The Burger Court Opinion Writing Database

Geders v. United States

425 U.S. 80 (1976)

Paul J. Wahlbeck, George Washington University
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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

February 3, 1976

MEMORANDUM FOR THE CONFERENCE

Subject: 74-5968 Geders v. United States

I agreed to undertake drafting a memorandum emphasizing the need to decide this case without reaching constitutional issues. It seems to me that this is a classic case in which we should not reach the constitutional question at this time. If the issue arises from a state court, we can deal with it at that time. I think we should take these questions one at a time. It may be that some will think that, on this record, this is harmless error.

Regards,

WEB

To: Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: The Chief Justice

Circulated: FEB 3 1976

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 74-5968

John A. Geders, Petitioner, *v.* United States. } On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[February —, 1976]

Memorandum of MR. CHIEF JUSTICE BURGER.

We granted certiorari to consider whether a trial court's order directing petitioner, the defendant in a federal prosecution, not to consult his attorney during a regular overnight recess, called while petitioner was on the stand as a witness and shortly before cross-examination was to begin, deprived him of the assistance of counsel so as to require reversal of his conviction.

(1)

A grand jury in the Middle District of Florida returned indictments charging petitioner and several codefendants with conspiracy to import, and illegal importation of a controlled substance into the United States, in violation of 18 U. S. C. § 371 and 21 U. S. C. § 952 (a), and with possession of marihuana, in violation of 21 U. S. C. § 841 (a). The charges grew out of plans for several of the defendants to fly about 1,000 pounds of marihuana from Columbia into the United States, plans that might have succeeded but for the fact that the pilot of the charter plane informed the United States Customs Service of the arrangements.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

March 10, 1976

Re: 74-5968 - Geders v. United States

MEMORANDUM TO THE CONFERENCE:

Enclosed is a draft of the opinion which, except on the Sixth Amendment point, tracks the foreparts of the memorandum I circulated. That was in the vain hope I could persuade four or five that we ought not reach a constitutional issue when a disposition on supervisory powers is available.

Regards,

WEB

substantially rewritten

To: Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: The Chief Justice

Circulated: _____

Recirculated: MAR 10 1976

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 74-5968

John A. Geders, Petitioner, *v.* United States. } On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[~~February~~ March —, 1976]

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari to consider whether a trial court's order directing petitioner, the defendant in a federal prosecution, not to consult his attorney during a regular overnight recess, called while petitioner was on the stand as a witness and shortly before cross-examination was to begin, deprived him of the assistance of counsel in violation of the Sixth Amendment.

A grand jury in the Middle District of Florida returned indictments charging petitioner and several codefendants with conspiracy to import, and illegal importation of a controlled substance into the United States, in violation of 18 U. S. C. § 371 and 21 U. S. C. § 952 (a), and with possession of marihuana, in violation of 21 U. S. C. § 841 (a). The charges grew out of plans for several of the defendants to fly about 1,000 pounds of marihuana from Columbia into the United States, plans that might have succeeded but for the fact that the pilot of the charter plane informed the United States Customs Service of the arrangements.

The trial of petitioner and one codefendant commenced on Tuesday, October 9, 1973. Petitioner testified in his

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

February 4, 1976

RE: No. 74-5968 Geders v. United States

Dear Chief:

I've read your memorandum suggesting disposition of the above on the basis of supervisory power. I voted at conference to reverse on the ground that petitioner's Sixth Amendment right to effective assistance of counsel had been violated and I would still vote to reverse on that ground. I think what I said in Brooks v. Tennessee, 406 U.S., at 612-613, although a state case turning on due process, involved an analogous situation.

Moreover, my concept of supervisory power differs I think from the approach taken in your memorandum. I read your approach as requiring appellate courts in effect to determine whether the trial court abused its discretion. I had thought that "supervisory power" contemplated fashioning of nonconstitutional rules for general application by federal courts in appropriate cases.

Sincerely,

Bill

The Chief Justice

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

March 25, 1976

RE: No. 74-5968 Geders v. United States

Dear Thurgood:

Please join me in the concurring opinion you have prepared in this case.

Sincerely,

Mr. Justice Marshall

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

February 4, 1976

No. 74-5968, Geders v. U. S.

Dear Chief,

I have read with interest your thorough memorandum. I continue, however, of the view that I expressed at our Conference. In short, I would not decide this case on other than a constitutional basis. If Geders had no right to confer with his counsel during the overnight recess, then I could not find that the trial judge abused his discretion. It is only because I think that Geders had such a constitutional right that I would reverse the judgment.

Sincerely yours,

P.S.
1/

The Chief Justice

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

March 10, 1976

No. 74-5968 - Geders v. U. S.

Dear Chief,

I am glad to join your opinion for the Court in this case.

Sincerely yours,

P.S.

The Chief Justice

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

February 17, 1976

Re: No. 74-5968 - Geders v. United States

Dear Chief:

I would prefer resting reversal on the constitutional ground.

Sincerely,

The Chief Justice

Copies to Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

March 12, 1976

Re: No. 74-5968 — Geders v. United States

Dear Chief:

Please join me in your draft of March 10 in this case.

Sincerely,

The Chief Justice

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

February 6, 1976

Re: No. 74-5968 -- Geders v. United States

Dear Chief:

I agree with Brennan and Stewart. I disagree with you and Rehnquist. There is clearly a constitutional right here asserted which should be decided.

Sincerely,

T. M.

The Chief Justice

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

March 18, 1976

Re: No. 74-5968 -- Geders v. U.S.

Dear Chief:

In due course I shall circulate either a dissent or join in the judgment.

Sincerely,

T.M.

The Chief Justice

cc: The Conference

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 74–5968

John A. Geders, Petitioner, *v.* United States. } On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[March —, 1976]

MR. JUSTICE MARSHALL, concurring.

I join in most of the Court's opinion, and I agree with its conclusion that an order preventing a defendant from consulting with his attorney during an overnight recess violates the defendant's Sixth Amendment right to counsel.

The Court notes that this case does not involve an order barring communication between defendant and counsel during a "brief routine recess during the trial day."[1] *Ante,* at 9 n. 2. That is, of course, true. I would add, however, that 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.

Thus, as the Court holds, a defendant who claims that

[1] I would assume, however, that the Court's repeated reference to the length of the overnight recess in this case—17 hours—is not intended to have any dispositive significance, and that the Court's holding is at least broad enough to cover all overnight recesses.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

March 16, 1976

Re: No. 74-5968 - Geders v. United States

Dear Chief:

You may join me in your circulation of March 10. I am gratified that the opinion is narrowly drawn, for I could not go along with the extension of the constitutional principle to a short recess in the middle of the day of trial.

Sincerely,

Harry

The Chief Justice

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

February 6, 1976

No. 74-5968 Geders v. United States

Dear Chief:

I have now had an opportunity to review carefully your interesting memorandum of February 3. While I agree with much of what you say, I adhere to my Conference vote that this case presents a constitutional issue.

I do think there is a good deal to Bill Rehnquist's argument that any rule adopted will be difficult to apply in some circumstances. I believe, however, that the general standard should be expressed in terms of a right exercisable only when this does not interfere with the customary and orderly progress of a trial. There is a distinction between a general recess of the trial (for the luncheon break, overnight, or for a weekend) and the episodic recesses that occur as incidents of the trial itself: e.g., the jury is excused for some purpose, counsel confer with the judge in chambers, delay occurs in producing the next witness, etc. Although no bright line can be drawn, I think that when counsel is available for consultation, without interfering with the normal conduct of trial, the Sixth Amendment right to counsel should be applicable.

There was no such interference in this case, and accordingly I do not view the question as coming within the admittedly broad discretion of a trial judge to conduct a trial.

It also occurs to me that even if this case were decided on "supervisory" grounds, we would have accomplished very little. The issue is likely to reappear in a state case, and in view of the vote at the Conference there is little reason to think that it would not be disposed of then on constitutional grounds. I would prefer to resolve the matter now.

Sincerely,

Lewis

The Chief Justice

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

March 10, 1976

No. 74-5968 GEDERS v. UNITED STATES

Dear Chief:

Please join me.

Sincerely,

Lewis

The Chief Justice

CC: The Conference

LFP/gg

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

February 6, 1976

RE: No. 74-5968 Geders v. United States

Dear Chief:

I have read your memorandum in this case, and Bill's and Potter's responses to it. In view of my vote at conference, it probably comes as no surprise that I agree with your memorandum, and could join it as an opinion of the Court; I disagree with some of Bill's and Potter's comments in response.

Potter's letter suggests that we are faced with a "either-or" situation, in which we either hold there is a violation of the constitutional right to counsel and reverse, or else affirm. I think the sense of Thurgood's Hale opinion last year, and its quotation from Grunewald, suggests that holdings which reverse the judgments of lower federal courts on the basis of supervisory authority may not be unrelated to or unconnected with the presence of a close or serious constitutional claim in the case. At the end of Hale, 422 U.S. 171, 180 there is a brief quotation from Grunewald v. United States, 353 U.S., at 423-424:

> "But where such evidentiary matter has grave constitutional overtones . . . we feel justified in exercising this Court's supervisory control."

Dear Chief:

I agree with Brennan and Stewart. I disagree with you and Rehnquist. There is clearly a constitutional right here asserted which should be decided. JHP

cc Conference

No doubt an argument based upon practicality can be made for deciding the "serious" constitutional claim right here and now, and saving time later. This argument, however, contravenes the traditional practice of avoiding decision of constitutional issues wherever possible, and it also neglects the quite real possibility that a reversal based on supervisory authority (with constitutional overtones) may, when presented as a naked claim of constitutional right by a state court litigant, be rejected by this Court. That is akin to what happened in Cupp v. Naughten, 414 U.S. 141, decided two Terms ago.

The question there was whether the state trial court's instruction to the effect that "every witness is presumed to speak the truth" in a criminal case infringed the defendant's right to have the state prove its case beyond a reasonable doubt under In re Winship, 397 U.S. 358 (1970). The Ninth Circuit upheld the defendant's claim, saying that such an instruction had been almost universally condemned by all the federal courts of appeals which had passed upon it. Some of these courts of appeals had quite clearly thought that the instruction in question did infringe on the constitutional requirement that the state prove its case beyond a reasonable doubt, although none appear to have grounded their holdings solely on that ground. See Cupp, 414 U.S., at 141. Nonetheless, the six man majority of our Court in that case decided that, notwithstanding the "unanimity of federal courts of appeals" Cupp, 414 U.S. 146, in exercising supervisory authority, it was not constitutional error for the state court to have given the instruction. For when the state chooses to sanction the giving of such an instruction, the inquiry is shifted in the manner indicated by Justice Frankfurter's language in McNabb v. United States, 318 U.S. 332, 340:

> "Moreover, review by this Court of state action expressing its notion of what will best further its own security in the administration of criminal justice demands appropriate respect for the deliberate judgment of a state in so basic an exercise of its jurisdiction."

Bill's letter points out that your opinion calls for appellate courts to decide in cases such as this whether the trial court has abused its discretion; I agree with his characterization of your opinion, but don't know how the result could be much different if the holding were to be put on the basis that the Sixth Amendment conferred a constitutional right upon this defendant to confer with his attorney during the overnight recess. My recollection of the conference deliberation is hazy, but I don't recall any substantial sentiment for the proposition that counsel could simply interrupt the testimony of a witness or a party and insist that the court recess in order that he might consult with his client.

If I am right in this, the only per se rule that could be formulated so as to avoid case-by-case adjudication would be the very mechanical one that whenever the court "recesses" the criminal defendant has a constitutional right to talk to his attorney. I think your opinion illustrates some of the difficulties with any such mechanical rule as this. On occasion when tempers become heated, a judge will leave the jury in the box and instruct counsel to meet with him in chambers, in order to admonish one or the other of them, or perhaps both of them, to "cool it". Technically this will not be at the normal time for a recess; the court wants to get on with the trial, and the purpose of the recess is the very limited one of trying to avoid contempt citations against one or more of the counsel. It would be hard for me to subscribe to a rule that during this sort of "recess", called by the court for one purpose only, counsel could insist on extending it beyond the time necessary for the court to attend to that purpose in order to confer with his client.

I venture to suggest that the circumstances under which a recess may be called are so varied that a flat rule to the effect that any time the court is not engaged in hearing the testimony of witnesses counsel has a constitutional right to confer with the defendant would simply be unworkable. Admittedly your opinion requires some case-by-case adjudication, but I doubt that an opinion putting the result on Sixth Amendment grounds could avoid that difficulty.

I do suggest that you delete or modify the penultimate sentence in your opinion reading:

> "If admonitions and the exercise of our supervisory powers are not efficacious it will be time enough to address problems of this kind in terms of the Constitution."

Presumably, so far as the federal court system is concerned, if the admonitions and exercise of our supervisory powers are not efficacious, it is a rather serious reflection on us. So far as the court systems of the various states are concerned, they are certainly not bound by our decisions based upon supervisory power, although they might take them as straws in the wind as to how we would decide a similar case coming from the state courts.

Sincerely,

WJB

The Chief Justice

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

March 17, 1976

Re: No. 74-5968 - Geders v. United States

Dear Chief:

Please join me.

Sincerely,

The Chief Justice

Copies to the Conference