rary

IN THE
SUPREME COURT OF THE REPUBLIC OF PALAU
APPELLATE DIVISION

VILMA YOSHIWO,
Appellant,
v.
REPUBLIC OF PALAU,
Appellee.

Cite as: 2022 Palau 15
Criminal Appeal No. 22-001
Appeal from Criminal Case No. 21-067

Argued: July 13, 2022
Decided: July 21, 2022

Counsel for Appellant ..... Johnson Toribiong
Counsel for Appellee ..... April Dawn Cripps, Special Prosecutor

BEFORE: OLDIAIS NGIRAIKELAU, Chief Justice;
JOHN K. RECHUCHER, Associate Justice;
DANIEL R. FOLEY, Associate Justice.

Appeal from the Supreme Court, Trial Division, the Honorable Honora Remengesau-Rudimch, Associate Justice, presiding.

OPINION

NGIRAIKELAU, Chief Justice:

[¶ 1] Appellant Vilma Yoshiwo ("Yoshiwo") was convicted of Misconduct in Public Office, Violation of the Code of Ethics, and Theft of Government Property in the First Degree. Yoshiwo appeals her conviction, arguing that the evidence was insufficient to justify her conviction and that the Trial Division improperly violated her right to counsel under the Palauan Constitution. We conclude that the Trial Division did violate Yoshiwo's right to counsel. Accordingly, we **VACATE** Yoshiwo's convictions and sentence, and

REMAND the case to the Trial Division for a new trial consistent with this Opinion.[1]

BACKGROUND

[¶ 2] Yoshiwo was first employed as a procurement officer with the Airai State Government on October 12, 2015.

[¶ 3] In May 2020, Emer Nevarez, an Airai State employee, performed renovation work on property owned by Yoshiwo.

[¶ 4] On August 20, 2021 the Republic of Palau charged Yoshiwo with committing the following crimes relating to the above-mentioned renovation:

A. Misconduct in Public Office, 17 PNC § 3918, due to an alleged violation of the Procurement Act, 40 PNC § 654(a)(1) ("Count 1").

B. Violation of the Code of Ethics, 33 PNC § 603, Use of Government Property ("Count 2").

C. Theft of Government Property in the First Degree, 17 PNC § 2615 ("Count 3").

[¶ 5] Yoshiwo pleaded not guilty to the charges and the case was set for trial.

[¶ 6] The trial ran for three days, from November 9-11, 2021.

[¶ 7] On November 11, 2021, the parties took testimony from Yoshiwo, beginning with direct examination by Yoshiwo's counsel, Mr. Toribiong, at 9:49:11 AM, followed by cross-examination by the Republic's counsel, Ms. Cripps at 11:00:18 AM. Yoshiwo Test. at 1, 27.

[¶ 8] At the conclusion of Yoshiwo's direct examination and before the start of her cross-examination, Mr. Toribiong called for a brief recess, which was agreed to by opposing counsel and the trial judge. Yoshiwo Test. at 27:4–27:24.

---

[1] We have held that "the mere fact that a judge has already presided over a proceeding or trial of a defendant that involved the same or similar conduct does not, in itself, constitute reasonable grounds for questioning the judge's impartiality in a subsequent proceeding or trial involving the same defendant." *Cura v. Momen*, 2022 Palau 6 ¶ 14. But if their "impartiality would be questioned . . . then disqualification is required unless an emergency exception is present." *Yano v. Yano*, 20 ROP 24, 26. We leave it to the judge below to address their "actual and apparent ability to decide the case impartially." *Id.*

[¶ 9] The recess lasted about eleven minutes, from 10:49:24 AM to 11:00:18 AM.

[¶ 10] Both parties agree that, during the recess, Justice Rudimch did not allow Yoshiwo to confer with her attorney, telling Yoshiwo "[y]ou are not allowed to go outside" during the break, where she would be able to confer with her attorney. ROP Resp. Br. at 30–32; Yoshiwo Opening Br. at 33-34; Yoshiwo Test. at 27:9.

[¶ 11] Upon beginning the cross-examination, Yoshiwo's counsel noted his objection to having been prevented from conferring with his client. Yoshiwo Test. at 28:1–28:27.

[¶ 12] On November 12, 2021, the day after Yoshiwo's testimony was taken, the Court rendered its verdict, finding Yoshiwo guilty of all three counts with which she was charged. Verdict at 1.

[¶ 13] Yoshiwo was sentenced to eighteen months of imprisonment, all suspended; five years of probation, which includes prohibitions on certain public employment; a fine of $2,500 ($1,000 for Count 1, $500 for Count 2, and $1,000 for Count 3); and restitution payments of $2,769.01 to the Airai State Government. Sentencing Order at 1-2.

[¶ 14] On Jan 13, 2022, Yoshiwo submitted a timely Notice of Appeal.

STANDARD OF REVIEW

[¶ 15] "[C]onclusions of law, such as matters of constitutional and statutory interpretation" are reviewed *de novo*. *Ellender Ngirameketii v. Republic of Palau*, 2022 Palau 9. By contrast, "[w]e review the sufficiency of the evidence underlying a criminal conviction for clear error, asking whether the evidence presented was sufficient for a rational fact-finder to conclude that the appellant was guilty beyond a reasonable doubt as to every element of the crime." *Xiao v. ROP*, 2020 Palau 4 ¶ 8 (cleaned up). In doing so, "we do not reweigh the evidence," instead we view the evidence "in the light most favorable to the prosecution." *Id.*

DISCUSSION

[¶ 16] Yoshiwo raises three issues on appeal. First, she argues that the Trial Division committed clear error in finding her guilty of Counts 1 and 2 in light

of insufficient evidence. Yoshiwo Opening Br. at 8. Next, Yoshiwo makes a similar argument regarding Count 3, contending again that the evidence is insufficient to justify conviction. *Id.* at 22. Finally, she argues that the Trial Division violated her constitutional right to counsel by preventing her from conferring with her attorney during the eleven-minute recess in between her direct and cross-examination. *Id.* at 33. Because we find that Yoshiwo's right to counsel was violated, as discussed below, we do not reach the former two questions.

I.

[¶ 17] Article IV, § 7 of the Republic of Palau Constitution establishes that "[a]t all times the accused shall have the right to counsel." ROP Const. art. IV § 7; *see also Rengiil v. Republic of Palau*, 20 ROP 141, 145 (2013). Whether this right attaches even during short breaks during a defendant's testimony is a question of first impression in Palau. When interpreting the nature of the right to counsel in Palau, "the Appellate Division has looked to the United States" and its interpretation of the Sixth Amendment to its constitution. *ROP v. Mesubed*, 20 ROP 219, 231 (Tr. Div. 2013); *see also Saunders v. ROP*, 8 ROP Intrm. 90, 91 n.1 (1999).

[¶ 18] The Republic of Palau contends that there is a case on point which could dispose of this issue, *Perry v. Leeke*, 488 U.S. 272 (1989), which features a situation parallel to that which is before the Court. ROP Resp. Br. at 33-34. There, the United States Supreme Court held that an order barring a defendant-witness from conferring with their attorney during a fifteen-minute recess between direct examination and cross-examination was permissible. *Perry*, 488 U.S. at 284-85.

[¶ 19] Yoshiwo's response is twofold. First, she argues that *Perry* was wrongly decided on the merits, and second, that its holding is especially inapt in this jurisdiction, which has a textually stronger constitutional guarantee of the right to counsel than the United States. Yoshiwo Resp. Br. at 19-20; *compare* U.S. Const. amend. 6 ("[i]n all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defense") *with* ROP Const. art. IV, § 7 ("[a]t all times the accused shall have a right to counsel") (emphasis added). Instead, Yoshiwo submits, the Court should embrace Justice Marshall's dissent in *Perry*, and hold that *any* bar on a defendant-witness conferring with counsel between examinations violates their right to counsel. Yoshiwo Resp. Br. at 19-20.

A.

[¶ 20] We begin by assessing Yoshiwo's claim that *Perry* was wrongly decided. There are six principal components of the majority's opinion in *Perry* with which this Court disagrees.

[¶ 21] First, the majority appears to ignore case law in the United States that both defines the scope of the right to counsel and suggests that the testimony-taking stage of prosecution falls within this scope. Courts have held that "the presumption that counsel's assistance is essential requires the conclusion that a trial is unfair if the accused is denied counsel at a critical stage of his trial." *United States v. Cronic*, 466 U.S. 648, 659 (1984); *see also United States v. Wade*, 388 U.S. 218, 237 (1967) (establishing that the right to counsel attaches at "critical stage[s] of the prosecution"). Taking testimony is a "critical stage of the prosecution." A recess between direct and cross-examination, in particular, is a period in which a defendant-witness and their attorney may want to discuss litigation strategy or exchange words of encouragement. *See Green v. Arn*, 809 F.2d 1257, 1263 (CA6 1987) ("[i]t is difficult to perceive a more critical stage of a trial than the taking of evidence on the defendant's guilt").

[¶ 22] Second, despite the *Perry* majority's insistence to the contrary, there is no "rule" prohibiting defendants-witnesses from conferring with counsel between their direct examination and cross-examination. *See Perry*, 488 U.S. at 282. The *Perry* majority cites no authority for this proposition, and furthermore, it is not uncommon for trial justices to call for recesses between examinations of defendant-witnesses without issuing bar orders on their conferral with counsel—indeed, this occurred twice in *Perry*. *Id.* at 288 (Marshall, J., dissenting).

[¶ 23] Third, the *Perry* majority advances the wrongheaded idea that defendants relinquish their right to counsel when they become witnesses. *Id.* at 281 (majority opinion) ("when a defendant becomes a witness, he has no constitutional right to consult with his lawyer while he is testifying"). This argument misunderstands the distinct relationships that defendant-witnesses have with counsel compared to nonparty witnesses. "A nonparty witness ordinarily has little, other than his own testimony, to discuss with trial counsel; a defendant in a criminal case must often consult with his attorney during the trial." *Geders v. United States*, 425 U.S. 80, 88 (1976); *see also Hernandez v. Peery*, 141 S. Ct. 2231, 2234 (2021) (Sotomayor, J., dissenting).

Defendant-witnesses, who are definitionally invested in the outcome of the prosecution, have a cognizable interest in opportunities to speak with counsel that is not meaningfully shared with nonparty witnesses.

[¶ 24] Fourth, the *Perry* majority's concern that allowing defendant-witnesses to confer with counsel between direct examination and cross-examination undermines the accuracy of their testimony is without evidence and misguided. The majority asserts, without authority, that it is an "empirical predicate" that preventing defendant-witnesses from speaking to counsel in between direct examination and cross-examination "is more likely to lead to the discovery of truth" than the alternative. *Perry*, 488 U.S. at 282. Justice Marshall, in dissent, rightly notes that "legal representation for the defendant at every critical stage of the adversary process *enhances* the discovery of truth." *Id.* at 291 (Marshall, J., dissenting). The majority's supposition, absent clear evidence supporting it, cannot outweigh a defendant-witness' right to counsel.

[¶ 25] Fifth, the majority's position that bar orders on defendant-witnesses conferring with counsel are acceptable during short breaks but not long breaks is contradictory and irreconcilable with the proffered reasoning. In its analysis, the *Perry* majority defends the central holding of *Geders v. United States*, 425 U.S. 80 (1976), prohibiting bar orders on conferral between defendant-witnesses and their attorney during seventeen-hour overnight recesses, but holds that they are permissible during fifteen-minute recesses. *Perry*, 488 U.S. at 280-81. In defense of its holding in *Perry*, the majority claims, without evidence, that permitting defendant-witnesses to speak to counsel between examinations grants them "an opportunity to regroup and regain a poise and sense of strategy" and that permitting this respite undermines "the discovery of truth." *Id.* at 282. Assuming this were true, this position is in conflict with the majority's approval of *Geders*, as a seventeen-hour recess surely provides a greater opportunity for a defendant-witness to regain their composure than a fifteen-minute break. *Id.* at 291-92 (Marshall, J., dissenting).

[¶ 26] Sixth, the majority's holding creates unworkable line-drawing problems. Assuming that a seventeen-hour recess between examinations is appropriate, but a fifteen-minute recess at that moment is not, judges will be forced "to guess at whether [they have] committed a constitutional violation" whenever they bar defendant-witnesses and counsel from conferring during recesses between examinations. *Id.* at 296 (citing *Sanders v. Lane*, 861 F.2d 1033, 1037 (1988)). "[T]he majority ensures that

defendants, even those in adjoining courtrooms, will be subject to inconsistent practices." *Id.*

[¶ 27] Taken together, these shortcomings in the majority's reasoning threaten the constitutional rights of criminal defendants and the equitable administration of justice. Indeed, other jurisdictions have arrived at the same conclusion regarding the merits of *Perry*. For example, the Hawai'i Supreme Court found that "the holding of the *Perry* majority does not adequately protect a defendant's right to counsel" and eschewed the rule. *State v. Mundon*, 121 Haw. 339, 366 (2009). "There are 50 states court systems, each interpreting their own state constitutions, to which we may look for guidance." *ROP v. Rafael*, 6 ROP Intrm. 305, 308 (1996).

B.

[¶ 28] The above concerns with *Perry* alone are sufficient to give this Court pause regarding adoption of the rule in that case. But the rule is especially inapt in the Republic of Palau, which has textually stronger constitutional protections of the right to counsel than does the United States. Article IV, § 7 of the Republic of Palau Constitution guarantees a right to counsel "at all times," while the Sixth Amendment to the United States Constitution contains no similar clause articulating the scope of the right to counsel. *Mesubed*, 20 ROP at 231. While the relative strength of this specific protection has not been examined in Palauan case law, this Court is comfortable comparing differences in the Palau and United States Constitutions to discern the nature of rights articulated in both documents. *ROP v. Carreon*, 19 ROP 66, 76 (2012) ("[t]his difference in Constitutional text and approach militates against uncritical incorporation of United State constitutional jurisprudence"). The *Perry* decision does not appear to adequately safeguard the right to counsel guaranteed by the United States Constitution; in Palau, where this guarantee is stronger, such an infringement is even less justifiable.

[¶ 29] Moreover, the chronology of the Palau Constitution's ratification suggests an expansive view of the rights of criminal defendants. The Palau Constitution was drafted during Palau's first Constitutional Convention in 1979, and entered into force on January 1, 1981. Constitution of the Republic of Palau, WIPO Lex (last visited July 14, 2022), https://wipolex.wipo.int/en/text/200951 at 1, 24. This ratification occurred in the wake of decades of increased protections for criminal defendant rights in the United States. *See, e.g., Gideon v. Wainright*, 372 U.S. 335 (1963) (creating a right for indigent criminal defendants to access state appointed attorneys); *see also*

Miranda v. Illinois, 384 U.S. 436 (1966) (preventing prosecutors from using responses to interrogations while in police custody as evidence unless they were made under advisement). That the phrase "at all times" was added to the relevant provision of the Palauan Constitution as part of a revision suggests that the drafters of the Palauan Constitution actively sought to incorporate the concern for the rights of criminal defendants that United States case law was developing at the time. *Compare* Standing Comm. Rep. No. 11 at 9-10 (presenting a draft of Article IV, § 7 of the Palauan Constitution which does not contain the phrase "at all times") *with* Standing Comm. Rep. No. 17 at 2 (advocating for the revision to the article from Committee Proposal No. 484).

[¶ 30] More specifically, the jurisprudential context suggests that the drafters of the Palau Constitution were particularly concerned with criminal defendants' right to counsel. When the Palau Constitution was drafted, the United States case governing defendant-witnesses conferring with counsel during recess in between examinations was *Geders*, and it contemplated no limit on that right to counsel. *See generally Geders v. United States*, 425 U.S. 80 (1976). The Palau Constitution's specification that the right to counsel attaches "at all times" in a criminal proceeding thus appears congruent with United States case law at the time it was drafted. ROP Const. art. IV, § 7. Indeed, it was years after the Palau Constitution had already entered into force that *Perry* was handed down, narrowing the right to counsel during recess in the United States. *Perry v. Leeke*, 488 U.S. 272 (1989). It seems the use of the explicitly broad language "at all times" was no mere accident; rather, it reflects an intent to codify the nuance of United States case law regarding the rights of criminal defendants.

[¶ 31] Finally, it is worth noting that the Hawai'i Constitution, which the Court in *Mundon* looked to in rejecting *Perry*, is more textually similar to the U.S. Constitution than the Palau Constitution with respect to the right to counsel. The Hawai'i Constitution asserts a right to "the assistance of counsel" and does not articulate the scope of the right, an ambiguity which it shares with the U.S. Constitution. Haw. Const. art. I, § 14. The Court in *Mundon* was explicit about this similarity, claiming that it does not hesitate to contradict the United States Supreme Court when it fails to protect rights "present in both the United States and Hawai'i Constitutions." *Mundon*, 121 Haw. at 365 (citing *State v. Bowe*, 77 Haw. 51, 57 (1994)). Similar language in state and national constitutions makes state court analyses of the common provisions

"particularly significant," *Rafael*, 6 ROP Intrm. at 309, and worthy of this Court's close attention.

[¶ 32] "Just because" Article IV, § 7 of the Palau Constitution "does not align with the U.S. approach, our Palauan rules are not to be dismissed." *Ngiraterang v. Ngarchelong State Assembly*, 2021 Palau 18, 21. "We are not bound by the limiting words" – or the lack thereof – "of foreign Constitutions and case law . . . we must first and foremost adhere to the constitutional principles and language that our Framers have set-out." *Id.* The Palau Constitution's protective attitude towards criminal defendants is clear and understandable considering the jurisprudential context. Against this constitutional backdrop, applying the rule from *Perry* is inappropriate.

C.

[¶ 33] Having decided against adopting the rule from *Perry*, the final question at issue is whether a showing of prejudice is necessary in claims of violation of the right to counsel as to discussions between a criminal defendant and counsel. Some jurisdictions have held that when the violation is "harmless beyond a reasonable doubt" the claimant cannot prevail. *Mundon*, 121 Haw. at 368; *see also Bova v. State*, 410 So. 2d 1343, 1344 (Fla. 1982). This Court views this requirement as untenable.

[¶ 34] This requirement would force criminal defendants and their attorneys to disclose what they would have discussed had they been permitted to confer. Being forced to disclose the intended subject matter of recess conversations with counsel is likely to be prejudicial to criminal defendants: in a conversation during recess between examinations, defendants and their counsel may want to discuss sensitive topics like litigation strategy, and can do so under the aegis of attorney-client privilege. *See generally* ROP R. Evid. 503. It would be unsurprising for criminal defendants whose right to counsel is violated to decide against filing a claim out of an interest in keeping private their potential discussions with counsel and safeguarding their right to attorney-client privilege.

[¶ 35] Moreover, both the majority and dissent in *Perry* and the court in *Geders* held that "a showing of prejudice is not an essential component" of claims regarding violation of the right to counsel. *Mundon*, 121 Haw. at 382 (Acoba, J., dissenting). As these two cases represent the extent of the United States Supreme Court's analysis of this question, great weight should be placed on their contention that a showing of prejudice should not be required.

[¶ 36] Finally, there is an epistemic problem at the heart of this requirement: it is difficult—if not impossible—to prove prejudice stemming from a conversation that never occurred. In sum, the prejudice requirement poses risks to attorney-client privilege and is contradicted by United States case law, and the prejudice itself cannot be known with certainty.

II.

[¶ 37] Having decided against following the rule in *Perry*, we now turn to the facts of this case. This analysis is straightforward. It is agreed-upon by both parties that during the eleven-minute break between direct examination and cross-examination, Yoshiwo was prevented from speaking to her attorney, Mr. Toribiong. ROP Resp. Br. at 30–2; Yoshiwo Opening Br. at 33-4. Her attorney noted this explicitly on the record at the start of Yoshiwo's cross-examination. Yoshiwo Test. at 28:1–28:27. This is sufficient to constitute a violation of Yoshiwo's right to counsel. As a showing of prejudice is not required, Yoshiwo prevails merely by establishing that this violation occurred, and she has.

III.

[¶ 38] Finally, as this is an issue of first impression in the jurisdiction, it is important to lay out explicitly the scope and implications of this decision. The holding of this case is reserved to cases of defendant-witnesses. A "nonparty witness ordinarily has little, other than his own testimony, to discuss with trial counsel," *Geders v. United States*, 425 U.S. at 88, so in the cases of nonparty witnesses, it is indeed "appropriate to presume that nothing but the testimony will be discussed." *Perry*, 488 U.S. at 284. By contrast, the same presumption is unsuitable for defendant-witness, who "in a criminal case must often consult with [their] attorney." *Geders*, 425 U.S. at 88. Furthermore, this holding should not be construed as permitting interruptions of ongoing testimony "*whenever* a criminal defendant wishes to confer with counsel." *Mundon*, 121 Haw. at 367 (emphasis added).

[¶ 39] Moreover, while we are not persuaded by the Republic of Palau's argument, we do recognize the legitimate concern the Republic raises regarding the potential coaching of defendant-witnesses.[2] However, "[t]here are other ways to deal with the problem of possible improper influence on testimony or 'coaching' of a

[2] To be sure, the trial court also alluded to the same concern during the trial when recess was declared.

witness short of putting a barrier between client and counsel." *Geders*, 425 U.S. at 89. Prosecutors may inquire about coaching during the defendant-witness' cross-examination, *Id.*, and trial judges may decide how brief to keep recesses, or whether to allow them at all.

CONCLUSION

[¶ 40] For the reasons set forth above, we **VACATE** the convictions and sentence, and **REMAND** the case to the Trial Division for a new trial consistent with this Opinion.

SO ORDERED, this 21st day of July, 2022.

OLDAIS NGIRAIKELAU
Chief Justice

JOHN K. RECHUCHER
Associate Justice

DANIEL R. FOLEY
Associate Justice