101).

The State filed an application for leave to appeal, which the Appellate Court granted, challenging the ruling on the *Geders* issue. (E. 4).[3] After briefing and argument, in a reported 2–1 decision, the Appellate Court reversed the postconviction ruling. *Clark*, 255 Md. App. at 348. The Appellate Court found it unnecessary to resolve whether trial counsel performed deficiently by not objecting. *Id.* at 340. Even assuming deficient performance

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[3] The State did not appeal the postconviction ruling as to ineffective assistance for failure to file a timely motion for a new trial. While this appeal has been pending, the circuit court has authorized Clark to file a belated motion for a new trial, Clark has filed such a motion through counsel, the circuit court has denied it, and Clark has appealed that decision to the Appellate Court, where the appeal is pending as No. ACM-REG-1323-2022.

by counsel, the court held, Clark failed to show he was actually deprived of consultation by the trial court's directive, and he failed to establish *Strickland* prejudice resulting from counsel's failure to object. *Id.*

This Court granted Clark's petition for a writ of certiorari.

QUESTION PRESENTED

Did the Appellate Court correctly reject Clark's claim that his counsel rendered ineffective assistance by not objecting when the trial judge instructed Clark to refrain from talking about the case with counsel during an overnight recess?[4]

STATEMENT OF FACTS

A. The underlying facts.

Although the facts of Clark's underlying offenses have limited relevance to the issue on appeal, the State is unable to adopt Clark's description of the facts, which is contrary to the jury's verdict. (*See* Pet'r Br. at 4–5). The State refers the Court to the detailed factual summary provided by the Appellate Court in its unreported opinion on direct appeal. (E. 31–41).

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[4] The State has consolidated Clark's questions presented.

Notably, although Clark asserts that he stabbed Fallin and Jackson in defense of himself and his wife (Pet'r Br. at 5), the jury rejected Clark's claim of perfect self-defense, and no instruction on defense of others was requested or given. (*See* Tr. 2/15/2019 at 126–53). The jury's verdict suggests it did conclude that Clark subjectively believed he was in immediate or imminent danger of death or serious bodily harm, and that he believed he needed to use deadly force to defend himself against that threat—but that the jury found one or both of those beliefs to be objectively unreasonable. (*See* Tr. 2/15/2019 at 148, 150–51) (jury instructions on imperfect self-defense as pertaining to murder, manslaughter, and assault).

B. The trial judge's instruction not to talk to counsel.

Clark testified in his own defense at trial. (*See* E. 35–41; Tr. 2/14/2019 at 207–80). His direct examination concluded at the end of the fourth day of trial. (Tr. 2/14/2019 at 280). The judge decided to recess the trial and have the State begin its cross-examination of Clark the next morning. (Tr. 2/14/2019 at 280–81). After dismissing the jury, the judge directed Clark, *sua sponte*, not to

speak with his counsel during the overnight recess:

> THE COURT: And, Mr. Clark, before you [step down from the witness stand].
>
> [CLARK]: Yes, sir.
>
> THE COURT: You can't talk to anybody about the case this evening even Mr. Garcia and Ms. Mantegna. Okay?
>
> [CLARK]: Okay.
>
> THE COURT: You can't talk to anybody. It sounds counter intuitive.
>
> [CLARK]: Yes.
>
> THE COURT: You can't talk to your own attorney about the case.
>
> [CLARK]: I understand, sir.
>
> THE COURT: Okay. You're welcome to step down. Go back to the trial table.
>
> [CLARK]: Okay. All right.

(E. 23–24).

Clark's counsel did not object to this directive, and neither Clark nor his counsel indicated that they needed to discuss anything during the overnight recess. (E. 24–25). The next morning, counsel again made no objection to the prior evening's directive, nor did Clark or counsel ask for an opportunity to discuss anything; rather, Clark immediately returned to the witness

stand, and cross-examination began. (E. 28–29).

The Appellate Court, noting the absence of an objection, held on direct appeal that no claim of a *Geders* error by the trial court was preserved for review. (E. 42–44). And, while the court expressed some skepticism that defense counsel might have had a strategic or tactical reason not to object, it acknowledged it could not "eliminate the possibility," and deferred consideration of any ineffective-assistance claim to postconviction review. (E. 44).

C. Testimony at the postconviction hearing.

At the subsequent postconviction hearing, the circuit court heard testimony from Clark's lead trial counsel, Tony Garcia, an experienced criminal litigator. At the time of Clark's trial, Garcia had been practicing criminal law for over 20 years (the first 10 years as a prosecutor). He had handled hundreds of criminal cases, including 30 to 40 murder trials, approximately 10 of which had involved claims of self-defense. (E. 72–73, 75–76).

Asked why he did not object when the court told Clark not to speak with him during the overnight recess, Garcia explained that there was no need for them to speak that evening:

> At the time, I didn't think there was anything for us to talk about that evening. We had talked that morning, I guess when I delivered the suit to him. We talked during the trial, right before lunch. I believe, you know, at every break. It's not like I can leave here and call him. You know, I can't call into JCI at that time, they have it now, because of all the COVID. So, the issue would have been, did I want to go back downstairs in the sheriff's lockup and see him that day? And before we went down—at the end of each day, I would always ask him if he had any questions or anything like that. So, the answer is that I just didn't have anything to go over with him because I thought he was doing good on the witness stand.

(E. 73–74).

Indeed, given that Clark's theory of the case was one of self-defense, Clark's decision to testify had not been made at the "last minute." (E. 78). For approximately a month before trial, Garcia and Clark had planned for Clark to take the stand, spending "many hours" preparing Clark to testify. (E. 78). He elaborated:

> For Mr. Clark's testimony, we practiced, without having a stopwatch, maybe eight to ten hours. We went to him. We went to JCI. . . . So we rehearsed. I would ask him direct and then I would have another young lady with me, (indiscernible), cross. And then we swapped and sometimes I would be the prosecutor and she would be the person and he would answer questions and we would go over the phrases he uses, the words he uses, his facial expression, you know, his pace, how to respond when confronted with evidence and how to do. And then we'd say, you know, try this

> or try that or why don't you do this or why don't you do that.

(E. 77–78). As part of the pretrial preparation for Clark's testimony, and to ensure Clark's "knowledge of the law" that applied, Garcia had "shown [Clark] all the evidence," including video footage, and educated Clark on "the elements of the crime and the elements to generate self-defense." (E. 78–79, 82).

As Garcia acknowledged, it would have been unethical for him to coach Clark during the overnight recess to "fix" any perceived mistakes from direct examination by changing his testimony on cross. (E. 82–83). And in any event, Garcia felt that Clark had performed well on direct examination: he had testified to all the facts that would need to be in evidence in order to argue self-defense, and he "was prepared" to be cross-examined by the prosecutors. (E. 82).

Thus, at the conclusion of Clark's direct examination, Garcia had no concern that he believed he needed to address with Clark:

> No. We talked all day. We talked in the morning, every break, lunch break or break to do this and that and sit at the trial table, go back and forth. After lunch before we sat down, we talked. Of if [sic] we wanted to go down, we'd go down and talk to him. At the end of the incident, you know, at the end of that

> day, I think he was sitting up here but I didn't have anything to ask him, and he didn't say, hey, I want to talk to you. And so, I guess I could have objected for the record that if the judge was wrong, I think the judge is wrong but, you know, I didn't have anything—I'd be lying if I said I had something to say and we were prevented from saying it.

(E. 83–84).

The next morning, before trial resumed, Garcia and another lawyer who was assisting him at trial, Anna Mantegna, spoke with Clark at the trial table about what they planned to do during the remainder of the trial. (E. 85).[5] But they did not discuss the substance of Clark's testimony, nor did Clark say he needed to discuss his testimony with them. (E. 85–86).

Garcia acknowledged he was not "specifically" familiar with the *Geders* case at the time of trial. (E. 74). But although he did not know that particular case, he knew the principle that it stood

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[5] Mantegna also testified at the postconviction hearing. Although she is an experienced attorney as well, Mantegna testified that she had served only in a law clerk or paralegal capacity in Clark's case. (Tr. 7/29/2021 at 147–48, 166–69). She testified about the trial and her and Garcia's meetings with Clark for trial preparation (Tr. 7/29/2021 at 152–63), but none of her testimony at the postconviction hearing concerned the trial judge's directive not to communicate during the overnight recess. (*See* Tr. 7/29/2021 at 147–71).

for: he knew that Clark "always has a right to talk to me." (E. 74). And Garcia testified that if Clark "had said he had anything to say, I would have talked to him." (E. 74). In hindsight, Garcia opined, "When I read it now [*i.e.*, the transcript of the trial judge's directive], I say wow, I should have objected[.]" (E. 86). But the fact remained: "[W]as I going to meet with him or say anything that night? The answer is no. And he didn't ask me." (E. 86).

Clark himself also testified at the postconviction hearing. (App. 61–74). But he was not asked about the *Geders* issue during his brief testimony and did not discuss it. He did not testify that there was anything that he had wished to talk with Garcia about during the overnight recess, but was prevented from discussing. Nor did he testify that he would have contacted Garcia during the overnight recess, or asked to do so, had the trial judge not given the directive.

D. The circuit court's postconviction ruling.

In discussing Clark's *Geders*-based ineffective-assistance claim in its postconviction ruling, the circuit court did not cite *Strickland v. Washington*, 466 U.S. 668 (1984), nor did it clearly

delineate a separate analysis of *Strickland*'s performance and prejudice prongs. In granting relief, the postconviction court highlighted Garcia's statement that, in retrospect, "he 'probably should have objected' to the trial court's instruction." (E. 93). The court acknowledged Garcia's extensive pretrial preparation of Clark and his testimony that he had felt no need to speak with Clark during the overnight recess and "would have objected had he needed to speak to [Clark], or if [Clark] had indicated a need to speak to him." (E. 93–94). Nevertheless, in the postconviction court's view, trial counsel's judgment that "there was no need to communicate that evening" was not a legitimate strategic or tactical reason not to object. (E. 94). On that basis, the court apparently found deficient performance.

From that conclusion, the court saw *Geders* as dispositive. It reasoned that Clark experienced prejudice "because he was deprived of his Sixth Amendment right to counsel during the overnight recess." (E. 94). Although the court appeared to accept Garcia's testimony that Clark had "not indicate[d] that he needed to speak to trial counsel" when they reconvened on the fifth day of trial, and although Clark himself gave no testimony at the

postconviction hearing that he had needed to communicate with counsel during the recess, the postconviction court speculated: "Although trial counsel may not have been aware of any need to consult with [Clark] overnight, [Clark] *may have* desired to do so, but was not able to due to the trial court's instruction." (E. 94) (emphasis added). In addition, the court articulated a supplemental reason to find prejudice: "because [Clark] was not able to raise the issue on appeal due to trial counsel's failure to object to the erroneous instruction." (E. 94).

E. The Appellate Court's decision.

As noted, the Appellate Court reversed. First, the majority held that Clark was not entitled to a presumption of prejudice where he failed to show that the improper directive actually deprived him of communication with counsel that he would otherwise have made. *Clark*, 255 Md. App. at 341–45. Therefore, it was Clark's burden to prove prejudice. *Id.* at 346; *but see id.* at 348–82 (Nazarian, J., dissenting) (asserting otherwise). Second, the Appellate Court rejected the postconviction court's determination that Clark had demonstrated prejudice merely from

the failure to preserve the *Geders* issue for direct appeal. *Id.* at 346–47 (majority op.). Because it reversed due to lack of prejudice, the court chose not to decide whether counsel performed deficiently by not objecting. *Id.* at 340.

STANDARD OF REVIEW

The Sixth Amendment grants criminal defendants a right to effective assistance of counsel at trial. *Wallace v. State*, 475 Md. 639, 653 (2021). A claim that counsel has rendered constitutionally ineffective assistance is assessed under the two-pronged *Strickland* standard: "(1) a [defendant] must show that counsel's performance was deficient, and (2) that the deficiency prejudiced the defense." *Wiggins v. Smith*, 539 U.S. 510, 521 (2003) (citing *Strickland*, 466 U.S. at 687).

Under *Strickland*'s deficient-performance prong, the defendant's "burden is to show 'that counsel made errors so serious that counsel was not functioning as the counsel guaranteed . . . by the Sixth Amendment.'" *Harrington v. Richter*, 562 U.S. 86, 104 (2011) (citation omitted). To satisfy this first prong, the defendant must show that counsel's acts or omissions "fell below an objective

standard of reasonableness" in light of "prevailing professional norms," and must overcome the "strong presumption" that counsel's conduct, under the circumstances, constituted "'sound trial strategy.'" *Strickland*, 466 U.S. at 688–90 (citation omitted). Representation need not be perfect or successful to be constitutionally effective; the "Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight." *Yarborough v. Gentry*, 540 U.S. 1, 8 (2003).

To satisfy the second prong, outside of circumstances in which prejudice is presumed, the defendant must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome of the proceedings." *Id.* "It is not enough 'to show that the errors had some conceivable effect on the outcome of the proceeding.'" *Harrington*, 562 U.S. at 104 (quoting *Strickland*, 466 U.S. at 693). "Counsel's errors must be 'so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.'" *Id.* (quoting *Strickland*, 466 U.S. at 687).

On appellate review, a postconviction court's ruling on an ineffective-assistance claim presents "'a mixed question of law and fact. The factual findings of the post-conviction court are reviewed for clear error.'" *Wallace*, 475 Md. at 653 (quoting *State v. Syed*, 463 Md. 60, 73 (2019)). A postconviction court's legal ruling as to "whether the defendant's Sixth Amendment rights were violated" is reviewed "without deference." *Newton v. State*, 455 Md. 341, 351–52 (2017).

ARGUMENT

THE APPELLATE COURT CORRECTLY REJECTED CLARK'S CLAIM THAT HIS COUNSEL RENDERED INEFFECTIVE ASSISTANCE BY NOT OBJECTING WHEN THE TRIAL JUDGE INSTRUCTED CLARK TO REFRAIN FROM TALKING ABOUT THE CASE WITH COUNSEL DURING AN OVERNIGHT RECESS.

The Appellate Court correctly rejected Clark's claim of ineffective assistance of counsel. Clark's primary complaint about the Appellate Court's decision is that it ruled that he—like most defendants claiming ineffective assistance—was obligated to prove *Strickland* prejudice. According to Clark, that ruling defied *Geders* and its progeny, including *Perry*, which have held that

prejudice is presumed or need not be proven when a *Geders* violation is established.

But neither the State nor the Appellate Court has disputed that it is unnecessary to show prejudice once a *Geders* violation is established. The flaw in Clark's argument is that, as the Appellate Court recognized, Clark has not established an actual *Geders* violation in the first place.

Indeed, no *Geders* claim is even directly before the Court in the current appeal. The claim that Clark presented on postconviction review, and that is now before this Court, is not a *Geders* claim, but is one step removed from a *Geders* claim. In other words, the pending claim is not that the trial court erred under *Geders* by directing Clark not to communicate with counsel. Clark attempted to advance such a claim of trial-court error on direct appeal, but it was not preserved. Rather, the claim before the Court is a *Strickland* claim of ineffective assistance of counsel: a claim that, by failing to object to the trial judge's directive—thereby failing to prevent or preserve an alleged *Geders* violation by the trial court—Clark's trial attorney rendered ineffective assistance. *Clark*, 255 Md. App. at 340 ("[B]ecause this case is

before us in the posture of review of a post-conviction claim of ineffective assistance of counsel, we do not address the merits of the trial court error. Rather, we address the claim through the lens of the test set forth in *Strickland v. Washington*.").

The Appellate Court correctly rejected Clark's claim for two reasons. First, Clark failed to show that the non-objection resulted in a *Geders* violation because Clark failed to show that *Geders* was ultimately violated. As the Appellate Court rightly held, joining a consensus of authority from other courts, a Sixth Amendment deprivation of the type recognized in *Geders* is not established unless a court's no-communication directive *actually prevents* the defendant and defense counsel from communicating.

True enough, the trial judge's directive was improper, and if Clark had shown that the improper directive stopped him from communicating with counsel—if he had shown that it actually prevented communication that otherwise would have occurred—a *Geders* violation would be established, and prejudice would be presumed. But Clark made no such showing. Demanding such a showing is not a requirement for the defendant to "retroactively prove prejudice" from a deprivation, as Clark would have it. (Pet'r

Br. at 7). Nor is it a delegation to the defense attorney of the authority to waive the defendant's constitutional right to the assistance of counsel. (*See* Pet'r Br. at 35–41). Rather, it is simply a requirement to show that the defendant was actually deprived of the assistance of counsel in the first place. Because Clark made no such showing, no presumption of prejudice arises.

Second, without the benefit of any presumption of prejudice, Clark did not prove that he was actually prejudiced by his attorney's failure to object. *Strickland* prejudice was not established merely by virtue of the fact that, due to trial counsel's non-objection, the *Geders* issue was not preserved for review on direct appeal. As the Appellate Court recognized, such a failure-to-preserve-for-appeal theory of *Strickland* prejudice is incompatible with precedent of this Court and the United States Supreme Court that *Strickland*'s prejudice prong is not satisfied "simply because the petitioner alleges that his or her trial counsel caused structural error," *i.e.*, an error that would be automatically reversible without inquiry into prejudice if preserved on direct appeal. *Ramirez v. State*, 464 Md. 532, 575–76 (2019) (citing, *inter*

alia, *Weaver v. Massachusetts*, 137 S. Ct. 1899 (2017), and *Newton v. State*, 455 Md. 341 (2017)).

Finally, as an alternative basis for affirmance, Clark's ineffective assistance claim may also be rejected on the *Strickland* performance prong. Although the Appellate Court resolved the ineffective-assistance claim on the prejudice prong instead, and did not reach the performance prong, Clark's attorney did not perform deficiently under the circumstances by deciding not to object to the trial court's directive.[6]

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[6] Although the Appellate Court did not decide the performance prong, Clark has sought this Court's review of the performance prong in his fourth question presented, and the Court granted his petition on that question. Accordingly, the issue of *Strickland* performance is before this Court. However, given that the Appellate Court did not decide it, and in light of the sequencing of the issues in Clark's brief, the State addresses *Strickland* performance last. *See, e.g.*, *Oken v. State*, 343 Md. 256, 284 (1996) (observing that it is not necessary to "approach the [two-pronged *Strickland*] inquiry in any particular order").

A. Clark failed to establish a *Geders* violation, entailing a presumption of prejudice, because he failed to show that the trial court's instruction actually deprived him of consultation with counsel.

Clark's claim that his counsel rendered ineffective assistance by failing to prevent a *Geders* violation fails because Clark failed to show that any Sixth Amendment deprivation actually occurred. A Sixth Amendment deprivation of the type recognized in *Geders* does not occur unless a court's no-communication directive actually prevents the defendant and defense counsel from communicating. A "condition precedent to a *Geders*-like Sixth Amendment claim is a demonstration, from the trial record, that there was an actual 'deprivation' of counsel—*i.e.*, a showing that the defendant and his lawyer desired to confer but were precluded from doing so by the [trial] court." *United States v. Nelson*, 884 F.3d 1103, 1109 (11th Cir. 2018). In short, a defendant is not actually deprived of counsel by a court's instruction not to communicate if the defendant was not going to communicate with counsel anyway. As the Appellate Court correctly recognized, this requirement to demonstrate an actual deprivation of counsel is fully supported by *Geders* and its progeny.

1. Geders *and the cases interpreting it support the rule that the Sixth Amendment is violated by a no-communication directive only if the directive actually deprives the defendant of consultation with counsel.*

Analysis begins with *Geders* itself. In *Geders*, as here, the defendant testified on his own behalf and completed his direct examination late in the day, such that the trial court chose to delay the prosecution's cross-examination until the next morning. 425 U.S. at 82. Over defense counsel's "persist[ent] . . . objection" that "he had a right to confer with his client about matters other than the imminent cross-examination, and that he wished to discuss problems relating to the trial with his client" before the next day of trial began, the court directed the defendant "not to discuss the case overnight with anyone," including his counsel. *Id.* at 82–83.

The Supreme Court recognized the benefit of witness sequestration orders generally, *see id.* at 86–89, but ruled that conflict between the interests served by sequestration and "the defendant's right to consult with his attorney during a long overnight recess in the trial" must, "under the Sixth Amendment, be resolved in favor of the right to the assistance and guidance of counsel." *Id.* at 91. Because the "challenged order prevented [the

defendant] from consulting his attorney during a 17-hour overnight recess, when an accused would normally confer with counsel," the Court held, without further analysis of prejudice, that the order "impinged upon [the defendant's] right to the assistance of counsel guaranteed by the Sixth Amendment." *Id.*

Subsequently, in *Perry*, the Court addressed two areas of post-*Geders* uncertainty: whether the rule of *Geders* applied to prohibitions of communication during recesses of shorter duration, and whether any showing of prejudice was necessary to obtain relief for a *Geders* violation. The trial court in *Perry* took only a 15-minute recess between the defendant's direct examination and cross-examination. *Perry*, 488 U.S. at 274. The court *sua sponte* ordered the defendant not to speak with anyone, including his lawyer, during that 15-minute break. *Id.* When the recess ended, defense counsel moved for a mistrial due to the restriction on communication. *Id.*

The Supreme Court held that the *Geders* rule did not apply to the 15-minute recess, explaining that a defendant has no "constitutional right to discuss [their] testimony while it is in progress," and that the 17-hour overnight recess in *Geders* was "of

a different character" from the 15-minute recess in *Perry*. *Id.* at 284. The difference, the Court explained, is that "the normal consultation between attorney and client that occurs during an overnight recess would encompass matters that go beyond the content of the defendant's own testimony—matters that the defendant does have a constitutional right to discuss with his lawyer, such as the availability of other witnesses, trial tactics, or even the possibility of negotiating a plea bargain." *Id.* In contrast, the "testifying defendant does not have a constitutional right to advice" during "a short recess in which it is appropriate to presume that nothing but the testimony will be discussed." *Id.*

But as to prejudice, the *Perry* Court announced that "a showing of prejudice is not an essential component of a violation of the rule announced in *Geders*." *Id.* at 279. The Court cited its post-*Geders* decision in *United States v. Cronic*, 466 U.S. 648 (1984), in which the Court recognized that prejudice must be presumed in certain "circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified," *id.* at 658, and its recognition in *Strickland* that "direct governmental interference with the right to counsel" 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." *Perry*, 488 U.S. at 279–80 (citing *Strickland*, 466 U.S. at 686–87, 692).

Both *Geders* and *Perry*, however, were cases in which defense counsel made a contemporaneous objection to the trial court's no-communication directive. Notwithstanding *Perry*'s teaching that a showing of prejudice is not necessary to establish a Sixth Amendment violation under *Geders*, multiple courts have recognized, both before and after *Perry*, that a *Geders* error is not established simply by a trial court's unobjected-to directive not to communicate with counsel during a lengthy recess, without more.

Rather, as the Appellate Court and almost all courts to consider the issue have held, a *Geders* error requires a showing that the directive caused "an actual 'deprivation' of counsel." *Nelson*, 884 F.3d at 1109; *accord Clark*, 255 Md. App. at 341 ("[T]o show a deprivation of the right to counsel in this context, there must be a showing that the instruction actually prevented the defendant and defense counsel from communicating."). In other words, the defendant must "show a 'deprivation' of his Sixth

Amendment rights by demonstrating that he wanted to meet with his attorney but was prevented from doing so by the instruction of the trial judge." *Stubbs v. Bordenkircher*, 689 F.2d 1205, 1207 (4th Cir. 1982).

Thus, alhough a trial court's directive not to communicate "may have been improper," it does not "constitute[ ] a per se violation of [the defendant's] sixth amendment rights" absent a showing that the defendant "wanted to meet with counsel, but was prevented from doing so by the court's instruction." *Bailey v. Redman*, 657 F.2d 21, 24–25 (3d Cir. 1981). One way to demonstrate a desire to communicate would be to object contemporaneously to the no-communication directive, as occurred in both *Geders* and *Perry*—and such an objection would also preserve the *Geders* issue for review on direct appeal. *See State v. Mebane*, 529 A.2d 680, 686 (Conn. 1987) ("Given the defendant's right to communicate with counsel, counsel's objection and exception, fairly viewed, must only mean that the defendant and counsel desired to communicate."). But an objection by counsel is not the only way to establish an actual deprivation of Sixth Amendment rights stemming from a trial-court directive in

contravention of *Geders*. *See Nelson*, 884 F.3d at 1109–10 ("The issue here isn't just that Skillern's lawyer failed to object to the district court's limitation. Instead, the problem is that the record is entirely devoid of *any* indication—in *any* form—that Skillern or his attorney planned or wanted to confer about his testimony during the recess.") (emphasis in original).

Though Clark claims this amounts to requiring the defendant to show prejudice resulting from a deprivation of the right to counsel, in contravention of *Perry*, it amounts to no such thing. Rather, it is a requirement to show that there was a deprivation of counsel in the first place. As the Third Circuit explained in an influential case, the requirement to show that the defendant "had wanted to meet with counsel but was hampered from doing so by the trial court's order," is not based on the defendant's "failure to prove the exact 'prejudice' caused by his inability to meet with counsel; rather, it is based on his failure to demonstrate that he was actually 'deprived' of his right to consult with his attorney." *Bailey*, 657 F.2d at 23–24; *see also State v. Baldridge*, 857 S.W.2d 243, 252 (Mo. W.D. Ct. App. 1993) ("Defendant has failed to present any evidence which

demonstrates that she would have met with counsel absent the ruling. Defendant correctly points out that she is not required to demonstrate prejudice to prevail on this point. However, she is required to demonstrate that she was deprived [of] her right to consult with her attorney, which she has failed to do in this case.") (internal citations omitted).

This requirement to establish an actual deprivation of counsel has been adopted by every federal appellate court to directly address the issue, including the Third, Fourth, and Eleventh Circuits. *Nelson*, 884 F.3d at 1109 (citing *Crutchfield v. Wainwright*, 803 F.2d 1103, 1109 (11th Cir. 1986) (en banc) (plurality op.), *abrogated in part on other grounds as stated in United States v. Cavallo*, 790 F.3d 1202 (11th Cir. 2015); *Stubbs*, 689 F.2d at 1207; and *Bailey*, 657 F.2d at 23–24); *cf. Abrams v. Barnett*, 121 F.3d 1036, 1040 n.4 (7th Cir. 1997) ("[T]he absence of any meaningful explanation to the court by Abrams' counsel as to why it was necessary to confer privately with his client provides further support for our holding that Abrams was not unconstitutionally deprived of counsel.") (citing *Crutchfield*, 803 F.2d at 1110). The actual-deprivation standard has likewise been

recognized by nearly every state appellate court to decide the issue, both before and after *Perry*.[7]

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[7] The actual-deprivation standard has been recognized by appellate courts in Alabama, Delaware, Florida, Georgia, Idaho, Illinois, and Missouri. *See Wallace v. State*, 851 So.2d 216, 218–21 (Fla. Ct. App. 3d Dist. 2003) (holding that no reversible *Geders* error was established "in the absence of any demonstration that anything that the trial court did affected anything, including the exercise of sixth amendment rights, that Wallace or his counsel did or wanted to do," and that *Perry* did not alter this principle, as "conclusively demonstrated by several post *Perry* cases which squarely so hold"; collecting cases); *Parker v. State*, 469 S.E.2d 410, 413 (Ga. App. 1996) ("[T]here is nothing in the record showing that Parker or his attorney indicated a desire to confer over the weekend recess but were prevented from doing so by the trial court's order."); *State v. Stover*, 881 P.2d 553, 556–57 (Idaho 1994) (recognizing *Perry*'s rule as to prejudice but explaining that it does not apply where "there effectively has been no denial of counsel"); *Baldridge*, 857 S.W.2d at 252; *Bailey v. State*, 588 A.2d 1121, 1129 (Del. 1991) ("*Perry* did not hold that *Geders* applied regardless of whether the defendant made some showing that he was actually prevented from communicating with his lawyer during a long recess."); *Haney v. State*, 603 So.2d 368, 378 (Ala. Crim. App. 1991) ("In order for appellant to prevail on this issue, she must demonstrate that the action of the trial court deprived her of a constitutional right which she sought to exercise."); *People v. Brooks*, 505 N.E.2d 336, 340 (Ill. 1987) (holding that defendant "has not shown an essential predicate for relief: that the trial judge's sequestration order deprived her of the assistance of counsel, for however long or short a period of time," where there "is nothing in the record to signify that the defendant and her attorneys wished to communicate during that period"), *abrogated on other grounds by People v. R.D.*, 613 N.E.2d 706 (Ill. 1993). *See generally* Daniel A. Klein, "Trial court's order that accused and his attorney not communicate during recess in trial as reversible error

The Eleventh Circuit's post-*Perry* decision in *Nelson* is illustrative. There, as here, the trial court directed one of the defendants (Skillern) and his attorney not to speak about Skillern's ongoing testimony during an overnight recess. *Nelson*, 884 F.3d at 1109. Although Skillern's attorney did not object to the limitation and arguably invited it, the Eleventh Circuit expressly declined to resolve the appeal on the basis of either non-preservation or invited error. *Id.* at 1109–10. It recognized that there need not "always be a formal objection," *id.* at 1109 n.3, but grounded its decision on the absence of *any* indication, by objection or otherwise, "that either Skillern or his lawyer had any intention or desire to discuss his testimony during the recess," such that Skillern could not "show that he was actually deprived of his right to counsel[.]" *Id.* at 1107.[8]

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under Sixth Amendment guaranty of right to counsel," 95 A.L.R. Fed. 601 (1989) (collecting cases).

The lone court that has expressly rejected the actual-deprivation standard, as discussed *infra*, is the District of Columbia Court of Appeals. Moreover, as also discussed *infra*, no previous reported Maryland case addressing a *Geders* issue has had any occasion to address the actual-deprivation standard.

[8] The trial court's directive allowed Skillern and his counsel to communicate about matters other than his testimony. Although

Likewise, in *Wallace v. State*, 851 So.2d 216 (Fla. Ct. App. 3d Dist. 2003), when the trial recessed in the midst of the defendant's testimony, the trial court gave the defendant a *sua sponte* directive much like the one the trial court gave here: "Mr. Wallace, I remind you again that you're still in the process of testifying, therefore, you are not to discuss with anyone including counsel anything that you have testified to or anything pertaining to your case." *Id.* at 217 n.1. As in this case, there was no objection.

The Florida appellate court recognized *Perry*'s holding that a trial court's interference with the right to confer with counsel would "require reversal even though no prejudice, stemming either from the contents of the forbidden consultation or the ultimate outcome of the trial[,] had resulted." *Id.* at 217–18. But, it explained, *Perry*'s holding as to prejudice does not "even come[ ] into play . . . in the absence of any demonstration that anything

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courts have held that there is no *Geders* violation if the defendant is restricted during a recess only from discussing the defendant's own testimony and is permitted to communicate with counsel about other matters, the *Nelson* court declined to resolve Skillern's claim on that basis in light of Eleventh Circuit precedent finding a Sixth Amendment violation even from such a partial restriction. *Nelson*, 884 F.3d at 1106 (discussing *United States v. Romano*, 736 F.2d 1432 (11th Cir. 1984)).

that the trial court did affected anything, including the exercise of sixth amendment rights, that Wallace or his counsel did or wanted to do." *Id.* at 218. Collecting ample supporting case law both before and after *Perry*, the court ruled that where a no-communication instruction "'is not objected to, nor is there any indication that counsel wanted to speak to the defendant'" or vice versa, "'there can be no impermissible infringement on the right to counsel.'" *Id.* at 220 (citation omitted).

2. *There was no actual deprivation of counsel in this case.*

As in *Nelson*, *Wallace*, and the other cases cited above, Clark failed to show that he was actually deprived of consultation with counsel. The trial court's no-communication directive was admittedly improper under *Geders*. But not only was there no objection at trial to the directive, there is no other evidence that Clark was actually deprived of any consultation with counsel that he desired or would have undertaken but for the court's directive.

As Garcia explained at the postconviction hearing (E. 73–74, 77–78), given his extensive pretrial preparation of Clark and Clark's good performance on the witness stand, Garcia "just didn't

have anything to go over with him." (E. 74). Garcia acknowledged: "I guess I could have objected for the record that . . . the judge is wrong but, you know, I didn't have anything—I'd be lying if I said I had something to say and we were prevented from saying it." (E. 84).

Although Clark also testified at the postconviction hearing (*see* App. 61–74), Clark likewise did not testify that he had wished to consult with counsel during the recess, that there was anything he wanted to talk about, or that he would have communicated or asked to communicate with counsel but for the trial court's directive.

Under these circumstances, the Appellate Court correctly concluded that "there was no showing of an actual deprivation of [Clark's] right to counsel, given that there was no objection to the instruction and there was no other evidence showing that [Clark] would have talked with counsel absent the instruction." *Clark*, 255 Md. App. at 346. Accordingly, Clark "was not entitled to a presumption of prejudice." *Id.*

3. *Clark's objections to the actual-deprivation standard lack merit.*

Clark (joined by the dissenting judge below and the Maryland Criminal Defense Attorneys' Association in an amicus brief) presents essentially three arguments in response but, as discussed in the following sections, none of his arguments are convincing.

First, Clark asserts that the Appellate Court's holding amounts to a requirement for him to "retroactively prove prejudice" (Pet'r Br. at 17), which he claims is contrary to *Perry* and other case law. But, as the cases discussed above explain and the Appellate Court majority recognized, the actual-deprivation standard is consistent with *Perry* and it is not a requirement to prove prejudice at all ("retroactively" or otherwise). Rather, it is a requirement to prove that the defendant "was actually deprived of the right to counsel, i.e., that the defendant wanted to talk with counsel, or that counsel wanted to talk with the defendant, and they would have done so absent the instruction." *Clark*, 255 Md. App. at 345 n.6. The cases Clark cites do not support his claims.

Second, Clark argues that applying the actual-deprivation standard is tantamount to allowing counsel to waive the right to attorney-client communication on a client's behalf. (Pet'r Br. at 35). It is no such thing. It is not merely the lack of an objection by counsel that indicates Clark was not actually deprived of consultation with counsel, but the lack of *any* evidence at all, from *any* source—including Clark's own postconviction testimony—to show that Clark would have consulted with counsel but for the trial judge's directive.

Third, Clark contends that the actual-deprivation standard is unworkable in practice and promotes invasion of the right to private communication with counsel. It does not. The requirement can be satisfied by a contemporaneous objection, without more. And even if no objection was made at trial, the defendant is not required to disclose the substance of any communication with counsel or the substance of any matter that the defendant wished to discuss with counsel. The defendant only needs to show that consultation would have occurred but for the directive.

i. The actual-deprivation standard does not amount to requiring "retroactive proof of prejudice."

Clark asserts that several Supreme Court opinions (including a dissent), prior Maryland jurisprudence, and cases from other jurisdictions, all support his position. He is wrong.

Not one of the Supreme Court decisions he cites—*Holloway v. Arkansas*, 435 U.S. 475 (1978); *United States v. Cronic*, 466 U.S. 648 (1984); *Delaware v. Van Arsdall*, 475 U.S. 673 (1986); *Strickland v. Washington*, 466 U.S. 668 (1984); *Mickens v. Taylor*, 535 U.S. 162 (2002); and *Bell v. Cone*, 535 U.S. 685 (2002)—involved an alleged *Geders* violation. Each case simply indicated (sometimes citing *Geders* or *Perry* in support) that a denial of the assistance of counsel at a critical stage of trial is a Sixth Amendment violation that does not require a showing of prejudice. But that is a proposition no one disputes.

Justice Sonia Sotomayor's opinion in *Hernandez v. Peery*, 141 S. Ct. 2231 (2021)—putting aside that it is a solo dissent from a denial of certiorari—is likewise not in any conflict with the actual-deprivation standard. Justice Sotomayor observed that "*Geders* and *Perry* require automatic reversal whenever a court

unjustifiably *denies a defendant access to counsel* during trial." *Id.* at 2235 (Sotomayor, J., dissenting) (emphasis added). But, as the actual-deprivation standard reflects, a no-communication instruction from a court does not actually "den[y] a defendant access to counsel," *id.*, if the defendant was not going to communicate with counsel anyway.[9]

Although Clark seeks support in prior Maryland cases, no previous reported Maryland case addressing a *Geders* or *Geders*-like issue has had any occasion to address the actual-deprivation standard. In *Snyder v. State*, 104 Md. App. 533, 561–63 (1995), the Appellate Court held that a trial court directive that barred the defendant from discussing his own testimony with counsel during a recess, but allowed consultation as to other matters, did not constitute a deprivation of counsel in violation of *Perry*. Likewise, in *Wooten-Bey v. State*, 318 Md. 301, 305–09 (1990), this Court held that, under *Perry*, a prohibition of communication

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[9] In *Hernandez*, an actual deprivation was evident (and was conceded) where defense counsel had unsuccessfully sought to vacate the trial court's no-communication order. *Hernandez*, 141 S. Ct. at 2232 (Sotomayor, J., dissenting) (citing *People v. Hernandez*, 101 Cal. Rptr. 3d 414, 411 (Cal. App. 2009), *rev'd*, 273 P.3d 1113 (Cal. 2012)).

limited to discussion of the defendant's testimony during a lunch recess did not violate the right to counsel. In holding that there was no deprivation of counsel for other reasons, neither decision cast any doubt on the proposition that an actual deprivation of counsel must be shown.[10]

The other cases Clark cites are almost all inapposite for similar reasons. In each of the cases Clark cites from the Second, Eighth, Ninth, and D.C. Circuits, and the cases from Connecticut, New Jersey, and Rhode Island, the trial judge's no-communication instruction was objected to, leaving no question that there was an actual deprivation of consultation with counsel.[11] Likewise, in the

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[10] *Clark v. State*, 306 Md. 483 (1986), a case that Clark does not cite (and which involved a different defendant with the same last name), concerned a quasi-*Geders* claim that the trial court deprived the defendant of his Sixth Amendment right to counsel by prohibiting the defendant's counsel from communicating with the attorney for a co-defendant, in order to coordinate their peremptory strikes of prospective jurors at a joint trial. Notably, counsel strenuously objected to the limitation on communication, *see id.* at 484–86, and this Court held that the limitation actually "deprived counsel of valuable information and advice concerning the exercise of the peremptory challenges," and reversed without a showing of prejudice from the deprivation. *Id.* at 490–91. Because there was an objection in *Clark*, there was no occasion to consider the actual-deprivation standard.

[11] *Jones v. Vacco*, 126 F.3d 408, 414 (2d Cir. 1997); *Moore v.*

Sixth Circuit and Pennsylvania cases Clark cites, it was clear from the record that the defendant was actually deprived of communication with counsel.[12] In the California and Kentucky cases, the courts held there was no complete deprivation of counsel, and thus no presumption of prejudice, from orders that imposed only minor limitations on attorney-client communication.[13]

Purkett, 275 F.3d 685, 687 (8th Cir. 2001); *United States v. Sandoval-Mendoza*, 472 F.3d 645, 650 (9th Cir. 2006); *Mudd v. United States*, 798 F.2d 1509, 1510 (D.C. Cir. 1986); *Mebane*, 529 A.2d at 682; *State v. Fusco*, 461 A.2d 1169, 1171 (N.J. 1983); *Mastacchio v. Houle*, 416 A.2d 116, 119 (R.I. 1980).

In three other cases, from the Seventh Circuit, Michigan, and New York, courts reviewed no-communication directives on direct appeal without any indication that there had not been an objection. *United States v. Santos*, 201 F.3d 953 (7th Cir. 2000); *People v. Igaz*, 326 N.W.2d 420 (Mich. App. 1982), *rev'd on other grounds*, 341 N.W.2d 467 (Mich. 1983); *People v. Joseph*, 646 N.E.2d 807 (N.Y. 1994).

[12] *Mitchell v. Mason*, 325 F.3d 732, 740–44 (6th Cir. 2003) (holding that showing of prejudice was not required where defendant could not communicate with trial counsel because counsel had been suspended from the practice of law for the month before trial); *Commonwealth v. Diaz*, 226 A.3d 995, 996–97 (Pa. 2020) (holding that showing of prejudice was not required where trial counsel failed to secure a Spanish language interpreter for first day of trial of defendant who lacked English proficiency).

[13] *People v. Hernandez*, 273 P.3d 1113, 1119 (Cal. 2012) (communication was limited only as to discussion of one piece of evidence); *Moore v. Commonwealth*, 771 S.W.2d 34, 40–41 (Ky.

And many of Clark's cases are even farther afield. None of the cases he cites from Idaho, Maine, Minnesota, Nebraska, New Hampshire, Virginia, and Wisconsin involved no-communication directives at all. Like the Supreme Court decisions he invokes, these cases merely cited *Geders* and/or *Perry* only for the general and undisputed proposition that no showing of prejudice is necessary if the defendant was in fact prevented from consulting with counsel at a critical stage.[14]

1988) (communication was limited, over objection, only during a lunch recess, but defendant had earlier opportunity to meet with counsel), *overruled on other grounds by McGuire v. Commonwealth*, 885 S.W.2d 931 (Ky. 1994).

[14] *State v. Alvarado*, 481 P.3d 737, 748–49 (Idaho 2021) (rejecting presumption of prejudice for claim of conflict of interest by defense counsel based on successive representation); *Theriault v. State*, 125 A.3d 1163, 1169 (Me. 2015) (rejecting presumption of prejudice for various non-*Geders*-related claims of ineffective assistance); *Cooper v. State*, 565 N.W.2d 27, 31 (Minn. App. 1997) (holding that lack of American Sign Language interpreter did *not* create a complete deprivation of counsel for deaf defendant who was nevertheless able to communicate with counsel); *State v. Davlin*, 658 N.W.2d 1, 7 (Neb. 2003) (rejecting presumption of prejudice for various non-*Geders*-related claims of ineffective assistance); *Grote v. Powell*, 562 A.2d 152, 155 (N.H. 1989) (rejecting presumption of prejudice from prosecution's discovery tactics); *Walker v. Commonwealth*, 515 S.E.2d 565, 573 (Va. 1999) (rejecting presumption of prejudice from admission of evidence of unadjudicated criminal conduct); *State v. Erickson*, 596 N.W.2d 749, 756–57 (Wisc. 1999) (rejecting presumption of prejudice from

Only two of the cases Clark cites merit more extensive discussion. *Martin v. United States*, 991 A.2d 791 (D.C. 2010), is the only extant reported decision that has expressly rejected the actual-deprivation standard. *See id.* at 795 & nn. 15 & 18, (rejecting government's argument that relied on actual-deprivation standard as expounded by the Third and Eleventh Circuits in *Bailey* and *Crutchfield*, *supra*, respectively). But, as the Appellate Court majority observed below, *Martin* is not persuasive. *Clark*, 255 Md. App. at 345. In *Martin*, the D.C. Court of Appeals relied primarily on its own prior decision in *Jackson v. United States*, 420 A.2d 1202 (D.C. 1979), which pre-dated all the other cases on point save *Geders* itself (and so did not have the benefit of their reasoning), and which held that a *Geders*-type directive constitutes plain error which requires automatic reversal on direct appeal even if not preserved by objection. *See Martin*, 991 A.2d at 795–96; *Jackson*, 420 A.2d at 1205.

Similarly, in *United States v. Torres*, 997 F.3d 624, 627–29 (5th Cir. 2021), the Fifth Circuit held that an unobjected-to

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unobjected-to denial of equal peremptory strikes for prosecution and defense in jury selection).

directive not to communicate with counsel during an overnight recess was reversible on plain-error review. But the *Torres* court did not address the actual-deprivation standard, nor discuss any of the decisions from other circuits and state courts applying it.[15]

Unlike *Martin*, *Jackson*, and *Torres*, this case is not in a plain-error posture on direct appeal. Indeed, it never was. Although Clark argued the unpreserved *Geders* issue on direct appeal, he did not ask the Appellate Court to exercise its discretion to review it for plain error. (*See* E. 42–44). *See also* Brief of Appellant, *Clark v. State*, No. 486, Sept. Term 2019, at 11–14 (filed Oct. 23, 2019) (including no plain-error claim). And in Maryland, plain-error review is discretionary with an appellate court. *See Givens v. State*, 449 Md. 433, 480–81 (2016) (rejecting contention that error would be automatically reversible as plain error, and

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[15] This may be attributable to the fact that, although the government's brief in *Torres* did argue there was no indication that the defendant or his counsel "desired to communicate during the recess and that the court's instruction prevented . . . any actual consultation from taking place," the brief failed to alert the court to any of the case law from other jurisdictions adopting the actual-deprivation standard. Brief of Appellee, *United States v. Torres*, No. 20-50092 (5th Cir.), 2020 WL 6120242, at *25 (filed Oct. 8, 2020).

reaffirming that plain-error review is discretionary); *Yates v. State*, 429 Md. 112, 132 (2012) ("The plain error standard gives a reviewing court a great deal of latitude to decide whether to exercise its discretion.").

For that reason, even if this case were in a plain-error posture, *Martin*, *Jackson*, and *Torres* would be unpersuasive. This Court has emphasized that one scenario where plain-error review should not be available is "where a defendant fails to object as a matter of trial tactics." *Givens*, 449 Md. at 481. If the *Martin/Jackson/Torres* approach of treating an unobjected-to no-communication directive as automatic plain error were adopted, it would incentivize defendants and their counsel *not* to object to directives that are improper under *Geders*. By tactically choosing to remain silent in the face of an improper directive, the defense would be able to build an automatic do-over into the case. That is, a defendant in Clark's shoes could strategically acquiesce to the trial court's erroneous prohibition—a costless maneuver if the defense did not intend to consult during the recess anyway—and, if convicted, simply demand an automatic reversal and new trial.

For these reasons, the Appellate Court correctly joined the consensus approach to *Geders* errors in applying the actual-deprivation standard.

ii. The actual-deprivation standard does not amount to allowing an attorney to waive their client's right to assistance of counsel.

Clark also argues that the actual-deprivation standard effectively amounts to allowing a defense attorney to waive the right to assistance of counsel on their client's behalf. (Pet'r Br. at 35–41). It is true that the right to counsel is personal to the defendant and must be knowingly and intelligently waived. *E.g. Pinkney v. State*, 427 Md. 77, 91–92 (2012). But the actual-deprivation standard does not equate to a waiver of the right to counsel—nor does Clark cite any case holding that it does.

Even where the right to counsel is at issue, the ordinary rule is that a represented defendant is expected to make objections through counsel. *See, e.g.*, *State v. Westray*, 444 Md. 672, 686–87 (2015) (holding that, where a defendant is represented by counsel, a defendant who seeks to challenge a trial court's failure to determine and announce that the defendant's decision to discharge

counsel is knowing and voluntary must make a contemporaneous objection through counsel). Application of ordinary preservation rules in the *Geders* context is not tantamount to waiver of the right to counsel.

Indeed, the actual-deprivation standard does not treat a non-objection by counsel as a waiver of the right to attorney-client consultation. Rather, as discussed, even where counsel does not object, if the defendant can show that he would have consulted with counsel but for the trial court's no-communication directive, the defendant has shown a deprivation of the right to counsel. Clark's problem in this case is simply that he has not even attempted to make that evidentiary showing.

iii. The actual-deprivation standard represents sound policy.

Further, Clark and the amicus urge that the actual-deprivation standard is unworkable as a policy matter. (Pet'r Br. at 34; Amicus Br. at 3–6). They claim that the actual-deprivation standard will force defendants to disclose the substance of the desired attorney-client communication in order to vindicate the right to consultation with counsel. This concern is overstated.

For one thing, there is no question that, in the ordinary case, an objection to the no-communication directive is all that is needed to satisfy the actual-deprivation standard. *See, e.g.*, *Mebane*, 529 A.2d at 686 ("Given the defendant's right to communicate with counsel, counsel's objection and exception, fairly viewed, must only mean that the defendant and counsel desired to communicate."). Thus, the amicus is simply wrong to claim that the standard will impair the *Geders* claims of defendants at trial and on direct appeal. Indeed, even without a contemporaneous objection, there may be sufficient indication in the record on direct appeal to satisfy the actual-deprivation standard. *See Nelson*, 884 F.3d at 1109–10 (explaining, on direct appeal, that "[t]he issue here isn't just that Skillern's lawyer failed to object to the district court's limitation. Instead, the problem is that the record is entirely devoid of *any* indication—in *any* form—that Skillern or his attorney planned or wanted to confer about his testimony during the recess.") (emphasis in original).

For another, even in the context of an ineffective-assistance claim raised at postconviction, the actual-deprivation standard is sound. The actual-deprivation standard imposes no requirement

that a defendant divulge the substance of intended attorney-client communication in order to establish a *Geders* claim. "[A] defendant need not disclose confidential information in order to prove that he has been 'deprived' of an opportunity to meet with counsel. To show a 'deprivation' of his sixth amendment rights, a defendant must merely demonstrate that he wanted to meet with counsel, but was prevented from doing so by the court's instruction." *Bailey*, 657 F.2d at 24.

It may be that in some circumstances, the credibility of an assertion that the defendant wished to meet with counsel would be enhanced by the disclosure of some degree of concrete detail about the topics of the desired communication. But the necessity to disclose some degree of otherwise-privileged information to establish an ineffective-assistance claim is commonplace. *See State v. Thomas*, 325 Md. 160, 174 (1992) ("We adopt the universally accepted rule that the [attorney-client] privilege is waived by the client in any proceeding where he or she asserts a claim against counsel of ineffective assistance and those communications, and the opinions based upon them are relevant to the determination of the quality of counsel."). A postconviction

petitioner may, in the first instance, tailor the extent of any disclosure the petitioner chooses to make to the needs of proving the desire for consultation, without revealing defense strategy.[16] And, as in any postconviction case where such disclosure of otherwise-privileged information might threaten the confidentiality of defense strategy for a potential retrial, precautions are available to prevent infringement on the petitioner's rights. *See, e.g.*, *Bittaker v. Woodford*, 331 F.3d 715, 726 (9th Cir. 2003) (endorsing use of protective orders regarding disclosure of attorney-client communications in postconviction proceedings to litigate ineffective-assistance claims).

In sum, Clark and the amicus advance no sound policy reason to reject the widely adopted actual-deprivation standard.

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[16] Nor would it be inappropriate for this Court to admonish postconviction courts to be generally receptive, where a trial court has given an improper directive not to communicate, to the credibility of petitioners' averments that they wished to consult with counsel.

B. In the absence of a presumption of prejudice, Clark failed to establish *Strickland* prejudice from his trial counsel's failure to preserve an objection to the trial court's instruction for direct appeal.

"In the absence of a presumption of prejudice," as the Appellate Court recognized, "it was [Clark's] burden to prove prejudice[.]" *Clark*, 255 Md. App. at 346. As the Appellate Court also correctly recognized, Clark has not attempted to show "a substantial or significant possibility that the verdict of the trier of fact would have been affected," *Bowers v. State*, 320 Md. 416, 426 (1990), had counsel objected. Rather, his sole claim of actual prejudice, which the postconviction court accepted (E. 94), is that Garcia's non-objection failed to preserve the *Geders* issue for review on direct appeal.

The Appellate Court rightly rejected this claim. *Clark*, 255 Md. App. at 346. Clark's failure-to-preserve-for-appeal theory of *Strickland* prejudice is foreclosed by this Court's decision in *Newton v. State*, 455 Md. 341 (2017).

In *Newton*, trial counsel did not object to an obvious and allegedly structural error by the trial court: allowing an alternate

juror to be present in the jury room during the jury's deliberations. Newton argued that he was prejudiced simply because, by not objecting, his attorney had failed to preserve a winning issue for appeal. *Id.* at 361. This Court rejected that argument, explaining that the prejudice inquiry is focused squarely on the effect of the alleged deficiency at trial: either that "the outcome *of his trial* would have been different" or that the error "rendered *his trial* fundamentally unfair." *Id.* at 357 (emphasis added). The Court explained the flaw in the failure-to-preserve-for-appeal theory of prejudice:

> Newton argues that he was prejudiced because if his trial counsel had objected to the presence of the alternate, he would have been granted a new trial on appeal. This argument assumes, however, that the trial court would have permitted the juror to sit in on deliberations over counsel's objection. When we examine prejudice for an ineffective-assistance-of-counsel claim, we "presume . . . that the judge . . . acted according to law." *Strickland*, 466 U.S. at 694. We therefore must assume that if Newton's attorney had objected, the judge would have sustained Newton's objection and excused the alternate as required.

Id. at 361.

So too here. In assessing *Strickland* prejudice, the inquiry is whether "but for counsel's unprofessional errors, the result of

the proceeding would have been different." *Strickland*, 466 U.S. at 694. In the context of alleged ineffective assistance of trial counsel, that means a showing that the result would have been different *at trial*. *See id.* at 695–96 (explaining that "the ultimate focus of [the ineffective assistance] inquiry must be on the fundamental fairness of the proceeding whose result is being challenged," and that "[w]hen a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent [counsel's] errors, the factfinder would have had a reasonable doubt respecting guilt").

Here, the question of whether the result at trial would have been different "but for counsel's unprofessional errors" is: what would have happened but for counsel's failure to object to the court's no-communication directive? In other words, what would have happened at trial if counsel had objected on the basis of *Geders*? There is no dispute that the trial court's directive clearly contravened the Supreme Court's holding in *Geders*. *Newton* teaches that it must be presumed that, upon being alerted to its error, the trial court would have recognized and corrected it. Thus, no claim on direct appeal would have arisen.

Newton's teaching is sound because any other rule would transform the *Strickland* prejudice inquiry into a loophole in the appellate preservation requirement and the plain-error review standard—especially in the context of allegedly structural errors, which the Supreme Court made clear in *Weaver v. Massachusetts*, 137 S. Ct. 1899 (2017), "do not relieve [defendants] of the obligation to prove prejudice when alleging the ineffective assistance of counsel." *Ramirez v. State*, 464 Md. 532, 573 (2019) (citing *Weaver*, 137 S. Ct. at 1912, and *Newton*, 455 Md. at 357). If failure to preserve for appeal what would have been structural error were all it took to demonstrate *Strickland* prejudice, it would amount to an end run around the principle that there is no presumption of prejudice "simply because the petitioner alleges that his or her trial counsel caused structural error." *Ramirez*, 464 Md. at 575.

Clark argues that *Newton* is distinguishable, but he is wrong. He claims prejudice because, unlike Newton, he actually presented his claim on direct appeal only for it to be rejected as unpreserved. (Pet'r Br. at 43).[17] But the Court's analysis in

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[17] Clark claims that he raised the issue "under the plain error standard of review" (Pet'r Br. at 43), but in this he is incorrect. As

Newton of the prejudice from trial counsel's alleged dereliction was not dependent on what happened on appeal; it was focused solely on the trial, making clear that "errors that would result in automatic reversal on direct appeal may not warrant a new trial when raised a part of a postconviction ineffective-assistance-of-counsel claim." *Newton*, 455 Md. at 359.[18]

Indeed, this Court's decision in *Newton* does not stand alone. Other courts have likewise rejected a failure-to-preserve-for-appeal theory of prejudice, recognizing that such an "approach would be contrary not only to the Supreme Court's prejudice analysis in *Strickland*, but also a steady line of subsequent cases holding that the [ineffective assistance of trial counsel] prejudice

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noted *supra*, Clark did not attempt to overcome the failure of preservation by presenting a plain error claim on direct appeal.

[18] Clark also asserts that *Newton* is distinguishable because it was not established in *Newton* whether the issue would have prevailed on appeal. (Pet'r Br. at 42). This argument mixes and matches separate parts of the *Newton* decision, which rejected claims of ineffective assistance by both Newton's trial and appellate counsel. The section of *Newton* that Clark quotes concerned the ineffective-assistance claim regarding his *appellate* counsel, and held that Newton was also not prejudiced by appellate counsel's failure to raise the unpreserved issue because there was no reasonable likelihood that it would have been reversible *on a plain-error standard*. *Newton*, 455 Md. at 366.

analysis focuses on the effect of an alleged error on the *verdict*—that is, on outcome of the trial." *Dickinson v. Shinn*, 2 F.4th 851, 860 (9th Cir. 2021) (emphasis in original).

If *Strickland* prejudice could be demonstrated simply by failure to preserve an issue that would have prevailed on appeal, "[a]ny defendant who could not make the prejudice showing necessary to have a defaulted claim of structural error considered could bypass that requirement by merely dressing that claim in ineffective assistance garb and asserting that prejudice must be presumed." *Purvis v. Crosby*, 451 F.3d 734, 743 (11th Cir. 2006); *see also, e.g.*, *Carratelli v. State*, 961 So.2d 312, 323 (Fla. 2007) (holding that "a defendant alleging that counsel was ineffective for failing to object or preserve a claim of reversible error in jury selection must demonstrate prejudice at the trial, not on appeal").

Although there are some decisions finding *Strickland* prejudice which articulate the finding as one that, but for a failure to object, *either* the trial court would have corrected its ruling *or* the issue would have been preserved for appeal, the Ninth Circuit explained in *Dickinson* why such remarks do not in fact support a failure-to-preserve-for-appeal theory of prejudice:

> To be sure, in a certain sense, the forfeiture of an issue for appeal is relevant to analyzing the prejudice of trial counsel's failure to object because we assume that if trial counsel had objected and the trial court erroneously overruled the objection, the error would have been corrected on appeal. But that is simply to say that when assessing whether a defendant was prejudiced by trial counsel's failure to object, we assume axiomatically that the objection, if raised, would have been correctly ruled upon. . . . [T]hese cases do not support the argument that the loss of an appellate standard of review [*e.g.*, review of a preserved objection for structural error or harmless error rather than review of an unpreserved objection only for plain error] can itself constitute prejudice under *Strickland*.

Dickinson, 2 F.4th at 864.

In sum, trial counsel's mere failure to preserve an issue for appeal does not constitute *Strickland* prejudice.

C. As an alternative ground for affirmance, Clark failed to establish that his trial counsel performed deficiently under *Strickland* by not objecting to the no-communication directive.

Finally, as an alternative ground for affirmance, Garcia's performance in not objecting to the no-communication directive, under the circumstances of this case, was not deficient.

Under the *Strickland* standard, counsel must be "strongly presumed to have rendered adequate assistance and made all

significant decisions in the exercise of reasonable professional judgment," *Strickland*, 466 U.S. at 690, and the burden to show otherwise "rests squarely on the defendant." *Id.* at 687. To meet the deficiency prong of *Strickland*, Clark must show that Garcia "made errors so serious that counsel was not functioning as the 'counsel' guaranteed [to Clark] by the Sixth Amendment." *Id.* at 687.[19]

An attorney's actions are objectively deficient only if "no competent attorney" would have done the same. *Premo v. Moore*, 562 U.S. 115, 124 (2011). Here, despite Clark's claim that trial counsel was "ignorant" of the *Geders* right (Pet'r Br. at 37), Garcia testified that, regardless of whether he knew the *Geders* case by name, he knew that Clark "always has a right to confer with me."

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[19] Although Clark demeans his trial counsel as "little more than a 'warm body with a bar card'" (Pet'r Br. at 46) (citation omitted), it is plain that Garcia thoroughly prepared Clark for trial and vigorously represented him throughout. Indeed, Garcia achieved significant success on Clark's behalf, obtaining not-guilty verdicts on second-degree murder and first-degree assault despite substantial evidence that Clark stabbed the victims because "'one of them said something to his wife'" and, in his view, the victims had "'no respect'" and he "'had to teach [them] a lesson.'" (E. 34) (quoting witness's description of Clark's account of the encounter the day after it occurred).

(E. 73; *see also* E. 74, 84). Garcia repeatedly explained the reason why he nevertheless did not object to the trial court's no-communication directive: having thoroughly covered the ground during pretrial preparation, there was no topic about which he and Clark needed to consult. That was a reasonable basis not to object.

In ruling otherwise, the postconviction court erred in relying on Garcia's opinion that in retrospect he "probably should have objected" and in concluding that Garcia's stated reason was not "strategic or tactical." (E. 93–94). Garcia's assessment of whether he should have objected in hindsight bears little weight. The Supreme Court has cautioned courts to be chary of adopting such post hoc evaluations because "even the most experienced counsel may find it difficult to resist asking whether a different strategy might have been better, and, in the course of that reflection, to magnify their own responsibility for an unfavorable outcome." *Richter*, 562 U.S. at 109. Yet the *Strickland* standard "calls for an inquiry into the *objective* reasonableness of counsel's performance, not counsel's subjective state of mind." *Id.* at 110 (emphasis added).

And the *Strickland* standard does not require counsel to object to every potentially objectionable occurrence at trial. *See Engle v. Isaac*, 456 U.S. 107, 133–34 (1982) (recognizing that the Constitution "does not insure that defense counsel will recognize and raise every conceivable constitutional claim"). To the contrary, choosing which objections to make is a hallmark of effective advocacy. Indeed, "[c]ounsel may decide, for strategic reasons, not to object to an obvious error." *Gordon v. United States*, 518 F.3d 1291, 1300 (11th Cir. 2008).

Gordon is instructive. There, the court rejected the claim that it would necessarily be deficient performance for counsel not to object to the obvious error of sentencing the defendant without offering the opportunity to allocute: for instance, it would not be deficient performance "not to interrupt the proceedings with an objection" to the failure to offer allocution if defense counsel's "client has informed him that he does not intend to allocute." *Id.*

Here, like the scenario explained in *Gordon*, there is no evidence that Clark or his counsel intended or needed to communicate during the recess. Although Clark may not have specifically informed Garcia that he did not wish to communicate

overnight, in the particular circumstances of this case, where Garcia testified that he had thoroughly prepared Clark and spoken with him at every other recess, and Clark's direct examination had proceeded according to plan, Garcia could fairly presume that there was no need to consult that evening. It was not ineffective assistance "not to interrupt the proceedings with an objection" simply for the sake of objecting, *id.*, when the defense had no intention of exercising the right that an objection would have preserved.

The First Circuit's decision in *Bucci v. United States*, 662 F.3d 18 (1st Cir. 2011), is also instructive because *Bucci* similarly involved an allegation that counsel performed deficiently by not objecting to a Sixth Amendment error that would have been reversible on direct appeal without consideration of prejudice—there, the structural error of partially closing the courtroom in violation of the defendant's right to a public trial. The *Bucci* Court recognized that competent counsel could forego raising a constitutional objection simply for the reason that "doing so would be a waste of the defense's time, energy, and resources" because "Bucci had little or nothing to gain from opening the courtroom to

additional members of the public." *Id.* at 31–32. It explained:

> [C]ompetent defense counsel in this case could have reasonably concluded that even a successful Sixth Amendment challenge to the partial courtroom closure would have done little to increase the defense's chances of securing a not-guilty verdict. As such, an objectively reasonable defense counsel could have made the strategic decision to forego the Sixth Amendment objection in favor of conserving the defense's limited resources for other important issues. Rather than raising a complicated constitutional issue that might require briefing and a hearing while offering limited upside to the defendant, the defense counsel could have reasonably believed his client's interests would be best served by moving the trial along and focusing on the immediate task of jury selection.

Id. at 32.

Likewise here, it was objectively reasonable not to object for objection's sake, where no consultation was needed and preserving an unexercised right to consult on principle would not "increase the defense's chances of securing a not-guilty verdict." *Id.*

To be sure, an attorney's failure to object to an improper no-communication directive might usually amount to deficient performance. But here, given Garcia's extensive preparation of Clark to testify and Clark's performance on the witness stand, Garcia's assessment that there was no need to consult that

evening—which Clark has, even now, advanced no evidence to dispute—was reasonable and provided an objectively reasonable and strategic basis for his decision to forgo an objection.

CONCLUSION

The State respectfully asks the Court to affirm the judgment of the Appellate Court of Maryland.

Dated: January 31, 2023

Respectfully submitted,

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CERTIFICATION OF WORD COUNT AND
COMPLIANCE WITH THE MARYLAND RULES

This filing was printed in 13-point Century Schoolbook font; complies with the font, line spacing, and margin requirements of Maryland Rule 8-112; and contains 12,975 words, excluding the parts exempted from the word count by Maryland Rule 8-503.

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DAMIEN GARY CLARK,	IN THE
Petitioner,	SUPREME COURT
v.	OF MARYLAND
STATE OF MARYLAND,	September Term, 2022
Respondent.	No. 25

CERTIFICATE OF SERVICE

In accordance with Md. Rule 20-201(g), I certify that on this day, January 31, 2023, I electronically filed the foregoing "Brief of Respondent" using the MDEC System, which sent electronic notification of filing to all persons entitled to service, including Andrew Cryan, Justice Beyond Bars, 3818 Pikeswood Drive, Randallstown, MD 21133.

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