CONCURRING AND DISSENTING OPINION BY
ACOBA, J., IN WHICH DUFFY, J., JOINS

In my view a defendant is entitled to counsel at all critical stages of a criminal proceeding, a trial is such a critical stage, the right to counsel applies to routine recesses during a trial, and a trial or a reviewing court may not inquire into the "need" for attorney-client consultation during such a recess, or condition such consultation upon a prior "objection," "request," or "concern" raised by the defendant. The majority's position violates such precepts and therefore I respectfully dissent from its decision on this issue.[1]

I.

In this case, during the cross-examination of Petitioner/Defendant-Appellant James Mundon (Petitioner), the circuit court of the fifth circuit (the court) called a 15-minute recess, and the jury was escorted out of the courtroom. At that time, the court, the Deputy Prosecuting Attorney (DPA) representing Respondent/Plaintiff-Appellee State of Hawaiʻi (Respondent), and Caren Dennemeyer (Ms. Dennemeyer), Petitioner's standby counsel, engaged in a discussion at the bench. The following colloquy ensued in which the court barred Petitioner's right to confer with Ms. Dennemeyer during the recess:

> [DPA]: [W]e would request at this time that Ms. Dennemeyer not be permitted to speak with [Petitioner] as he is in the middle of his cross-examination.
> MS. DENNEMEYER: At all? That's not during the break or at all?
> THE COURT: That's correct. [Petitioner] has made the decision to take the stand and to testify, and just as when you have --
> MS. DENNEMEYER: I'm here –

[1] I concur in the other parts of the majority opinion.

> THE COURT: Ms. Dennemeyer. Ms. Dennemeyer, as you well know, it is not proper for attorneys to be coaching witnesses in the middle of their testimony.
> By the same manner, [Petitioner] has made the decision to take the witness stand, and the [DPA] is correct. It would be improper for you to approach him or to speak with him in the middle of his testimony.
> By the same token, [Petitioner], as I said, if you don't understand the question, then say so.
> MS. DENNEMEYER: Thank you, your Honor.
> THE COURT: If your answer – if you're not in agreement with what's being asked, then say so. Okay.
> MS. DENNEMEYER: Thank you, your Honor. That was all I wanted to tell him. Thank you.
> THE COURT: Anything further? Okay. Then let's take a 15-minute recess.

(Emphases added.) The court's ban plainly violated Petitioner's right to counsel,[2] Petitioner's attorney client privilege, see Hawaiʻi Revised Statutes (HRS) § 626-1 (Supp. 2006), Hawaiʻi Rules of Evidence (HRE) Rule 503,[3] and Petitioner's right against self-incrimination.[4]

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[2] Petitioner argues that the "[c]urtailment of attorney-client consultation violates rights conferred under Amendment VI to the U.S. Constitution and Art. I, Section 14 of the State Constitution." All "references to federal law" herein are "used only for the purpose of guidance, and d[o] not themselves compel the result" reached in this opinion. Arizona v. Evans, 514 U.S. 1, 9-10 (1995) (citing Michigan v. Long, 463 U.S. 1032, 1041 (1983)). I adopt the rationale herein under the independent provisions of the Hawaiʻi Constitution.

The right to counsel is protected under article I, section 14 of the Hawaiʻi Constitution. It states, "In criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for the accused's defense." Similarly, Amendment VI to the U.S. Constitution states, "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."

[3] The confidentiality of the attorney-client privilege is protected under HRS § 626-1, which enacted the HRE. HRE Rule 503(b) states, in part:

> General rule of privilege. A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client (1) between the client or the client's representative and the lawyer or the lawyer's representative[.]

[4] The right against self-incrimination is protected under article I, section 10 of the Hawaiʻi Constitution. It states, in relevant part, "nor shall any person be compelled in any criminal case to a witness against oneself." Amendment V of the U.S. Constitution also guarantees a defendant the privilege against self-incrimination. Amendment V states, in part, "[n]o person . . . shall be compelled in any criminal case to be a witness against himself[.]"

II.

A.

A defendant is entitled to counsel at every critical stage of a judicial proceeding. Roe v. Flores-Ortega, 528 U.S. 470, 483 (2000) ("The presumption that counsel's assistance is essential requires us to conclude that a trial is unfair if the accused is denied counsel at a critical stage[]" of a "judicial proceeding." (Quoting United States v. Cronic, 466 U.S. 648, 659 (1984).). Obviously, the "trial itself" is one of the critical stages during which the accused is entitled to representation. Argersinger v. Hamlin, 407 U.S. 25, 37 (1972) (holding that, "absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial"); United States v. Wade, 388 U.S. 218, 227 (1967) (stating that "[t]he presence of counsel at such critical confrontations, as at the trial itself, operates to assure that the accused's interests will be protected consistently with our adversary theory of criminal prosecution").

In this connection, "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). Therefore, as Justice Marshall wrote in his dissent in Perry v. Leeke, 488 U.S. 272 (1989) [hereinafter Perry II], affirming Perry v. Leeke, 832 F.2d 837 (1987) [hereinafter Perry I], "the Sixth Amendment forbids 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." Id. at 285 (Marshall, J., dissenting, joined by Brennen, J. and Blackmun, J.) (internal quotation marks and citation omitted) (emphasis added).

B.

Second, HRE Rule 503(b) provides that "[a] client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client[.]" This court has stated that "[t]he underlying principle of this privilege is to 'encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice[.]'" Save Sunset Beach Coalition v. City & County of Honolulu, 102 Hawaiʻi 465, 484, 78 P.3d 1, 20 (2003) (quoting State v. Wong, 97 Hawaiʻi 512, 518, 40 P.3d 914, 920 (2002)). The attorney-client privilege addresses "the need for the defendant to have the freedom to divulge all of the facts of the case in order to enable his attorney to prepare a complete defense." In re Doe, 420 N.Y.S. 2d 996, 998 (N.Y. Sup. Ct. 1979). See also People v. Meredith, 631 P.2d 46, 51 (Cal. 1981) ("Adequate legal representation in the . . . defense of litigation compels a full disclosure of the facts by the client to his attorney. . . . Given the privilege, a client may make such a disclosure without fear that his attorney may be forced to reveal the information confided to him.").

C.

Third, the fifth amendment of the United States Constitution establishes that no person "shall be compelled in any criminal case to be a witness against himself[.]" This court has stated that the fifth amendment is a "keystone of 'our accusatory system of criminal justice [that] demands that the government seeking to punish an individual produce the evidence against him by its own independent labors, rather than by the . . . expedient of compelling it from his own mouth.'" State v. Russo, 67 Haw. 126, 131, 681 P.2d 553, 558 (1984) (quoting Miranda v. Arizona, 384 U.S. 436, 460 (1966)) (ellipsis in original).

A defense attorney serves a crucial role in the protection of the defendant's privilege against self-incrimination. Indeed, "[t]he position of the lawyer as a guardian of the accused's right against self incrimination is . . . basic to modern criminal law jurisprudence[.]" People v. Baldi, 76 A.D.2d 259, 285 (N.Y. App. Div. 1980), rev'd on other grounds by People v. Baldi, 429 N.E.2d 400 (N.Y. 1981). Of course, this privilege "cannot be violated by [the defendant's] attorney." People v. Belge, 372 N.Y.S.2d 798, 802 (N.Y. Co. Ct. 1975) (upholding attorney's decision not to disclose client's confession regarding unrelated murder). As the Belge court stated in regard to the attorney's role,

> the constitution . . . attempts to preserve the dignity of the individual and to do that guarantees him the services of an attorney who will bring to the bar and to the bench every conceivable protection from the inroads of the state against such rights as are vested in the constitution for one

> accused of crime. Among those substantial constitutional rights is that a defendant does not have to incriminate himself.

Id. (emphasis added). Accordingly, counsel should not disclose reasons for seeking to engage in discussions with his or her client during court recesses. If an attorney is required to disclose or if inquiry by the court is made of the subject matter or the nature of the communication with his or her client, then, in effect, the attorney may be compelled to disclose what the defendant may not be compelled to disclose under the fifth amendment. Id. at 802-03.

III.

With all due respect, the majority's grounds for disagreement with this opinion rests on several fundamental misstatements and misconceptions: (1) that because Petitioner chose to appear *pro se*, he has no basis to complain,[5] (2) that Petitioner handled much of his own trial without the need for standby counsel,[6] (3) that standby counsel acts only in an advisory capacity and accordingly Petitioner is not entitled to full representation,[7] (4) that nothing of consequence could occur

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[5] The majority quotes Farretta v. California, 422 U.S 806, 834 n.46 (1975), for the proposition that "[a] defendant who elects to represent himself cannot thereafter complain that the quality of his own defense amounted to a denial of effective assistance of counsel[,]" majority opinion at 67-68 (emphasis and internal quotation marks omitted), and also argues that it would be absurd to vacate "when [Petitioner] did not choose to utilize such right, but instead chose to represent himself," id. at 69 (emphasis omitted).

[6] The majority argues that during trial Petitioner conducted opening statements, cross examination of witnesses, objections, his own testimony, and closing argument, "all with little assistance from Dennemeyer." Id. at 68. The majority also argues that Petitioner had a "candid nature and assertive conduct throughout the proceedings." Id. at 67.

[7] According to the majority, a court may appoint standby counsel to assist a *pro se* defendant but such standby or advisory counsel "do[es] not actively participate in the trial, but act[s] in an advisory capacity[,]" id.
(continued...)

in an attorney-client conference during a "minimal 15-minute" recess,[8] (5) that the issue is moot because the court advised Petitioner of what his counsel would have told him,[9] (6) that nothing significant would occur between Petitioner and counsel during a 15 minute recess, inasmuch as Petitioner did not request a recess, did not object to, and did not express any concerns with the court's ban,[10] and (7) that it is absurd to treat the barring of an attorney client conference during an ordinary recess as reversible error.[11]

A.

The majority's discussion of Petitioner's *pro se* status is irrelevant and inconsistent. The majority quotes Farretta for the proposition that "a defendant who elects to represent himself cannot thereafter complain that the quality of his own defense amounted to a denial of effective assistance of counsel." Majority opinion at 67-68 (citations and quotation marks

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[7](...continued)
at 68 (quoting State v. Hirano, 8 Haw. App. 330, 333 n.5, 802 P.2d 482, 848 n.5 (1990) (citing Farretta, 422 U.S. 806)) (brackets in original), and, therefore, "Dennemeyer did not represent [Petitioner] in the manner of a full-time attorney but, instead, acted only in an 'advisory capacity[,]'" id. (citing Hirano, 8 Haw. App. at 333 n.5, 802 P.2d at 484 n.5).

[8] The majority argues that "[g]iven [Petitioner's] conscious election to proceed *pro se*, it cannot be said that a minimal 15-minute deprivation of [Petitioner's] access to his standby counsel during a trial that spanned six days contributed to his ultimate conviction." Id. at 68-69.

[9] The majority argues that "the trial court communicated the advice that [Petitioner's] standby counsel wanted to impart to [Petitioner during the 15-minute recess.]" Id. at 69.

[10] The majority argues that there was no evidence that Petitioner had a "matter or concern" that he wanted to raise with Ms. Dennemeyer, id. at 67, such as evidence that Petitioner wished to speak to counsel, requested to a recess, or objected to the court's admonition, id. at 67, 71.

[11] According to the majority, the "dissent's bright line rule" that any deprivations of a defendant's right to confer with counsel is harmful extinguishes discretion afforded to the trial courts. Id. at 71-72.

omitted). This contention is irrelevant because neither Petitioner nor his counsel argues that the quality of Petitioner's *pro se* representation amounted to a denial of effective assistance of counsel. What the majority misconceives is that whether counsel was ineffective is not the same question as whether the right to counsel was denied. The Perry II court explicitly distinguished ineffective assistance of counsel from the denial of counsel stating, "[a]ctual or constructive denial of the assistance of counsel altogether, . . . 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 II, 488 U.S. at 280 (internal quotation marks and citations omitted).

Contrary to the majority's statements, this case does not even raise the question of whether Petitioner's *pro se* performance was ineffective. Rather, this case involves "denial of the assistance of counsel altogether," id., because the court violated Petitioner's right to counsel when it mandated that Petitioner not speak to his standby counsel at all during a routine recess. Thus, the majority's contention that a *pro se* defendant cannot complain about the quality of his own performance is puzzling and has no bearing at all in this case.

However, by arguing as it does, the majority also contradicts its own holdings in asserting that "it would be absurd to vacate [Petitioner's] convictions based on a violation of [Petitioner's] right to assistance of counsel, as the dissent implicitly suggests, when [Petitioner] did not choose to utilize

such right, but chose to represent himself." Majority opinion at 69 (emphasis omitted). In this statement, the majority suggests that Petitioner does not have a right to Ms. Dennemeyer's assistance because he chose to represent himself. This suggestion contradicts its holdings 1) that "a criminal defendant has a constitutional right to confer with his or her counsel during a routine recess taken during trial proceedings, even when such recess is taken in the middle of the defendant's testimony[,]" id. at 64 (emphasis omitted), and 2) "that the trial court erred when it ordered [Petitioner] not to speak with his standby counsel during the 15-minute recess taken during his cross-examination[,]" id. at 65. The majority's position leaves only two options for the defendant: either give up the right to self-representation and utilize the right to counsel by employing full-time counsel, or continue *pro se* representation without the assistance of standby counsel. Consequently the majority's opinion directly clashes with the majority's holding that a criminal defendant has a constitutional right to speak with his or her standby counsel.

B.

Second, the majority wrongly concludes that Petitioner handled much of his own trial without the need for standby counsel. What the majority ignores is that the trial transcripts demonstrate that Petitioner relied heavily on Ms. Dennemeyer throughout Petitioner's trial. Ms. Dennemeyer consulted with

Petitioner and spoke to the jury during his opening statement.[12] Petitioner specifically requested to confer with Ms. Dennemeyer before Petitioner decided to testify on his behalf.[13] Ms. Dennemeyer made suggestions to Petitioner while he was testifying

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[12] Petitioner and Ms. Dennemeyer conferred four times during Petitioner's opening statement. The transcripts also reflect Ms. Dennemeyer spoke to the jury at the end of Petitioner's opening statement.

> MS. DENNEMEYER: All of that aside, the one point I wanted to ask you folks to keep an eye out for was trying to get [Petitioner] to remind you of is he's in a truck with a bench seat with a backpack, a fully loaded backpack in between the two of them.
>
> The witness is going to assert that he held a knife in one hand -- I don't know which –- that he was groping at her with another hand, and that at the same time he was kissing her breast. I'm asking you folks to keep an eye on how is that physically possible? If there's a backpack in between them, one hand is tied up, the other hand is tied up, how could he have done that? That's all I wanted to ask you to look for. Thank you.

[13] Before testifying, Petitioner asked to speak with his standby counsel.

> THE COURT: . . . [Petitioner], at the beginning of the trial, the [c]ourt informed you [sic] have your constitutional right to take the stand and to testify, and the [c]ourt advised you that the decision to testify is yours to make.
>
> And you do have stand-by counsel, and so you should confer with stand-by counsel as to whether or not you will be testifying in this case.
>
> . . . .
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> [Petitioner], you indicated at the beginning of the trial that you understood your rights. Do you understand your rights at this time?
>
> [PETITIONER]: Yes.
>
> <u>THE COURT: And, [Petitioner], what is your decision as to whether you will be taking the stand to testify or not?</u>
>
> <u>[PETITIONER]: May I speak with my stand-by counsel first before I make a decision?</u>
>
> <u>THE COURT: Certainly. Yes, you may.</u>
>
> <u>(At which time [Petitioner] and [Ms. Dennemeyer] conferred privately)</u>
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> THE COURT: [Petitioner], for the record, have you had an opportunity to confer with your stand-by counsel?
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> [PETITIONER]: Yes.
>
> THE COURT: And have you made a decision made [sic] as to whether you'll be taking the stand?
>
> [PETITIONER]: I will be taking the stand.

(Emphasis added.)

on direct examination.[14] Ms. Dennemeyer frequently objected to Respondent's cross-examination when Petitioner was on the stand. Ms. Dennemeyer objected to the jury instructions.[15] Furthermore, Petitioner followed Ms. Dennemeyer's advice. Hence, the majority incorrectly characterizes Petitioner as exhibiting "assertive

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[14] As Petitioner was finishing his narrative on direct examination, Ms. Dennemeyer counseled Petitioner on his direct examination.

> MS. DENNEMEYER: May I approach, your honor?
> THE COURT: Excuse me. Does that conclude your statement, [Petitioner]?
> [PETITIONER]: That's what went happen.
> THE COURT: Does that conclude your statement?
> MS. DENNEMEYER: Before he concludes, I wanted to approach to talk to him.
> [PETITIONER]: Yeah, please.
> THE COURT: Ms. Dennemeyer.
> MS. DENNEMEYER: Is there -- can you see it?
> [PETITIONER]: Yeah.
> <u>MS. DENNEMEYER: You never talked about it. Maybe you want to go back and break down the incident of the scene more closely</u>.
> <u>[PETITIONER]: Okay</u>.
> I had asked Ms. Dennemeyer to put -- what you call it? The sketching up because this is the best view of the marine camp crime scene.
> [Petitioner's direct continues]

(Emphases added.)

[15] Ms. Dennemeyer objected to Respondents's proposed jury instructions.

> THE COURT: Okay. I'd like to move to the State's proposed instructions. And looking at State's instruction one, do we have an agreement?
> [DPA]: Yes
> [PETITIONER]: Yes
> THE COURT: Number two, do we have agreement?
> [DPA]: Yes.
> [PETITIONER]: Yes.
> MS. DENNEMEYER: This -- well, he's agreeing to their -- this is what I would enter objection. I believe that the first one, two, three -- there's three identical instructions, and there's more of the same instruction later on. So I object to the repeating of the instruction -- or [Petitioner], I guess, is objecting if you feel that way. If you don't, that's okay.
> THE COURT: [Petitioner], your position.
> [PETITIONER]: Yes, I'm going to object also.
> . . . .
> THE COURT: . . . Number seven.
> MS. DENNEMEYER: Same objection.
> THE COURT: [Petitioner], I just need for you to respond on the record as well.
> [PETITIONER]: I agree with Ms. Dennemeyer[.]

conduct throughout the proceedings." Majority opinion at 67. Indeed, the transcripts reflect that on his cross-examination, Petitioner was far from assertive. Petitioner was often confused throughout Respondent's cross-examination, and was repeatedly reminded by the court not to answer when Ms. Dennemeyer objected.[16] Obviously, Petitioner was "unfamiliar with the rules of evidence . . . . [He] lack[ed] both the skill and knowledge adequately to prepare his defense, even though he [may] have [had] a perfect one. He require[d] the guiding hand of counsel at every step of the proceedings against him." Perry II, 488 U.S. at 286 (quoting Powell v. Alabama, 287 U.S. 45, 68-69 (1932)) (quotation marks omitted). The majority's suggested curtailment of this attorney-client relationship during a routine

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[16] The court repeatedly reminded Petitioner to stop speaking when Ms. Dennemeyer objected. For example:

> [DPA]: Q. Is it coincidence that right where she claims you attacked her the second time, there's her backpack and sandals?
> [PETITIONER]: A. No, there is no coincidence. I didn't attack her any first time, second time. I just told you. I cannot explain to you one more time. I grabbed when I turned –
> [DPA]: Objection; nonresponsive to that specific question, your Honor. I'm going to move to strike.
> [PETITIONER]: No
> THE COURT: Sustained. [Petitioner].
> [PETITIONER]: No.
> THE COURT: Just a minute. Just a minute.
> [PETITIONER]: No, it's wrong. You're wrong.
> THE COURT: <u>[Petitioner], as I instructed you earlier, whenever there's an objection, you are to stop speaking</u>.
> . . .
> [DPA]: Q. Is it a coincidence that right where she claims she had to drop her bag and take off her shoes to escape from you the second time that's right where the bag and the shoes are; is that a coincidence?
> MS. DENNEMEYER: Objection; asked and answered.
> [PETITIONER]: No, it's not a coincidence.
> THE COURT: <u>[Petitioner], once again when there's an objection, please do not answer.</u>

(Emphases added.)

recess disregards Petitioner's obvious legal need for counsel.

C.

Third, the majority mistakenly believes that standby counsel acts only in an advisory capacity, and, accordingly, Petitioner is not entitled to otherwise obtain counsel's help. In arriving at this conclusion the majority 1) misstates the law in deciding that standby counsel can only act in an advisory capacity, 2) fails to recognize that the court, in its discretion, allowed hybrid-representation and therefore Ms. Dennemeyer did actively participate in trial, and 3) again contradicts its holding that defendants are entitled to consult with their standby counsel during a routine recess.

The majority's reliance on note 5 of Hirano, 8 Haw. App. at 333 n.5, 802 P.2d at 484 n.5, citing Farretta, supra, for the proposition that "standby or advisory counsel 'do[es] not actively participate in the trial, but act[s] in an advisory capacity[,]'" is inaccurate. To the contrary, Farretta's only discussion of standby counsel acknowledges that "[a] State may-even over objection by the accused-appoint a 'standby counsel' to aid the accused if and when the accused requests help, and to be available to represent the accused in the event that termination of the defendant's self-representation is necessary." Farretta, 422 U.S. at 806 n.46. The majority's assertion is a misstatement of the law because Farretta allows standby counsel to actively participate at trial to aid the accused when help is requested.

In Hirano, the court was confronted with the issue of whether a criminal defendant had a constitutional right to appear

as *pro se* co-counsel. 8 Haw. App at 332, 802 P.2d at 484. "Writers have labeled such an arrangement as 'hybrid representation.'" Id. at 333, 802 P.2d at 484 (quoting 2 W. LaFave & J. Israel, Criminal Procedure § 11.5(f) (1984)). Hirano held that the right to proceed as *pro se* co-counsel is not guaranteed under the federal or state constitutions. Id. However, Hirano did not preclude such hybrid representation. Instead Hirano left open the possibility for hybrid representation as "[s]uch representation is in the discretion of the trial court." Id. at 336, 802 P.2d at 485.

In this case, unlike in Hirano, Petitioner requested to represent himself *pro se* rather than *pro se* co-counsel. The court, in its proper discretion, appointed Ms. Dennemeyer as standby counsel and apparently allowed Petitioner to have hybrid representation. A review of the transcript demonstrates that Ms. Dennemeyer was obviously more than an advisor. As discussed previously, Ms. Dennemeyer consulted with Petitioner and spoke to the jury during opening statement, made suggestions to Petitioner while on direct examination, frequently objected to Respondent's cross-examination, and objected to jury instructions. Ms. Dennemeyer acted as full-time counsel at several key periods of Petitioner's trial.

The majority has not cited any authority for the proposition that a defendant's right to speak to standby counsel or hybrid counsel during a routine recess can be abrogated. The fact that standby counsel was appointed in this case evinces the court's belief that Petitioner could not adequately represent

himself. The majority again implies that since Petitioner was "*pro se*," he was entitled only to advice from standby counsel. Majority opinion at 67-69. This position again contradicts the majority's own holdings. Petitioner had the right to speak to Ms. Dennemeyer during a routine recess regardless of whether Ms. Dennemeyer was standby, hybrid, or regular counsel.

D.

Fourth, the majority argues that nothing of consequence could occur in an attorney-client conference during a "minimal 15-minute" recess. A time limit, as drawn by the majority, would be arbitrary. As Justice Marshall in his dissent argued, "it defies common sense to argue that attorney-defendant conversations regarding the availability of other witnesses, trial tactics, or even the possibility of negotiating a plea bargain . . . cannot, or do not, take place during relatively brief recesses." <u>Perry II</u>, 488 U.S. at 294 (Marshall, J. dissenting, joined by Brennen, J. and Blackmun, J.) (internal quotation marks and citations omitted). For example, a defendant on the stand "may remember the name or address of a witness, or the location of physical evidence which would be helpful to his defense. <u>It would take mere seconds to convey this information to counsel</u>." <u>Id.</u> (emphasis added). Additionally, it would only take seconds for a defendant to convey to his lawyer that he has concluded that "he should attempt plea negotiations with the prosecution or accept an outstanding plea bargain offer." <u>Id.</u> These opportunities "might be lost forever, however, if a bar order issues." <u>Id.</u>

Within a 15-minute recess, a defendant may well have questions in regard to matters unrelated to the testimony he was giving at the time the recess was taken. A defendant could seek to ask his or her counsel about testimony which would in turn alert counsel that the defendant's privilege against self-incrimination was implicated. The majority's reliance on "the [court's] admonishment to [Petitioner,]" majority opinion at 66, does not account for what Petitioner might have wanted to say to his counsel during a short recess. Defendants may not be cognizant of an issue that would arise in the context of a discussion with their attorneys before meeting with them. The majority seemingly ignores the fact that matters of legal consequence that were not considered the subject of pre-recess "concerns" may arise during the recess meeting simply as a result of contact between attorney and client.

E.

Fifth, the majority mistakenly believes that this issue is moot because the court advised Petitioner of what his counsel would have told him. Majority opinion at 69. This reasoning is flawed because in examining the reason offered by Petitioner's counsel to determine that the court's error was "harmless," the majority intrudes upon the privilege held by a defendant with respect to information conveyed to or from his or her attorney. In essence, the majority's approach condones the disclosure of information through the defendant's attorney that would otherwise be confidential. Such an approach undermines the principle of "full and frank communication" protected by the attorney client

privilege under HRE Rule 503(b). See Save Sunset Beach, 102 Hawaiʻi at 484, 78 P.3d at 20.

Thus, in examining the reasons for conferring with a client during a trial recess, the majority directs that the nature of the information or communication, i.e., "concerns," majority opinion at 67, must be disclosed in order to determine whether a trial court's decision to prohibit discussions between an attorney and the defendant was harmless or not. But the nature of the information, "objection," id. at 67, 69, 73, or "concern," id. at 67, 73, if disclosed, might itself incriminate the defendant. See State v. Kamanao, 103 Hawaiʻi 315, 321, 82 P.3d 401, 407 (2003) (citing State v. Shreves, 60 P.3d 991, 995 (Mont. 2002) for the proposition that "[t]he privilege against self incrimination does not turn upon the type of proceeding in which its protection is invoked, but [rather,] upon the nature of the statement or admission and the exposure which it invites") (internal quotation marks omitted); State v. Kupihea, 80 Hawaiʻi 307, 313, 909 P.2d 1122, 1128 (1996) (stating that "the privilege against self incrimination extends not only to answers that would in themselves support a conviction, but to those that would furnish a link in the chain of evidence needed to prosecute" (quoting Territory v. Lanier, 40 Haw. 65, 72 (1953)).

The majority's view could also lead to fifth amendment violations because "[t]he criminal defendant's self-incrimination rights become completely nugatory if compulsory disclosure can be exacted through his attorney[,]" Belge, 372 N.Y.S. 2d at 802 (internal quotation marks omitted), or if a defendant is required

to voice some objection, majority opinion at 67, 69, 73, specifically request the opportunity to speak to counsel, id. at 67, 69, or express on the record a "concern[,]" id. at 67, in order to convince a trial court that a meeting between attorney and client should be permitted during a routine recess. See Commonwealth v. Stenhach, 514 A.2d 114, 117-18 (Pa. Super. Ct. 1986) (stating that "[t]he right not to be compelled in any criminal case to be a witness against himself would be empty if defense counsel, repeating information provided by a client, acted as a witness against him"). Thus, in addition to violating the attorney-client privilege, the majority's approach infringes on defendants' fifth amendment privilege against self-incrimination.

F.

Sixth, the majority erroneously asserts that nothing significant would have occurred between Petitioner and Ms. Dennemeyer during the 15-minute recess because Petitioner did not request a recess, and did not object to or express any concerns with the court's ban. The majority concludes that "there was no evidence in the record or identified during oral argument before this court that [Petitioner] did, in fact, have a 'matter or concern' that he wanted to raise with [Ms.] Dennemeyer." Majority opinion at 66. According to the majority, "the speculatory assertion that [Petitioner] 'may have wished to discuss an issue with his court appointed counsel' during the recess, . . . is insufficient . . . to show that the [court's]

error contributed to [Petitioner's] ultimate conviction." Id. at 65 (brackets omitted).

The majority reaches this conclusion despite the fact that it "agree[s]," id. at 60, with Justice Marshall's statement that "[n]owhere have we suggested that the Sixth Amendment right to counsel turns on what the defendant and his attorney discuss or at what point during a trial their discussion takes place." Perry II, 488 U.S. at 291 (emphasis added). Indeed, Justice Marshall pointed out that the need for attorney and defendant discussions during a trial recess works both ways; that is, while the defendant's attorney may want to discuss certain issues with the defendant during a recess, the defendant may have an equal desire to discuss certain issues with his or her attorney during a recess or may have questions with respect to counsel's advice. See id. at 294.

The majority cites to no authority for the proposition that there needs to be "evidence in the record" to show that a defendant must "have a matter or concern that he wanted to raise with" his or her counsel in order to establish that there was a reasonable possibility that the court's "constitutional error" of preventing discussions during a routine trial recess contributed to the defendant's conviction. See majority opinion at 66. Indeed, it is difficult to imagine how such "evidence" could be provided, because a defendant's trial counsel would not know beforehand whether the defendant had an issue that he or she wished to discuss during a recess. Defendants themselves would not know that they are required to object, express concern, or

state for the record that they have an issue they would like to discuss with their attorneys, or trusting in the confidentiality of the attorney-client privilege would not volunteer in court the reason for conferring during the recess.

When a court prevents a defendant from speaking with his or her attorney during a routine trial recess, it deprives the defendant of the opportunity to discuss matters he or she may want to raise with the attorney, some examples of which have been noted above. This deprivation occurs regardless of whether there is "evidence in the record" to establish that the defendant wanted to engage in such discussions. The constitutional right to counsel guarantees defendants an opportunity for dialogue, and nowhere is it required that defendants provide affirmative evidence of their desire to avail themselves of this right. Thus, while Petitioner may not have affirmatively requested to speak to Ms. Dennemeyer on the record, that in itself does not establish that nothing of legal consequence would have been communicated between Petitioner and counsel during the recess.

Despite its disavowal, majority opinion at 70-73, the majority, by grounding its analysis in what Petitioner's counsel apparently wanted to say to Petitioner, incorrectly implies that it is appropriate to delve into the reasons for communications between an attorney and his or her client in order to gauge whether barring such communication during an ordinary recess was "harmless." As explained above, this approach is in derogation of the right to counsel, the attorney-client privilege and the right against self-incrimination.

G.

1.

Finally, the majority wrongly asserts that it is "absurd" that the barring of the attorney-client conference during an ordinary recess is reversible error. Id. at 70. The majority misrepresents this opinion as establishing a "bright line" rule that "any deprivation of a defendant's right to confer with counsel is harmful," id. at 69-70 (emphasis in original), and maintains that this "bright line" approach leads to three absurd results - "[r]ever[sal of] a defendant's conviction based on a violation of his right to confer with counsel, even where the defendant expressly states there is no need for such communication," id. at 70-71,[17] "[r]evers[al of] conviction where [Petitioner] never asked to confer with Dennemeyer nor objected to or expressed any concerns regarding the court's admonition not to confer with counsel during the routine 15-minute recess," id. at 71,[18] and "extinguish[ment of] the discretion afforded to the trial courts,"[19] id. at 71-72.

The underlying fallacy of the majority's opinion is that, contrarily, both the majority and dissent in Perry II indicated that a showing of prejudice is not required. In

[17] Such a case bereft of surrounding circumstances is not before this court. But tellingly, the majority creates a hypothetical situation that again underscores its misperception about a defendant's right to counsel. As indicated supra, the majority's posed inquiry would violate a defendant's right to counsel and attorney-client privilege and risk violation of the right against self-incrimination.

[18] This contention was addressed supra.

[19] See discussion infra.

Geders, the United States Supreme Court (Supreme Court) addressed the question of "whether a trial court's order directing [a criminal defendant] not to consult his attorney during a regular overnight recess, called while [the defendant] 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." 426 U.S. at 81. In a concurring opinion, Justice Marshall, joined by Justice Brennan, explained that, under the majority's holding, "a defendant who claims that an order prohibiting communication with his [or her] lawyer impinges upon his [or her] Sixth Amendment right to counsel need not make a preliminary showing of prejudice." Id. at 92 (Marshall, J., concurring, joined by Brennan, J.)

Eleven years later, in Perry II, the Supreme Court again considered the question of whether a trial court's order prohibiting a criminal defendant from conferring with defense counsel constituted an impermissible violation of the sixth amendment. In Perry II, the primary question was whether the defendant needed to show that the denial of counsel prejudiced the defendant in order to have his conviction set aside. 488 U.S. at 286 (Marshall,J., dissenting, joined by Brennen, J. and Blackmun, J.). The district court granted the defendant's writ for habeas corpus determining that the defendant "had a right to counsel during a brief recess and he need not demonstrate prejudice from the denial of that right in order to have his conviction set aside." Id. at 276 (emphasis added) (citation omitted). The Court of Appeals of the Fourth Circuit in an en

banc panel reversed the district court, determining that, although a constitutional error had occurred, the error was not prejudicial. Id. Four judges, however dissented on the prejudice analysis, reasoning that "the prejudice inquiry was particularly inappropriate in this context because it would inevitably require a review of private discussions between client and lawyer." Id. (emphasis added).

On certiorari before the Supreme Court, the majority held that no constitutional error had occurred; however the majority could not "accept the rationale of the Court of Appeals' [majority] decision" with regard to the Fourth Circuit's holding that the error was not prejudicial. Id. at 280. The Supreme Court reaffirmed that "a showing of prejudice was not an essential component" to reverse a defendant's conviction when the defendant was denied access to his lawyer. Id. at 278-79. The majority stated:

> There is merit in petitioner's argument that a showing of prejudice is not an essential component of a violation of the rule announced in *Geders*. In that case, we simply reversed the defendant's conviction without pausing to consider the extent of the actual prejudice, if any, that resulted from the defendant's denial of access to his lawyer during the overnight recess.

Id. (emphasis added). The Supreme Court also noted that "reversal [without prejudice] was consistent with the view we have often expressed concerning the fundamental importance of the criminal defendant's constitutional right to be represented by counsel." Id. at 280. See, e.g., Cronic, 466 U.S. at 653-54; Chapman v. California, 386 U.S. 18, 23, n.8 (1967); Gideon v. Wainwright, 372 U.S. 335 (1963); Glasser v. United States, 315 U.S. 60, 76 (1942).

Justice Marshall, dissenting in Perry II, also agreed that the denial of the assistance of counsel during a critical stage of the criminal proceeding warranted a reversal without any proof of prejudice. Perry II, 488 U.S. at 278-79 n.7 (Marshall, J. dissenting, joined by Brennen, J. and Blackmun, J.). Justice Marshall noted that

> [f]ew categories of constitutional error so undermine the adversary system as to warrant reversal without any proof of prejudice in a particular case. Denial of the assistance of counsel during a critical stage of criminal proceedings is one such category of error. Whether the deprivation of counsel spans an entire trial or but a fraction thereof, it renders suspect any result that is obtained.

Id. (quoting Perry I, 832 F.2d at 849 (Winter, C.J., dissenting)) (emphasis added).

Indeed, Hawaiʻi courts have recognized that the Hawaiʻi Constitution protects certain rights "so basic to a fair trial that its contravention can never be deemed harmless." State v. Holbron, 80 Hawaiʻi 27, 31 n.12, 904 P.2d 912, 918 n.12 (1995) (quoting State v. Suka, 79 Hawaiʻi 293, 300, 901 P.2d 1272, 1279 (App. 1995)); see also State v. Bowe, 77 Hawaiʻi 51, 881 P.2d 538 (1994) (holding that use of a coerced confession in criminal trial would be fundamentally unfair).

2.

In arriving at its holdings, the majority agrees with the reasoning of Justice Marshall's dissent in Perry II. The majority admits that "[w]e are persuaded by the reasoning of the [Perry II] dissent [by Justice Marshall,]" majority opinion at 60, and agrees with Justice Marshall's proposition that "**any** order barring communication between a defendant and his attorney, at least where the communication would not interfere with the

orderly and expeditious process of the trial," violates a criminal defendant's state constitutional right. Id. at 63-64 (quoting Perry II, 488 U.S. at 285 (Marshall, J., dissenting, joined by Brennan, J., and Blackmun, J. (emphasis in original))).

However, both Justice Marshall's dissent, as well as the majority in Perry II, recognized that a showing of prejudice was not required as part of a claim of denial of counsel. As noted supra, Justice Marshall maintained that the "denial of the assistance of counsel during a critical stage of the criminal proceeding" "warrants a reversal without any proof of prejudice." Perry II, 488 U.S. at 278-79 n.7 (Marshall, J. dissenting, joined by Brennen, J. and Blackmun, J.) (quoting Perry I, 832 F.2d at 849 (Winter, C.J., dissenting)).

Unlike both the Perry II majority and Justice Marshall's dissent, the majority requires that there be affirmative evidence in the record to support a finding that Petitioner needed to speak to his counsel during a routine recess. The majority mandates a showing that Petitioner "requested a recess" or "objected to" the trial court's admonition when the court prohibited communication, majority opinion at 73, and thus, that prejudice existed. This mandate directly conflicts with both the ruling of the Perry II majority and the dissent by Justice Marshall. The majority's requirement of prejudice even contradicts the majority's own adoption of Justice Marshall's dissent.

3.

Again, the majority erroneously argues that under this

opinion, a defendant who repeatedly asks to confer with his counsel while testifying and whose requests are denied by the court would be entitled to a *per se* reversal or vacation of his conviction. Id. at 71-72. Contrary to the majority's assertions, this opinion does not extinguish the discretion afforded to the court. As stated previously, "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 trial," Perry II, 488 U.S. at 285 (Marshall, J., dissenting, joined by Brennen, J. and Blackmun, J.), violates a criminal defendant's constitutional right to counsel. As Justice Marshall indicated, a trial court has due discretion to determine whether a recess should be taken in light of the trial court's control over the orderly and expeditious progress of trial.[20] With all due respect, the majority's argument is simply off the mark.

IV.

The majority's approach in this case infringes upon a defendant's right to be represented by counsel at every "critical stage" of the trial and undermines the attorney-client privilege and defendants' fifth amendment rights. For the foregoing reasons, I dissent to this part of the majority's opinion.

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[20] Of course, the question of the denial of counsel during a non-routine recess is a question not presented by this case, inasmuch as the only issue before us is whether Petitioner was prevented from talking to his counsel during a routine recess.