No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

Michael Skillern

Petitioner,

- vs -

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

This Petition for Writ of Certiorari is brought to address Constitutional errors made by the United States District Court for the Middle District of Florida, the Honorable Mary Stenson Scriven presiding during Michael Skillern's jury trial. Such errors departed from the accepted and usual course of trial proceedings, such that the errors of the District Court, sanctioned by the United States Court of Appeals for the Eleventh Circuit, affected the framework within which the trial proceeded. Errors of the nature brought to this Court's attention by this Petition for Writ of Certiorari are errors, that resolve important federal questions in a manner that is in conflict with other United States Courts of Appeals and that substantially conflict with the substantive decisions of this Court. The errors of the United States District Court for the Middle District of Florida, that are sanctioned by the United States Court of Appeals for the Eleventh Circuit compel the exercise of this Court's supervisory power, to resolve not only a circuit split but decisions of the Eleventh Circuit that establish rules not found or authorized by this Court's relevent substantive decisions.

Further the District Court and the Eleventh Circuit abdicated their obligation to dismiss a prosecution brought for conduct, under statutes (18 USC § 1341, mail fraud and 18 USC § 1343, wire fraud) which do not have extraterritorial effect such that the District Court did not acquire subject matter jurisdiction, under the Government's indicted theory, of this case and the factual circumstances applicable to the business transactions made the basis of the prosecution.

Fifty-six (56) years ago this Court held:

> "The due process clause of the Fourteenth Amendment guarantees the assistance of counsel unless that right is intelligently and understandingly waived by the accused..." (See Carnley v. Cochran, 369 U.S. 506, 8L.Ed.2d. 70, 32 S. Ct. 884 (1962).

Twenty-seven (27) years later in 1989 this Court, opined in Perry a defendant who testifies in his own behalf shall be entitled to the Sixth Amendment's guarantee of access to counsel and the right to effective assistance of counsel; because these rights are distinguishable, this Court made clear the denial by the government or the courts, of access to counsel beyond a short break in trial is a right not subject to prejudice analysis.

Further twenty-six (26) years later the DC Circuit in an opinion predicated on Perry and Justice Scalia's concurrence in Mudd (1986), stated in its analysis of a defendant's Sixth Amendment right to confer with his attorney during a trial recess, that:

> "After Cronic, the Court confirmed that a trial court's denial of the defendant's right to confer with his attorney during trial recess "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 v. Leeke, 488 U.S. 272, 280, 109 S. Ct. 594, 102 L.Ed.2d 624 (1989). As this Court explained in (417 U.S. App. D.C. 374) Mudd (795 F.3d 111) 798 F.2d at 1515 a rule that requires a defendant to establish that he was prejudiced by his inability to consult with counsel would require a defendant to show "what he and counsel discussed, what they were prevented from discussing, and how the order altered the the preparation of defense" and [p]resumably the government would then be free to question the defendant and counsel about the discussion that did take place.... We stated then that we could not accept a rule whereby private discussions between counsel and client could be exposed...

The Eleventh Circuit's "Actual-Deprived Rule" among other consequences would require exposure of counsel and a defendant's privileged communications. See United States v. Bell, 795 F.3d 88 (DC Cir. 2015).

QUESTION I

DID THE DISTRICT COURT'S ORDER PROHIBITING DEFENDANT SKILLERN, FROM CONFERRING WITH TRIAL COUNSEL DURING AN OVERNIGHT RECESS, REGARDING DEFENDANT SKILLERN'S PAST DAY'S TRIAL TESTIMONY, AND OTHER TRIAL TACTICS WHICH WOULD INEVITABLY INCLUDE DEFENDANT SKILLERN'S ONGOING TESTIMONY, VIOLATE THE SIXTH AMENDMENT'S GUARANTEE OF ACCESS TO COUNSEL, AND VIOLATE THIS COURT'S SUBSTANTIVE DECISIONS IN GEDERS V. UNITED STATES, 425 U.S. 80, 91 (1976), AND PERRY V. LEEKE, 488 U.S. 272 (1989)?

QUESTION II

BECAUSE 18 USC § 1341 (MAIL FRAUD) AND 18 USC § 1343 (WIRE FRAUD) DO NOT APPLY EXTRATERRITORIALLY, DOES THE LACK OF SUBJECT MATTER JURISDICTION MANDATE THAT THE DISTRICT COURT'S JUDGMENT OF CONVICTION AND SENTENCE BE DEEMED VOID AB INITIO?

QUESTION III

DID THE DISTRICT COURT'S RULING LIMITING DEFENDANT SKILLERN'S SIXTH AMENDMENT-SECURED AUTONOMY, AND RIGHT OF ACCESS TO COUNSEL DURING AN OVERNIGHT RECESS AND DURING THE FIRST AND SECOND DAY OF TRIAL, USURP CONTROL OF DEFENDANT'S PEROGATIVE TO DIRECT AND CONFER WITH COUNSEL ON ALL ISSUES REGARDING DEFENDANT SKILLERN'S DEFENSE, THEREBY COMMITTING CONSTITUTIONAL ERROR, THAT IS STRUCTURAL ERROR, AND NOT SUBJECT TO HARMLESS ERROR ANALYSIS?

QUESTION IV

DOES THE DISTRICT COURT'S JURY INSTRUCTION REGARDING WHAT THE GOVERNMENT IS NOT REQUIRED TO PROVE MISSTATE THE LAW AND LESSEN THE BURDEN OF PROOF REGARDING THE GOVERNMENT'S BURDEN TO DEMONSTRATE THAT ANY MAILING BY THE POSTAL SERVICE OR COMMERCIAL CARRIER WAS FOR THE PURPOSE OF EXECUTING A SCHEME TO DEFRAUD?

QUESTION V

DOES THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT'S DECISION IN CRUTCHFIELD V. WAINWRIGHT, 803 F.2d 1103 (11th CIR. 1986) ANNOUNCING THE "ACTUAL-DEPRIVATION RULE" IMPERMISSIBLY ABROGATE THE RULE IN GEDERS V. UNITED STATES, 425 U.S. 80, 91 (1976), AND PERRY V. LEEKE, 488 U.S. 272 (1989)?

CERTIFICATE OF INTERESTED PERSONS

The following persons have an interest in the outcome of this case. These representations are made in order that the Judges of this Court may evaluate disqualification or recusal.

Petitioner: Michael Skillern

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2. Direct Appeal:

For the Government:

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OPINIONS BELOW

On February 3, 2016 Petitioner was convicted of Counts 1,2,3-6, 7-10 of the indictment, and on May 24, 2016 the United States District Court, for the Middle District of Florida, Tampa Division, sentenced Petitioner to an aggregate 120 months in prison, 3 years supervised release and $1000 special assessment, as is set out in Petitioner's "Judgment in a Criminal Case"; see Appendix 1. The United States Court of Appeals for the Eleventh Circuit decision Affirming Petitioner's Conviction and Sentence, is set forth in Appendix 2.

JURISDICTION

On March 8, 2018, the United States Court of Appeals for the Eleventh Circuit issued its (published) decision; (Appendix (Appx.) 2) AFFIRMING and on July 13, 2018 Petitioner's Motion for Panel Rehearing/ Rehearing En Banc was denied. (See Appx 3). This Court has jurisdiction pursuant to 28 USC § 1254(1) and 28 USC § 2106, and Rule 13, Rules of the Supreme Court.

The Petition for Writ of Certiorari is due on October 11, 2018, (Sup. Ct. Rule 13.3); the Petitioner filed this Petition for Writ of Certiorari, Appendices and Motion to Proceed In Forma Pauperis on Aug. 28 2018, pursuant to the prison "mailbox rule," and Rules of the Supreme Court, Rule 13.1, FED.R.App.P. 4(c)(1)(A)(i), and Houston v. Lack, 487 U.S. 266 (1988).

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PROVISIONS INVOLVED

Fifth Amendment to the Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in Militia, when in actual service in time of War or public danger; nor shall be compelled in any criminal case to be a witness against himself, nor deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation.

Sixth Amendment to the Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the States and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witness against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Fourteenth Amendment to the Constitution provides in part:

> Section 1. [Citizens of the United States.] All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any laws which abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTES

18 USC § 371 Conspiracy to commit offense or to defraud United States provides:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object is the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

18 USC § 1341 provides:

> § 1341. Frauds and swindles:
> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter give away, distribute, supply or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or article or attempting to do so, places in any post office or authorized depository for mail matter, any matter or thing whatever be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than 20 years, or both. If the violation occurs in relation to, or involving any benefit authorized, transported, transmitted, transferred, disbursed, or paid in connection with, a presidentially declared major disaster or emergency (as those terms are defined in section 102 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (41 USC 5122)), or affects a financial institution, such person shall be fined not more than, $1,000,000 or imprisoned more than 30 years, or both.

18 USC § 1343 Fraud by wire, or television provides:

> Whoever, having devised or intending to devise any scheme or or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both. If the violation occurs in relation to, or involving any benefit authorized, transported, transmitted, transferred, disbursed, or paid in connection with, a presidentially declared major disaster or emergency (as those terms are defined in section 102 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 USC 5122)), or affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

18 USC § 1956(h) provides:

> "Any person who conspires to commit any offense defined in this Section or Section 1957 [18 USC § 1957] shall be subject to the same penalties as those prescribed for the offense the commission of which was the object of the conspiracy."

21 USC § 1254 (1) provides:

> Cases in the courts of appeal may be reviewed by the Supreme Court by the following methods:
> (1) By writ of certiorari granted upon petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

28 USC § 2106 provides:

> The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order or require such further proceedings to be had as may by just under the circumstances.

STATEMENT OF THE CASE

THE JURY TRIAL PROCEEDING

1. The District Court Judge deprived Petitioner of his fundamental Sixth Amendment right of access to counsel during the first two (2) days of Petitioner's trial testimony (through cross examination and redirect), including one (1) overnight recess (16-17 hours in length), two (2) lunch recesses (1½- 2 hours in length) and at multiple times when the trial Judge excused Petitioner from the courtroom, while the Judge, prosecution, and all defense lawyers, discussed aspects of the of the trial proceeding as well as Petitioner's testimony. The infringment on Petitioner's right of access to counsel and the usurption of Petitioner's Sixth Amendment-secured autonomy, was the result of the District Court's Judge's order limiting Petitioner's right to confer with his lawyer (Atty. Schneider) during the lunch recesses for two (2) days and one overnight recess; the Petitioner's Sixth Amendment autonomy was violated because excluding Petitioner from the courtroom during attorney conferences, coupled with sequestering Petitioner while testifying for two (2) of three (3) days, usurped Petitioner's right to make fundamental choices about his defense which necessarily includ- Petioner's past and impending testimony, and trial tactics not limited to but including whether or not to call other witnesses. These errors are not "invited errors" as it was the trial Judge who initiated the instruction and polite requests for clarification can not amount to an inference of some unethical tactic to invite error.

THE INDICTMENT

2. The Government's theory of prosecution in this case is, set out in its Indictment, which alleges that Petitioner and his codefend-

ant's conspired to utilize a telemarketing group based in Spain to place, "unsolicited telephone calls to potential and existing victims outside the United States from boiler rooms." (See Indictment "Manner and Means" § 16; Appx 4). Further the Government's Indictment alleged in § 17-27 various misrepresentations which eminated from the telemarketers to foreign persons or entities all outside of the United States of America. The "Overt Acts" section of the Indictment lists as the first "Overt Act", the contract between OWN GOLD, LLC (the producer) and SHUKR HOLDINGS, LLC (the sales agent). SHUKR HOLDINGS, LLC (hereinafter SHUKR) was responsible for the sale of OWN GOLD LLC's (hereinafter "OG, LLC") products, and the employment of boiler room telemarketers. SHUKR would receive a 72.5% commission of total gross sales. (See Indictment - "Overt Acts" § 28(b)). § 24 of the "Manner and Means", charges that "victims funds were sent to accounts owned or controlled by the boiler room telemarketers at financial institutions overseas in order to perpetuate the fraud scheme." (Indictment § 24).

3. With regard to the charged "Overt Acts" (§ 28 of the Indictment) there are forty-three (43) overt acts of which sixteen (16) refer to foreign transactions with foreign persons or entities doing business with the telemarketer group consumating wholly foreign transactions; there are ten (10) transactions charging transactions in the Middle District of Florida, and there are seventeen (17) overt acts relating to contracts between the defendants, legal opinions, establishment of bank accounts and other business conduct, in the normal course, not related to any particular "victim". There were 328 foreign purchasers (sometimes referred to as customers) who purchased through the foreign telemarketers and 20 domestic customers. Domestic customers represent less than 6% by individual count of all purchasers who executed contracts,

and paid for gold, yet to be produced (mined) and refined to 80% purity, and approximately 3% of the money paid for gold that was to be mined and delivered at a future date. The "Certificate of Ownership" mailed by "OG, LLC" charged in each overt act charging a mail fraud, was mailed after the fraud, if any, was complete. After the telemarketing group and/or "OG, LLC" had received the purchase price (pre-payment) for gold yet to be mined, "OG, LLC" caused a Certificate of Ownership to be mailed to the purchaser, similar in nature as any mailing after the expenditure of funds, such as credit card receipt or hotel billing statement sent via the Postal Service. In as much as the customer's gold delivery date was approximately 12 months in the future the mailing could not be for the purpose of "lulling".

CONSPIRACY COUNTS

4. The Indictment (Counts 1 and 2), "Manner and Means" among other allegations alleges that it was the engagement of a "boiler room telemarketing" group to sell gold ore or gold dore from mines owned or controlled by coconspirators, which the Government further alleged such mines were not owned, or not capable of producing gold or gold dore. (Indictment § 17). Notably § 20 § 21 § 22-26 generally refer to conduct if determined to be fraud, would be conduct that was completed outside the territorial borders of the United States. As with the "Manner and Means" the "Overt Acts" section of the Indictment, to the extent it refers to conduct that may be determined to be in execution of a "scheme to defraud" generally such conduct refers to conduct in Spain or the United Kingdom.

MAIL FRAUD COUNTS

5. Indictment Counts 3-6 charge as part of the mail fraud scheme:

(i) the mailing of a "Certificate of Ownership" from "OG, LLC" to the resident of the United Kingdom, (Count 3);

(ii) the mailing of a "Certificate of Ownership" from "OG, LLC" to a resident of the United Kingdom, (Count 4);

(iii) the mailing of a "Certificate of Ownership" from "OG, LLC" to a resident of Florida, (Count 5);

(iv) the mailing of a "Certificate of Ownership" from "OG, LLC" to a resident of Florida, (Count 6).

WIRE FRAUD COUNTS

5.1 Indictment Counts 7-10 charge wire fraud as follows:

(i) Wire transfer from "OG, LLC" to SHUKR in Florida, (Count 7); (payment of sales commissions);

(ii) Wire transfer to SHUKR from "OG, LLC" to SHUKR in Florida; (Count 8); (payment of sales commission),

(iii) Wire transfer in Florida, (Count 9); (payment of sales commission); and

(iv) Wire transfer from "OG LLC" to SHUKR in Florida; Count 10); payment of sales commission).

MONEY LAUNDERING CONSPIRACY COUNT

6. The Indictment alleged in Count 2 a money laundering conspiracy (violation of 18 USC § 1956(h)) by virtue of the following transactions:

(i) Wire transfer of $61,080.08 from SHUKR to Chelsemore management in Cyprus;

(ii) Wire transfer from "OG, LLC" of $201,230 to Alpine Holdings

Corporation in St. Vincent and the Grenadines;

(iii) Wire transfer from SHUKR of $9,250.00 to Adriana Camargo in Spain;

(iv) Wire transfer from SHUKR of $116,689.00 to Chelsemore Management in Cyprus; and

(v) Wire transfer from SHUKR of $40,000 to Adriana Palomino in Andora.

7. Petitioner was acquited of Counts 11, 12, and 13 charged in the Indictment as "Illegal Money Transactions". All transfers were impliedly the transfer of "ill gotten" gains or proceeds from the alleged crimes.

8. Petitioner timely filed Notice of Appeal, and prosecuted an appeal to the United States Court of Appeals for the Eleventh Circuit.

The Eleventh Circuit AFFIRMED on March 8, 2018 (See Appx 2), (United States v. Nelson, 2018 U.S. App LEXIS 5864 (11th Cir. 2018). Petitioner's Motion for Panel Rehearing/Rehearing En Banc was denied without opinion on July 13, 2018 (See Appx 3).

REASONS FOR GRANTING THE WRIT

QUESTION I

> DID THE DISTRICT COURT'S ORDER PROHIBITING DEFENDANT SKILLERN FROM CONFERING WITH TRIAL COUNSEL DURING AN OVERNIGHT RECESS, REGARDING DEFENDANT SKILLERNS PAST DAY'S TRIAL TESTIMONY AND OTHER TRIAL TACTICS WHICH WOULD INEVITABLY INCLUDE DEFENDANT SKILLERN'S ON-GOING TESTIMONY, VIOLATE THE SIXTH AMENDMENT'S GUARANTEE FOR ACCESS TO COUNSEL, AND VIOLATE THIS COURT'S SUBSTANTIVE DECISIONS IN GEDERS V. UNITED STATES, 425 U.S. 80, 91 (1976), AND PERRY V. LEEKE, 488 U.S. 272 (1989)?

9. During the course of Petitioner's jury trial after the Government concluded presentation of its case in chief, Petitioner's Attorney

Stanley G. Schneider (Atty. Schneider) began direct examination of Petitioner. At the first short break, (on the first day of Petitioner's testimony) the District Court Judge instructed Petitioner that during a break he was not to discuss his testimony or impending testimony with anyone, "including his lawyer." Subsequently at the end of the first day of Petitioner's testimony, the sequestration order was stated again; Atty. Schneider did not use the magic words "I object" but rather engaged the Court in a polite, nonconfrontational dialog attempting to "flesh out" the extent of the District Court's prohibition on Petitioner's conferring with, and or acess to counsel during his testimony. The prohibition was clearly enunciated by the District Court stating:

> "you can talk about the weather. What do you mean other than may come up? **Not his testimony or impending testimony"**

(See Trial Tr. Doc No. 431-9 at 208-209)

This instruction was in full force and effect through the first overnight recess of Petitioner's testimony, as well, noon recess (approximately 1½ hours) first and second day, and throughout all of the second day of testimony which included, cross examination on the second day. Petitioner was excused from the courtroom by order of the District Court during attorney conferences with the Court. At the time of the overnight recess, on the second day of Petitioner's testimony the judge vacated the restriction regarding Petitioner's access to Atty. Schneider. It is of note that the Government in its brief to the Eleventh Circuit cited five courts of appeals opinions, that hold, an overnight limitation on a defendant's Sixth Amendment right to acess to counsel that is a defendant's right to confer with counsel (irrespective of the fact that the defendant is testifying

at the time of the overnight recess) is a Sixth Amendment violation that is not subject to harmless error analysis. Further the Government states:

> "Under these authorities, the district court's limitation here impermissably constrained Skillern's ability to consult with his attorney during the first overnight recess."

(See Appellee's Brief page 52)
(See also Appx 2 - Eleventh Circuit Opinion § II)

As conceeded by the Government this limitation is a constitutional error. Further such error is not subject to harmless error analysis. (See Perry). The Eleventh Circuit Panel, opinion characterized their consideration of Petitioner's "Geders" argument on direct appeal as follows:

> "So is Skillern right that a Geders - type Sixth Amendment violation is necessarily structural error? **Tough to say**" (emphasis added)

(See Appx 2)

The rule of lenity would counsel that Petitioner is entitled to a reversal.

10. However, Petitioner's right to a reversal is well settled by this Court's Geders and Perry decisions. This Court in Geders held:

> "any conflict between the defendant's right to consult with his attorney during the long evernight recess and the prosecutor's desire to cross-examine the defendant without intervention of defense counsel and the risk of improper "coaching" must under the Sixth Amendment be resolved in favor of the right to the assistance and guidance of counsel."

In Petitioner's case the District Court barred Petitioner from consulting with Atty. Schneider on an overnight recess, (approximately 16-17 hours), after Petitioner's first day of testimony and before cross-examination, depriving Petitioner of access to counsel

without restriction or conditions, to discuss trial tactics, what facts were by Petitioner's testimony put in evidence for the jury to consider, and what facts need to be covered during the next day in trial and put into evidence by the Petitioner's impending testimony. The District Court made no distinction between a testifying non-party witness, and a testifying defendant with her orders of sequestration. This Court in Perry held:

> "1. A showing of prejudice is not an essential component of a violation of the Geders rule, in light of the fundamental importance of the criminal defendant's right to be represented by counsel...."
>
> "However... The long interruption in Geders was of a different character because in the normal consultation between attorney and client that occurs during an overnight recess would encompass matters that the defendant does have a constitutional right to discuss with his lawyer - such as the availability of other witnesses, trail tactics,... such discussions will inevitably include some consideration of the defendant's ongoing testimony does not compromise that basic right in that instance."

11. Geders and Perry, by committing a recognized constitutional error; that is a structural error, and is not subject to harmless error analysis, the Eleventh Circuit disregarded the constitutional rule in Geders and Perry by opining that neither Petitioner or Atty. Schneider demonstrated a desire to confer over the evening recess about Petitioner's testimony, which analysis is simply a harmless error analysis employed by Eleventh Circuit Panel and "rebranded" as the "actual - deprivation rule" (a rule which imposes a burden on a defendant or his lawyer to demonstrate a desire to confer during a recess); citing Crutchfield v. Wainwright, 802 F.2d 1103; 1986 U.S. App. LEXIS 33403 (11th Cir. 1986)(en banc).

Further the Eleventh Circuit's opinion disregards the expressed rule enunciated in Perry that overruled in substance and form the ill conceived idea of shifting the burden to a defendant or his lawyer, to demonstrate a desire to consult with counsel on an overnight recess about all matters, including testimony impending and ongoing. Petitioner was deprived of his Sixth Amendment right, a right that exists by operation of the Constitution, for access to counsel during, one (1) overnight recess, two (2) lunch recesses (1½-2 hours), all during the first two (2) days of his testimony. Atty. Schneider did not state the magic words "I object" or move for a mistrial, but the dialog between Atty. Schneider and the Judge and Petitioner unequivocally demonstrates that a lawyer and his client wanted to be able to confer unrestrained by the District Court's Order. Moreover there is nothing in this Court's holdings that could possibly give rise to a "burden shifting" rule, (the "actual deprivation rule" announced in Crutchfield) in regard to a Sixth Amendment fundamental right, for access to counsel during trial. Perry would suggest that the holding in Crutchfield is overrruled by this Court's holding in Perry published approximately three (3) years after Crutchfield. Petitioner's review of all circuit court's decisions found no other circuit adopting an "actual deprivation rule" in the context of the Eleventh Circuit's holding in Petitioner's case.

QUESTION II

BECAUSE 18 USC § 1341 (MAIL FRAUD) AND 18 USC § 1343 (WIRE FRAUD) DO NOT APPLY EXTRATERRITORIALLY, DOES THE LACK OF SUBJECT MATTER JURISDICTION MANDATE THAT THE DISTRICT COURT'S JUDGMENT OF CONVICTION AND SENTENCE BE DEEMED VOID AB INITIO?

12. This Court's most recent opinion regarding the canon of statutory construction known as the presumption against extraterritoriality, seemingly dictates that the mail fraud and wire fraud (18 USC § 1341 and 18 USC § 1343) do not have, extraterritorial effect, because of their focus on the procription of domestic frauds. The Government indictment charges violations of the mail fraud and wire fraud statutes that are predicated on transactions and money raised outside of the United States. As enunciated in this Court's opinion in RJR Nabisco, Inc, et al v. European Community et al, 579 U.S.____, 136 S. Ct.____, 195 L. Ed.2d 476; 2016 LEXIS 3925 (2016), This Court holds:

> "Absent clearly expressed congressional intent to the contrary Federal laws will be construed to have only domestic application."

citing Morrison v. National Austrilia Bank, Ltd., 561 U.S. 247. 255, 130 S. Ct. 2869, 177 L.Ed.2d 535.

In its application of the general rule this Court has adopted a two step analysis of extraterritoriality issues. First issue is whether the statute gives a clear affirmative indication that it applies extraterritorially; if the statute is not found exterritorial, then the analysis for step two is an examination of the statute's "focus", to determine whether the case involves a domestic application of the statute. (See RJR Nabisco et al); further

> "If the conduct relevant to the statute's focus occurred in the United States, then the case involves permissable domestic application even if other conduct occurred abroad; but if the relevant conduct occurred in a foreign country, then the case involves impermissable extraterritorial application, regardless of whether other conduct occurred in U.S. territory." RJR Nabisco et al. id.

13. In Petitioner's case the Government indicted the fraud conduct based on the obtaining money by false pretense, or misrepresentations, etc that were, characterized as "boiler room" telemarketing sales conducted outside of the United States. To be sure there was other conduct within the United States, that was generally in the normal course of any business transaction, such as forming corporations, opening bank accounts, seeking legal opinions for guidance, entering into contracts, all of which are non-fraudulent business operations.

There were a few U.S. customers who were included in the indictment, without which the Government would not have any operative domestic conduct to bring this case in the Middle District of Florida. The question is, because the law is unsettled as to what amount of domestic conduct would displace the presumption against extraterritoriality, and thereby support venue and **subject matter** jurisdiction in the Middle District of Florida; is Petitioner's case barred by the presumption against extraterritorial application of the mail & wire fraud statute? Petitioner postulates that because, the large majority of the alleged fraud occurred outside the United States, the conduct of Petitioner and Petitioner's alleged codefendants is not cognizable under the mail and wire fraud statutes and the Petitioner's convictions and sentence under 18 USC § 1341, and 18 USC § 1343 are unconstitutional and in violation of Petitioner's Fifth Amendment due process rights, (CONST.amend V), and Sixth Amendment due process. (CONST.amend. VI).

QUESTION III

DID THE DISTRICT COURT'S LIMITING DEFENDANT SKILLERN'S SIXTH AMENDMENT-SECURED AUTONOMY AND RIGHT OF ACCESS TO COUNSEL DURING AN OVERNIGHT RECESS AND DURING THE FIRST AND SECOND DAY OF TRIAL USURP CONTROL OF DEFENDANT'S

PEROGATIVE TO DIRECT AND CONFER WITH COUNSEL ON ALL ISSUES REGARDING DEFENDANT SKILLERN'S DEFENSE THEREBY COMMITTING CONSTITUTIONAL ERROR, THAT IS STRUCTURAL ERROR, AND NOT SUBJECT TO HARMLESS ERROR ANALYSIS?

14. This Court recently in McCoy v. Louisiana, 138 S. Ct. 1500, 200 L.Ed.2d 821; 2018 U.S. LEXIS 2802 (2018) opined:

> "The defendant does not surrender control entirely to counsel, for the Sixth Amendment, in grant[ing] to the accused personally the right to make his defense. ..." speaks of the 'assistance' of counsel, and an assistant, however expert, is still an assistant." Faretta v. California, 422 U.S. 806, 819-820, 95 S. Ct. 2525, 45 L.Ed.2d 562. The lawyer's province is trial management, but some decisions are reserved for the client-including whether to plead guilty, waive the right to a jury trial, testify in one's own behalf, and forgo an appeal."

Further McCoy holds:

> "Violation of a defendant's Sixth Amendment-secured autonomy ranks as error of the kind our decisions have called "structural"; when present, such an error is not subject to harmless-error review" (citation omitted).

As long ago as 1991 this Court announced an error that is ranked as strutural is not subject to harmless error review. The District Court's sequestration orders affecting Petitioner, that is, excusing Petitioner from the Courtroom during conferences with the prosecution and defendants' lawyers as well as the prohibition of conferring with Atty. Schneider regarding Petitioner testifying in his own behalf violated Petitioner's Sixth Amendment-secured autonomy, an error that is "structural" and required reversal without regard to "invited error" or "harmless error" review.

QUESTION IV

DOES THE DISTRICT COURT"S JURY INSTRUCTIONS REGARDING WHAT THE GOVERNMENT IS NOT REQUIRED TO PROVE MISSTATE THE LAW AND LESSEN THE BURDEN OF PROOF, REGARDING THE GOVERNMENT'S BURDEN TO DEMONSTRATE THAT ANY MAILING BY THE POSTAL SERVICE OR COMMERCIAL CARRIER WAS FOR THE PURPOSE OF EXECUTING A SCHEME TO DEFRAUD.

15. The District Court instructed the jury that the Government was required to prove that:

> "4. the Defendant... causing, something meant to help carry out the scheme to defraud."

(See Appx 7; page 22)

Problematic is that the mail fraud statute, (18 USC § 1341) states in part:

> ... " for the purpose of executing such scheme or artifice or attempting to do so, places in any post office or authorized depository for mail matter"...

and for the District Court's jury instruction to negate proof beyond a reasonable doubt of the element of the mail fraud statute, (by misstating the statute) that the mailing was for the purpose of executing the scheme to defraud, lessens the burden of proof on the Government, to prove the element (mailing for the purpose of executing the scheme to defraud) of the statute that is required for the mail fraud statute to proscribe, conduct under 18 USC § 1341. In Petitioner's trial the Government's Indictment alleged a mailing of a "Certificate of Ownership" as the overt act, which could not be material to the fraudulent misrepresentations because the fraud, if any, of obtaining money was complete before the mailing of any "Certificate of Ownership". See United States v. Maze, 414 U.S. 395, 38 L.Ed.2d 603, 94 S. Ct. 645 (1973). Petitioner acknowledges that the Maze Court discussed in dicta that the mailings in Maze were from unrelated third parties, however the holding is predicated on the materiality of the mailing. Because mailing a "Certificate of Ownership" was post paying the purchase price it could not have influenced a customer's decision to purchase gold.

QUESTION V

> DOES THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT'S DECISION IN CRUTCHFIELD V. WAINWRIGHT, 803 F.2d 1103 (11th CIR. 1986) ANNOUNCING THE "ACTUAL-DEPRIVATION RULE" IMPERMISSABLY ABROGATE THE RULE IN GEDERS V. UNITED STATES, 425 U.S. 80, 91 (1976) AND PERRY V. LEEKE, 488 U.S. 272 (1989)?

16. The Eleventh Circuit's Crutchfield en banc pluarlity opinion relied on by the Panel in petitioner's appeal that stated:

> "Our en banc decision in Crutchfield therefore establishes the principle that 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 district court."

Such an expression of limiting Petitioner's Sixth Amendment-secured autonomy and the right of access to counsel is contrary to this Court's jurisprudence (See Perry and Geders) and Petitioner's ("not waived") Sixth Amendment rights. (See CONST.amend. VI; see McCoy).

The Eleventh Circuit's opinion (Appx 2) affirming Petitioner's conviction and sentence states:

> "The issue here isn't just that Skillern's laywer failed to object to the district court's limitation. Instead the problem is that the record is devoid in any form-that Skillern or his attorney planned or wanted to confer about his testimony during the recess.3 To the contrary Skillern got from the district court exactly what his lawyer asked for-namely permission to speak "about matters other than his testimony.""

The Eleventh Circuit obviously disregards the fact that the limitation is a Sixth Amendment violation that is "structural" error. Skillern's request to the District Court for clarification in regards to the instruction to not confer with Atty. Schneider is in no way an espression of agreement with the District Court's instructions, but rather at least inferrentially an expression of dissatisfaction or

objection. Further the Sixth Amendment right to access to counsel and autonomy are fundamental rights that can not be waived by Atty. Schneider, and were not waived by Petitioner.

ARGUMENT AND AUTHORITIES

ARGUMENT AND AUTHORITIES REGARDING: QUESTION I

17. Petitioner's Sixth Amendment argument is framed by two (2) Supreme Court decisions, and one (1) DC Circuit opinion;

(i) Geders v. United States, 425 U.S. 80, 91, 47 L.Ed.2d 592, 96 S. Ct. 1330 (1976);

(ii) Mudd v. United States, 798 F.2d 1509, (D.C. Cir. 1986); and

(iii) Perry v. Leeke, 488 U.S. 272, 102 L.Ed2d 624, 109 S. Ct. 594 (1989).

As previously stated Geders held that prohibiting conferring with defense counsel during an overnight recess shortly before defendant's cross-examination violated the Sixth Amendment and could not be justified by concerns regarding coaching. The Geders Court stated:

> "We hold that an order preventing petitioner from consulting with counsel "about anything" during a 17 hour overnight recess between his direct-and cross-examination impinged upon his right to the assistance of counsel guaranteed by the Sixth Amendment."

Mudd held that the Sixth Amendment was violated by an order for a defendant to not speak to his defense attorney over a weekend recess between his direct and cross-examination, even where the order prohibited only discussions regarding the defendant's testimony. Further Mudd squarely held that no showing of prejudice is required once a Sixth Amendment violation is established, but noted that restricting discussions during a very brief recess might not constitute a Sixth

Amendment violation. The question unanswered by Geders and Mudd was settled by Perry, which holds, the Sixth Amendment is not violated where no discussions are allowed between a defendant and his counsel during a fifteen minute recess; however, Perry holds that the Sixth Amendment right to unrestricted access to a defendant's lawyer during an overnight, trial recess, where discussions would inevitably include a defendant's testimony, is a Sixth Amendment violation for which no prejudice need be demonstrated. (See also, United States v. Bell, 795 F.3d 88 (DC Cir. 2015); (Dissent by Wilkins; Geders presumed prejudice)

Additionally, problematic with the Eleventh Circuit's reasons for sanctioning the District Court's "Geder's type" structural error is exacerbated by the District Court's instructions to Petitioner prior to Petitioner answering the first question on direct examination, that is, the District Court instructed that the only right Petitioner was waiving was his Fifth Amendment right to remain silent and not testify. (See Appx. 5 - Excerpt from Trial Transcript pages 107-110) The District Court failed to inform Petitioner that she would sequester him during all recesses (including overnight) during the first day, through the end of the second day of testimony, thereby restricting access to Atty. Schneider in violation of Petitioner's Sixth Amendment right to access to counsel and autonomy.

Petitioner has demonstrated that the District Court committed a constitutional error that, violated his Sixth Amendment right guaranteeing access to counsel, that such error is not subject to harmless error analysis, and that there is a deep and mature split between the Eleventh Circuit and the DC Circuit, as well as the Seventh Circuit (See United States v. Santos, 201 F.3d 953; 2000 U.S. App. LEXIS 649 (7th Cir. 2000), Second Circuit (United States v.

Triumph Capital Group, Inc, 487 F.3d 124, 133 (2nd Cir. 2007); Ninth Circuit; United States v. Sandoval-Mendoza, 472 F.3d 645, 651 (9th Cir. 2006); and the Fourth Circuit; United States v. Cobb, 905 F.2d 784, 791-792 (4th Cir. 1990). Additionally fifty-six (56) years ago this Court held in the context of a Fourteeth Amendment application, the Sixth Amendment right to assistance of counsel which includes the Sixth Amendment right of access to counsel, could only be waived by a defendant's clear understanding and intelligence as to the waiver. (See Carnley v. Cochran, 369 U.S. 506, 8L.Ed.2d 70, 82 S. Ct. 884 (1962)). Petitioner did not waive his Sixth Amendment rights by simply asking for clarification, and Atty. Schneider does not have authority to waive Petitioner's rights. This Court's decision in Perry is dispositive of the issues in Petitioner's case and establishes that Petitioner's, Petition for Writ of Certiorari, be granted and that Petitioner's conviction and sentence be vacated and the case be remanded to the lower courts for further consideration in light of this Court's jurisprudence. (See also United States v. McLaughlin, 164F.3d1(DC Cir. 1998).

ARGUMENT AND AUTHORITIES REGARDING: QUESTION II

18. The Government's indictment in this case advances a theory of a fraud being committed by a telemarketing group based in Spain, selling a specific quantity of gold, to be mined in the future. Out of 351 customers who purchased gold there were approximately 20 customers who were located in the United States. By individual count less than 6% of the sales were made in the United States. Of the $6.8 million raised by pre-selling (to be mined) gold the United States customers purchased $241,000 worth that is, out of the total sales approximately 4% were United States transactions. At trial

the Government presented twenty-five (25) witnesses;

(i) two (2) U.S. law enforcement agents
(ii) One (1) U.K. law enforcement agents
(iii) One (1) Spanish law enforcement agents
(iv) Six (6) U.K. customers;
(v) four (4) U.S. customers;

The remaining eleven (11) witnesses were witnesses from the Bureau of Land Management, Montana State employees, and others who testified regarding establishment of corporations and bank accounts.

U.S. customers are incidently included in two (2) mail fraud counts and two (2) wire fraud counts; from the Middle District of Florida and certain wire transactions from the Middle District of Florida to foreign locations and companies or individuals, were charged as wire fraud counts; there is no showing that the charged conduct was in execution of a mail or wire fraud scheme.

PRESUMPTION AGAINST EXTRATERRITORIALITY

19. This Court has held:

> "It is a basic premise of our legal system that, in general, United States law governs domestically but does not rule the world."

(See Nabisco, Inc, citing Microsoft Corp. v. AT&T Corp., 550 U.S. 437, 454, 127 S. Ct. 1746, 167 L.Ed.2d 737 (2007):

That is to say:

> "When a statute gives no clear indication of an extraterritorial application it has none."

(See Nabisco, Inc, citing Morrison v. National Australia Bank Ltd., 561 U.S. 247, 255, 130 S. Ct. 2869, 177 L.Ed.2d 535 (2010)).

The Morrison Court employed a two step framework for analysing extraterritoriality issues. The first step of the analysis consists of reviewing the statute in question to determine if the presumption against extraterritoriality has been rebutted or stated another way whether the statute gives a clear affirmative indication that it applies extraterritoriality; second if the statute is not extraterri-

torial, then a determination must be made whether or not the case involves a domestic application which turns on the statute's focus. (Nabisco, Inc; Morrison)

20. This Court's decision in Morrison is dispositive of Question II. The mail fraud statute contains no clear indication of extraterritorial application therefore it has none. (Morrison) The wire fraud statute contains a similar phrase referring to foreign commerce as is contained in the Securities and Exchange Act of 1934 § 10(b) (codified in 15 USC § 78; (b)) which the Morrison Court held to be insufficient to defeat the presumption against extraterritoriality; for that reason the wire fraud statute language gives no clear indication that the statute should apply extraterritorially.

21. Just as in Morrison, the domestic activity in Petitioner's case in not the focus of the Government's indictment, nor the focus of presentation of the case. The focus of the mail and wire fraud statute is the criminalization of a "scheme to defraud" executed either by the use of the U.S. Postal Service or common carriers and the wire fraud statute's focus is the use of wire transmissions in interstate or foreign commerce for the purpose of execution of a "scheme to defraud". Their exists no clear statement between the circuit courts as to a "bright line" test for determining what amount of domestic "effects" or domestic "touch and concern" would defeat the presumption against extraterritoriality. (See Doe I v. Nestle USA Inc, 766 F.3d 1013, 1028 (9th Cir. 2014; see also Al Shimari v. CACI Premier Tech, Inc, 758 F. 3d 516 (4th Cir. 2014); United States v. Philip Morris USA, Inc et al, 566 F.3d 1095 (DC Cir. 2009); (See also Consolidated Gold Fields et al V. Minoroc, 871 F.2d 252 (2nd Cir. 1989); arbitrarily finding that a limited number of shares of securities involving a foreign transaction

effected shareholders in the United States, This case did not analyze the transaction as the Supreme Court instructed in Morrison). The Eleventh Circuit has adopted a hybrid approach that amalgamated "touch and concern" standards with Morrison's "focus" test, considering whether the claim and relevant conduct are sufficiently focused in the United States to warrant displacement and permit jurisdiction in the United States. (See Doe v. Drummond, 782 F.3d 576 (11th Cir. 2015), (see also Bal·co v. Drummond Co., 767 F.3d 1229, 1238-39 (11th Cir. 2014)).

22. Petitioner asserts because the law is unsettled with regard as to how much domestic contact is required to rebut the presumption against extraterritoriality the rule of lenity would counsel that this case be reversed, judgment vacated and Petitioner released from prison as the District Court did not have subject matter jurisdiction to enter a judgment and sentence.

ARGUMENTS AND AUTHORITIES REGARDING: QUESTION III

23. This Court's recent decision in McCoy v. Louisiana, 138 S. Ct. 1500; 200 L.Ed.2d 821 (2018), is dispositive of Petitioner's issue raised in Question III. To the extent that the Eleventh Circuit held that Atty. Schneider's lack of a confrontational objection allowed the District Court to deprive the Petitioner of any Sixth Amendment right, the Eleventh Circuit Panel committed constitution error. It is axiomatic that counsel does not have the authority to waive Petitioner's Sixth Amendment right of access to counsel, nor does Atty. Schneider have the authority to waive Petitioner's Sixth Amendment-secured autonomy. (See McCoy).

This Court held in McCoy:

"(cc) The Sixth Amendment guarantees to each defendant

> 'the Assistance of Counsel for his defence'. The defendant does not surrender control entirely to counsel for the Sixth Amendment, in grant[ing] to the accussed personally the right to make his defense."... The lawyer's province is trial management, but some decisions are reserved for the client - including whether to plead guilty, waive the right to a jury trial, testify on one's own behalf, and forgo an appeal."

In Petitioner's case the District Court by her order prohibiting Petitioner from access to Atty. Schneider during the first day of his testimony, overnight recess and the second day of his testimony, had the additional consequences of depriving Petitioner of his Sixth Amendment-secured autonomy. The District Court's instructions regarding waiver of Fifth Amendment rights, omitted notice of restricting access to counsel, thus the Petitioner's option regarding testifying was deprived, before the District Court informed Petitioner of the sequestration. Clearly any defendant would desire to confer with counsel regarding his testimony before cross-examination by a skilled prosecutor. The guidance of counsel so often referred to by this Court was lost before it was available because of the District Court's order prohibiting conferring with counsel, and the fact that the District Court ordered Petitioner out of the courtroom while the prosecution and all lawyers conferred regarding matters that effect Petitioner's, life and liberty, is a violation of his Fifth Amendment, and Sixth Amendment due process rights, (See Appx. 6); Excerpt from Trial Transcript page 100 at lines 8-25; see also pages 101-106; discussion of trial strategy. This instruction began on the first day of Petitioner's testimony and continued until the end of the second day of testimony when the District Court abandoned the Sixth Amendment violation.

24. As Petitioner's decision to testify was predicated in part on the fact that he was waiving his Fifth Amendment right to not testi-

fy and that belief was reenforced by the District Court's admonishment which did not include an admonishment regarding a prohibition against conferring with his attorney. (See Appx. 5). As Petitioner was testifying, the violation of Petitioner's Sixth Amendment secured-autonomy was complete when the District Court imposed her sequestration orders on Petitioner. This error is structural and requires reversal of the lower court's judgment . (See McCoy)

ARGUMENT AND AUTHORITIES REGARDING: QUESTION IV

25. The District Court's jury instruction regarding mail fraud is a misstatement of law that lessens the burden of proof on the Government. (See Appx. 7 - jury instructions) The Eleventh Circuit holds that for a defendant to commit wire fraud the government must prove:

> (i) "that a defendant intentionally participated in a scheme to defraud"; and
> (ii) "used wire communications to further that scheme."

(See 18 USC § 1341; Belt v. United States, 868 F.2d 1208 (11th Cir. 1989).

Further in order to establish mail fraud the government must prove:

> (i) that the defendant "intentionally participated in a scheme to defraud"; and
> (ii) "used the mails to further that scheme."

(See 18 USC § 1341; United States v. Wingate, 997 F.2d 1479, 1432 (11th Cir. 1993).

Both the mail and wire fraud statutes punish the scheme to defraud. (See Neder v. United States, 527 U.S. 1, 144 l.Ed.2d 35, 119 S. Ct. 1827 (1999); Pasquantino v. United States, 554 U.S. 349, 161 L.Ed.2d 619, 125 S. Ct. 1766 (2005).

26. The jury instructions regarding mail fraud and wire fraud lessen the burden of proof on the Government by misstating the language of the statute, and using in both (mail & wire fraud) instructions,

and using the following:

"something meant to help carry out the fraud."

The above language's common English meaning is something less than the statutory command stating:

"for the purpose of executing the scheme to defraud."

To execute the scheme to defraud is such that what ever was mailed or transmitted by wire was necessary to or material to execute the scheme to defraud. In regard to the mail fraud counts, the Government alleged and proved that a receipt for funds paid for gold was mailed after the money had been received either by the telemarketing group or "OG LLC". Such mailing is not for the purpose of executing the fraud as if there was a fraud it would have been complete when the customer tendered the funds in payment under the purchase and sale contract.

In regard to the wire fraud counts only money wired between the sellers of the gold and the telemarketing group or other defendants was alleged to be in execution of the scheme to defraud. Such wire transfers could not be necessary for the execution of the scheme to defraud as the fraud, if any, was complete when the money left the purchaser's possession.

Because "materiality" is an element of both wire fraud and mail fraud the Government's failure to plead and prove acts that were material facts to the execution of the scheme of the defraud and because the District Court's jury instructions failed to correctly state the law, Petitioner's conviction and resulting sentence violates Petitioner's Sixth Amendment right to a jury trial.

ARGUMENT AND AUTHORITIES REGARDING: QUESTION V

27. The District Court's order denying Petitioner access to Atty. Schneider can not be reviewed under the invited error analysis or harmless error analysis because the District Court's restriction on the assistance of counsel is a structural error and by this Court's jurisprudence is not subject to a prejudice determination. Further the trial transcript plainly shows that it was the District Court that initiated the instruction and continued with the restriction on Petitioner regarding access to counsel after Petitioner had completed cross-examination and it was time for the second day evening recess. See Perry and Geders.

28. The Eleventh Circuit's reliance on Crutchfield is misplaced as Perry for all practical purposes overruled Crutchfield. The Eleventh Circuit "Actual Deprivation Rule" is in conflict with Perry, and several sister circuits cited infra. The effect of the "Actual Deprivation Rule" requires timely and succinctly articulated objection to manner and conditions of the District Court's sequestration of Petitioner while on the witness stand, which is simply a harmless error analysis, "rebranded". There exist no relevant authority to support the Eleventh Circuit's "Actual Deprivation Rule", that purports to shift or create a burden on Petitioner to preserve the right to exercise, his fundamental Sixth Amendment right of access to Atty. Schneider during lengthly breaks in trial while Petitioner is testifying

29. In Mudd, then Circuit Judge Scalia opined in his concurrence:

> "I therefore join the majority's holdings that a prohibition on attorney - defendant discussion during substantial recesses, even if limited to discussion of testimony, like the similar violation at issue in Geders, it constitutes

per se reversible error."

Subsequently the D.C. Circuit in Ball, decided on July 28, 2015 affirmed the Mudd decision holding:

> "...a rule that requires the defendant to establish that he was prejudiced by his inability to consult with counsel would require the defendant to show what he and counsel discussed, and how the order altered the preparation of his defense, and [p]resumably the government would be free to question the defendant and counsel...." "We stated then that we could not accept a rule whereby private discussions between counsel and client could be exposed..." citing Martin v. Lauer, 686 F.2d 24, 32 (DC Cir. (1982).

CONCLUSION

This Court should grant this Petitioner for Writ of Certiorari becaue the District Court committed errors that are "strutural" and such errors were sanctioned by the Eleventh Circuit. The structural errors compromised the framework on which the trial proceeded all in violation of Petitioner's Fifth and Sixth Amendment rights as well as the Due Process Clause.

The Petitioner has brought to this Court's attention two (2) questions which involve a division between circuits as to the statutory interpretation of the relevant statutes in question. Further this case presents questions the resolution of which by the District Court and by the Eleventh Circuit are directly contrary to and disregards the resolution of important constitutional issues decided by this Court, which unsettles the law and deprives citizens of their Fifth Amendment right of notice to what conduct the law criminalizes.

Petitioner respectfully request this Court to vacate the judgments and opinions of the lower courts and or the Petitioner immediately released from prison as Petitioner's conviction is based on conduct not criminalized by the law.

Respectfully submitted

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