

No. 18-60646

IN THE  
SUPREME COURT OF THE UNITED STATES

Michael Skillern

Petitioner,

- vs -

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR REHEARING FROM THE DENIAL OF  
PETITION FOR A WRIT OF CERTIORARI

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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

1. District Court Criminal Proceedings:

For the Government:

U.S. Attorney Roberta J. Bodner (Trial)  
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AUSA Rachelle D. Bedke (Trial)  
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Counsel for Michael Skillern:

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440 Louisiana, Suite 800  
Houston, Texas 77002

2. Direct Appeal:  
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Tampa, FL 33606

For the Government:

U.S. Attorney Roberta J. Bodnar (Appeal)  
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David M. Lieberman  
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Counsel for Michael Skillern

Stanley G. Schneider (Appeal)  
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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 was 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). Pursuant to the Clerk's Letter of instruction dated November 28, 2018 the Petitioner files this Petition for Rehearing, on December 9th 2018 which is before December 12, 2018 the expiration of 15 days from the date of the Clerk's letter.

CONSTITUTIONAL AND STATUTORY  
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.

QUESTION PRESENTED FOR REVIEW ON REHEARING

This Petition for Rehearing, is brought to address a Constitutional error made by the United States District Court for the Middle District of Florida, the Honorable Mary Stenson Scrivens presiding during Michael Skillern's jury trial. Such error departed from the accepted and usual course of trial proceedings, such that the error of the District Court, which was sanctioned by the United States Court of Appeals for the Eleventh Circuit, affected the framework within which the trial proceeded. The error of the United States District Court for the Middle District of Florida, that is sanctioned by the United States Court of Appeals for the Eleventh Circuit compels the exercise of this Court's supervisory power, to resolve not only the circuit split but decisions of the Eleventh Circuit that establish rules not found or authorized by this Court's relevant substantive decisions.

QUESTION I

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" REQUIRED AS A CONDITION PRECEDENT TO THE SIXTH AMENDMENT'S RIGHT OF ACCESS TO COUNSEL IMPERMISSIBLY ABROGATE THE RULE IN GEDERS V. UNITED STATES, 425 U.S. 80, 91 (1976), AND PERRY V. LEEKE, 488 U.S. (1989)?

## STATEMENT OF THE CASE

### Motion for Rehearing from Denial of Petitioner's, Petition for Writ of Certiorari - Summary Statement

1. Michael Skillern (hereinafter) referred to as Petitioner) filed (1) Motion to Proceed In Forma Pauperis, (2) Petition for Writ of Certiorari and Appendices on August 28, 2018 (pursuant to Supreme Court Rule 13.1) and under the provisions of Houston v. Lack, 487 U.S. 266 (1988) ("prison mailbox rule").

2. Petitioner was notified by letter from the Office of the Clerk, On October 15, 2018, that his Petition for Writ of Certiorari had been denied on October 15, 2018. On November 2, 2018 Petitioner filed a letter (that was construed to be an incomplete motion for rehearing) with Clerk and copied the Justices.

3. Petitioner's Motion for Rehearing is limited pursuant to Supreme Court Rule 44.2 to the following substantial grounds not articulated in Petitioner's Petition for Writ of Certiorari:

- (1) Forty-two (42) years ago this Court held in Geders v. United States, 425 U.S. 80, 471 L.Ed. 2d 592, 96 S. Ct. 1330 (1976), that a testifying defendant in a criminal proceeding has a Sixth Amendment right for access to counsel that allows a testifying defendant to confer with counsel without restriction of any nature during long recesses and in particular with overnight recess; to restrict a defendant's access to counsel in this circumstance is a constitutional error not subject to a demonstration of prejudice.
- (2) Thirteen (13) years later this Court in Perry v. Leeke, 488 U.S. 272, 102 L.Ed. 2d 624, 109 S. Ct. 594 (1989) reaffirmed the rule in Geders and opined that a prohibition on a testifying defendant over short breaks (15 minutes) was not a Sixth Amendment violation.

Neither Perry or Geders require a demonstration of prejudice or any other condition prededent to a defendant's reliance on the Sixth Amendment right of access to counsel.

4. Petitioner re-urges at a minimum that this Court resolve the deep and mature circuit split, that has its genesis in this Court's decision in Geders v. United States, 425 U.S. 80, 47 L.Ed. 2d 96 S. Ct. 1330 (1976) and the federal rule governing sequestration of wintesses during trial. The rules do not distinguish between a testifying defendant in a criminal trial, and a non party witness regarding conferring with one's attorney except for this Court's decision. This Court in Geders and Perry v. Leeke 488 U.S. 272, 102 L.Ed. 2d 624, 109 S. Ct. 594 (1989) set out clear rules, designed to protect a testifying defendant in a criminal case, against a steady and non-homogenous erosion of one's fundamental Sixth Amendment guarantees to effective assistance of counsel and/or access to counsel, in multiple circuit court's of appeals since this Court's Geders opinion. A criminal trial defendant's Sixth Amendment protections have been subjected to unconstitutional limitations, that in many instances conflict with other circuit courts and with this Court's Geders and Perry rules. (See Appendix 4 - Perry decision footnote 2) There still to this day exists a circuit split despite this Court's guidance. See Appendix 5 - Excerpt from Government's Brief on direct appeal.)

Perry Is Dispositive of Petitioner's Sixth Amendment Deprivation

The Eleventh Circuit's Crutchfield decision is contrary to the majority of its sister circuits, and is contrary to the Supreme Court's, decision in Geders and Perry.

To accept Crutchfield's flawed test of requiring a demonstration of a condition precedent before a defendant may be protected by the Sixth Amendment right of access to counsel, would give rise to a presumption that a defendant does not have a Sixth Amendment right of access to counsel unless one can demonstrate entitlement to the Sixth Amendment fundamental right of access to counsel.

The panel in Petitioner's appeal relied on Crutchfield's flawed "condition precedent" requirement to strip away Petitioner's fundamental Sixth Amendment right of access to counsel.

Crutchfield was decided, published on November 10, 1986, 78 days after the Mudd v. United States 798 F. 2d 1509, (DC Cir. 1986), case was published by the DC Circuit.

Crutchfield holds that:

"We conclude that a defendant or the defendant's counsel must indicate on the record, a desire to confer in order to preserve a deprivation of assistance of counsel claim."

Prior to Crutchfield, the DC Circuit in Mudd held:

"We find a per se rule best vindicates the right to effective assistance of counsel"...

Obviously a per se rule as inferred in Geders is a deep conflict with a "condition precedent" rule as enunciated by Crutchfield.

In 1989 when the Perry Court opined regarding prohibiting communications between an attorney and a testifying defendant, it made clear that the Geders rule was a rule for which no demonstration of prejudice is required, but the prohibition for short (15 minutes) breaks would not constitute a Sixth Amendment violation.

CONCLUSION

Petitioner prays this Court for an order re-docketing Petitioner's Petition for Writ of Certiorari.

Respectfully submitted



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