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UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES OF AMERICA

vs

MICHAEL SKILLERN

Case Number. 8:14-cr-58-T-35TBM
USM Number: 44656-379

Stanley Schneider, Retained

JUDGMENT IN A CRIMINAL CASE

The defendant was found guilty to Counts One, Two, Three, Four, Five, Six, Seven, Eight, Nine, and Ten of the Indictment. Accordingly, the court has adjudicated that the defendant is guilty of the following offenses:

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
18 U.S.C. § 371	Conspiracy to Commit Mail Fraud and Wire Fraud	February 2014	One
18 U.S.C. § 1956(h)	Conspiracy to Commit Money Laundering	February 2014	Two
18 U.S.C. § 1341	Mail Fraud	December 17, 2011	Three
18 U.S.C. § 1341	Mail Fraud	March 30, 2012	Four
18 U.S.C. § 1341	Mail Fraud	June 4, 2013	Five
18 U.S.C. § 1341	Mail Fraud	June 21, 2013	Six
18 U.S.C. § 1343	Wire Fraud	March 29, 2012	Seven
18 U.S.C. § 1343	Wire Fraud	April 20, 2012	Eight
18 U.S.C. § 1343	Wire Fraud	April 26, 2013	Nine
18 U.S.C. § 1343	Wire Fraud	May 8, 2013	Ten

The defendant is sentenced as provided in the following pages of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

The defendant has been found not guilty on Counts Eleven (11), Twelve (12) and Thirteen (13) of the Indictment by judgment of acquittal.

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IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of **ONE HUNDRED AND TWENTY (120) Months. This term consist of SIXTY (60) Months as to Count One of the Indictment and ONE HUNDRED AND TWENTY (120) Months as to Counts Two through Ten of the Indictment. All such terms to run concurrently.**

The Court makes the following recommendations to the Bureau of Prisons:
Confinement at FCI Beaumont, TX.

The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons as notified by the United States Marshal.

RETURN

I have executed this judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By: _____
Deputy U.S. Marshal

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SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **THIRTY-SIX (36) Months as to Counts One through Ten of the Indictment. All such term to run concurrently.**

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not illegally possess a controlled substance.

For offenses committed on or after September 13, 1994:

The mandatory drug testing requirements of the Violent Crime Control Act are waived. However, the Court orders the defendant to submit to random drug testing not to exceed 104 tests per year.

The defendant shall not possess a firearm, destructive device, or any other dangerous weapon.

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervision that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervision in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below).

The defendant shall also comply with the additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1. The defendant shall not leave the judicial district without the permission of the court or probation officer;
2. The defendant shall report to the probation officer in a manner and frequency directed by the court or probation officer;
3. The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4. The defendant shall support his or her dependents and meet other family responsibilities;
5. The defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
6. The defendant shall notify the probation officer **at least ten (10) days prior** to any change in residence or employment;
7. The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
8. The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9. The defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;

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10. The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11. The defendant shall notify the probation officer within **seventy-two (72) hours** of being arrested or questioned by a law enforcement officer;

12. The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13. As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

ADDITIONAL CONDITIONS OF SUPERVISED RELEASE

1. The defendant shall be prohibited from incurring new credit charges, opening additional lines of credit, or making an obligation for any major purchases (defined as $1,000.00 or more) without approval of the Probation Officer.

2. The defendant shall provide the probation officer access to any requested financial information.

3. The defendant shall cooperate in the collection of DNA, as directed by the Probation Officer.

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth in the Schedule of Payments.

Total Assessment	Total Fine	Total Restitution
$1,000.00	waived	$6,862,579.16

The defendant shall make restitution (including community restitution) to the following payees in the amount listed below. **Restitution is payable to the Clerk, U.S. District Court for distribution to the victims. The victim list shall be provided under separate cover by the U.S. Attorney's Office.**

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(I), all nonfederal victims must be paid in full prior to the United States receiving payment.

Name of Payee	Total Amount of Loss	Amount of Restitution Ordered
Clerk, U.S. District Court Sam M. Gibbons U.S. Courthouse 801 N. Florida Ave. Tampa, Fl. 33602	$6,862,579.16	$6,862,579.16

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SCHEDULE OF PAYMENTS

Special assessment shall be paid in full and is due immediately.

Restitution: While in the custody of the Bureau of Prisons, you shall either (1) pay at least $25 quarterly if working non-Unicor or (2) pay at least 50 percent of your monthly earnings if working in a Unicor position. Upon release from custody, you are ordered to begin making payments of **$200.00** per month and this payment schedule shall continue until such time as the Court is notified by the defendant, the victim or the government that there has been a material change in your ability to pay.

Joint and Several

Restitution shall be paid jointly and severally with Codefendants Naadir Cassim, Jon Craig Nelson and Adriana Maria Camargo in Case Number 8:14-cr-58-T-35TBM.

FORFEITURE

Defendant shall forfeit to the United States those assets identified in the Order of Forfeiture, that are subject to forfeiture.

Interest on the ordered restitution is waived. The defendant shall pay interest on any fine of more than $2,500, unless the fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on the Schedule of Payments may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

*Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18, United States Code, for offenses committed on or after September 13, 1994 but before April 23, 1996.

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IT IS ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant shall notify the court and United States Attorney of any material change in the defendant's economic circumstances.

Date of Imposition of Sentence:

May 24, 2016

MARY S. SCRIVEN
UNITED STATES DISTRICT JUDGE

June 15, 2016

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UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES OF AMERICA

v. CASE NO. 8:14-cr-58-T-35TBM

MICHAEL SKILLERN

FORFEITURE MONEY JUDGMENT AND PRELIMINARY ORDER OF FORFEITURE FOR SUBSTITUTE ASSET

The United States moves pursuant to 18 U.S.C. § 981(a)(1)(C), 28 U.S.C. § 2461(c), and Rule 32.2(b)(2), Federal Rules of Criminal Procedure, for a forfeiture money judgment against defendant Michael Skillern representing the proceeds obtained as a result of the mail and wire fraud conspiracy charged in Count One of the Indictment. In addition, the United States requests a preliminary order of forfeiture for the following real property as a substitute asset, pursuant to 21 U.S.C. § 853(p), as incorporated by 28 U.S.C. § 2461(c), in partial satisfaction of the defendant's money judgment:

> The real property, including all improvements thereon and appurtenances thereto, located at 3527 Colmar Way, Houston, Texas 77084, which is legally described as follows:
>
> LOT FOUR HUNDRED FOURTEEN (414), IN BLOCK THIRTEEN (13), OF ROLLING GREEN, SECTION TWO (2), AN ADDITION IN HARRIS COUNTY, TEXAS, ACCORDING TO THE MAP OR PLAT THEREOF RECORDED IN VOLUME 320, PAGE 57, OF THE MAP RECORDS OF HARRIS COUNTY, TEXAS.

Following a jury trial, the defendant was found guilty, in relevant part, with conspiracy to commit mail and wire fraud, in violation of 18 U.S.C. § 371, as charged in Count One of the Indictment.

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Being fully advised of the relevant facts, the Court finds that the defendant obtained proceeds in the amount of $7,302,642.39 as a result of the conspiracy to commit mail and wire fraud, in violation of 18 U.S.C. § 371, as charged in Count One of the Indictment.

Accordingly, it is **ORDERED** that the motion of the United States is **GRANTED**.

It is **FURTHER ORDERED** that, pursuant to the provisions of 18 U.S.C. § 981(a)(1)(C), 28 U.S.C. § 2461(c), and Rule 32.2(b)(2), Federal Rules of Criminal Procedure, defendant Michael Skillern is jointly and severally liable to the United States of America with co-defendants Adriana Maria Camargo, Naadir Cassim, and Jon Craig Nelson for a forfeiture money judgment in the amount of $7,302,642.39.

It is **FURTHER ORDERED** that, pursuant to 21 U.S.C. § 853(p), as incorporated by 28 U.S.C. § 2461(c), and Rule 32.2(e)(1)(B), Federal Rules of Criminal Procedure, the asset identified above is **FORFEITED** to the United States of America for disposition according to law, subject to the provisions of 21 U.S.C. § 853(n), as incorporated by 28 U.S.C. § 2461(c).

This order shall become a final order of forfeiture as to the defendant at sentencing.

The Court retains jurisdiction to complete the forfeiture of the asset and the forfeiture of any property belonging to the defendant which the United States is

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entitled to seek as a substitute asset under 21 U.S.C. § 853(p), as incorporated by 28 U.S.C. § 2461(c), to satisfy the defendant's money judgment.

DONE and **ORDERED** in Tampa, Florida, this 15th day of June, 2016.

MARY S. SCRIVEN
UNITED STATES DISTRICT JUDGE

Copies to:
All Parties/Counsel of Record

APPENDIX I

UNITED STATES OF AMERICA, Plaintiff - Appellee, versus JON CRAIG NELSON, MICHAEL SKILLERN, Defendants - Appellants.
UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT
2018 U.S. App. LEXIS 5864
No. 16-14253
March 8, 2018, Decided

Editorial Information: Prior History

Appeals from the United States District Court for the Middle District of Florida. D.C. Docket No. 8:14-cr-00058-MSS-TBM-2.

Disposition:
AFFIRMED.

Counsel For UNITED STATES OF AMERICA, Plaintiff - Appellee: Roberta Josephina Bodnar, U.S. Attorney's Office - FLM, OCALA, FL; Rachelle DesVaux Bedke, Arthur Lee Bentley, III, James A. Muench, Sara C. Sweeney, U.S. Attorney's Office, TAMPA, FL; David M. Lieberman, U.S. Department of Justice, Criminal Division, Appellate Section, WASHINGTON, DC.

For JON CRAIG NELSON, Defendant - Appellant: Adeel Bashir, Alec Fitzgerald Hall, Yvette Clair Gray, Federal Public Defender's Office, TAMPA, FL; Rosemary Cakmis, Donna Lee Elm, Federal Public Defender's Office, ORLANDO, FL.

For MICHAEL SKILLERN, Defendant - Appellant: Stanley G. Schneider, Casie Lynn Gotro, Schneider & McKinney, PC, HOUSTON, TX; Michael Maddux, Michael P. Maddux, PA, TAMPA, FL.

Judges: Before MARCUS and NEWSOM, Circuit Judges, and MOORE,* District Judge.

CASE SUMMARY District court did not deprive defendant of Sixth Amendment rights because trial record didn't reflect that either defendant or his lawyer had any intention or desire to discuss his testimony during overnight recess; therefore, defendant couldn't show that he was actually deprived of his right to counsel, as required by Crutchfield v. Wainwright.

OVERVIEW: HOLDINGS: [1]-One defendant's Sixth Amendment argument failed under the court's en banc decision in Crutchfield v. Wainwright, because the record did not reflect that defendant (or his lawyer) actually wanted or planned to discuss his testimony during the overnight recess. It was defendant's attorney who actually proposed the limitation that the defendant challenged. The record was entirely devoid of any indication-in any form-that defendant or his attorney planned or wanted to confer about his testimony during the recess. To the contrary, defendant got from the district court exactly what his lawyer asked for-namely, permission to speak "about matters other than his testimony"; [2]-Sufficiency of the evidence challenges were rejected.

OUTCOME: The convictions were affirmed.

Exhibit 2
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LexisNexis Headnotes

Constitutional Law > Bill of Rights > Fundamental Rights > Criminal Process > Assistance of Counsel

The Sixth Amendment provides that in all criminal prosecutions, the accused shall enjoy the right to have the assistance of counsel for his defense. U.S. Const. amend. VI.

Criminal Law & Procedure > Appeals > Reversible Errors > Structural Errors

Structural errors are those (comparatively few) that affect the framework within which the trial proceeds, rather than being simply an error in the trial process itself. Most errors don't fall into the narrow structural-error category and are instead deemed "trial errors"; they don't require reversal if the government can show beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.

Criminal Law & Procedure > Appeals > Reversible Errors > Structural Errors
Criminal Law & Procedure > Appeals > Standards of Review > Plain Error > Definitions
Criminal Law & Procedure > Appeals > Standards of Review > Plain Error > Burdens of Proof

In the case of non-structural trial errors, the "plain error" rule severely restricts appellate review of unchallenged trial-court rulings. Under the plain-error standard, the United States Court of Appeals for the Eleventh Circuit has discretion to correct an error in a criminal trial, even absent a proper objection, where (1) an error occurred, (2) the error was plain, (3) the error affected substantial rights, and (4) the error seriously affects the fairness, integrity or public reputation of judicial proceedings. Whether the structural-error doctrine modifies a defendant's burden to satisfy all four plain-error factors remains unsettled.

Criminal Law & Procedure > Appeals > Standards of Review > Harmless & Invited Errors > Definitions
Criminal Law & Procedure > Appeals > Standards of Review > Plain Error
Criminal Law & Procedure > Appeals > Reversible Errors > Structural Errors

As a rule, a party may not challenge as error a ruling or other trial proceeding invited by that party. While the United States Court of Appeals for the Eleventh Circuit has held that it may not invoke the plain error rule to reverse the district court's judgment if an error is invited, the relationship between structural errors and the invited-error doctrine is murky.

Constitutional Law > Bill of Rights > Fundamental Rights > Criminal Process > Assistance of Counsel

In order to make out a Geders v. United States-type Sixth Amendment violation, a criminal defendant must demonstrate that he and his counsel actually intended to confer during the recess and would have done so if not prevented by the district court.

Constitutional Law > Bill of Rights > Fundamental Rights > Criminal Process > Assistance of Counsel

A condition precedent to a Geders v. United States-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

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his lawyer desired to confer but were precluded from doing so by the district court.

Opinion

Opinion by: NEWSOM

Opinion

NEWSOM, Circuit Judge:

Defendants Michael **Skillern** and Jon Craig Nelson appeal their convictions for mail fraud, wire fraud, and associated conspiracies, all of which arose out of their efforts to peddle non-existent gold to the public through their company, **Own Gold** LLC. Although **Skillern** and Nelson have raised a number of issues on appeal, our focus in this opinion is on Skillern's contention that the district court deprived him of his Sixth Amendment right to the "Assistance of Counsel" when, just before an overnight recess that occurred while **Skillern** was on the stand, the court granted his lawyer's request to speak to him "about matters other than his testimony." **Skillern** now insists that the Constitution required the district court to go farther and to specify that he could speak to his attorney about *any* topic, including his testimony.

Because Skillern's attorney proposed the very limitation of which he now complains by asking to speak to **Skillern** "about matters other than his testimony," we are presented with several questions about the nature of and relationship among the various "error" doctrines that pervade federal criminal law-trial error, harmless error, structural error, plain error, and invited error. In the end, we needn't definitively resolve those questions, because Skillern's Sixth Amendment argument fails for the separate and more basic reason that, in the circumstances of this case, the district court committed no constitutional error. Under this Court's en banc decision in *Crutchfield v. Wainwright*, 803 F.2d 1103 (11th Cir. 1986), because the record does not reflect that **Skillern** (or his lawyer) actually wanted or planned to discuss his testimony during the recess, he was not deprived of his Sixth Amendment right to the assistance of counsel.

I

In 2011, **Skillern** and Nelson started a company called **Own Gold** LLC for the purpose of mining, processing, and selling gold. Own Gold's website and marketing materials represented that it was a "gold producer" with mining claims worth some $81 billion. For the next two years **Own Gold** used a telemarketing firm to execute contracts with hundreds of people who believed that they were actually buying gold. Those contracts specified the amounts of gold purchased and prices, and represented that customers could retrieve their gold ore "at any time after the execution and payment of consideration" by "appear[ing] in person" at the mining site. Otherwise, **Own Gold** had 360 days to deliver the gold; if it failed to do so, it would refund the purchase price. All told, **Own Gold** accepted 441 orders and collected more than $7.3 million from customers.

As it turns out, Own Gold's representations about its gold production were, well, *mis*representations. From its inception in 2011 until it stopped executing sales contracts with customers in 2014, **Own Gold** appears to have produced less than six ounces of gold from its own mining operations. In light of its near-total failure to produce any gold from its own mines, **Own Gold** resorted to trying to fulfill customers' orders by purchasing gold from third parties. Even so, despite taking orders for 5,912

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ounces of gold and accepting more than $7.3 million from its 351 customers, **Own Gold** ultimately delivered a mere 150 ounces-valued at $241,000-to 20 customers. **Own Gold** refunded only $35,022 to four customers; none of the other orders was either fulfilled or refunded. Meanwhile, **Skillern** collected approximately $488,000, Nelson bagged about $300,000, and Own Gold's telemarketing firm netted a whopping $5.1 million over a two-year period.

In February 2014, **Skillern** and Nelson were indicted for mail fraud, wire fraud, conspiracy to commit mail and wire fraud, conspiracy to launder money, and illegal money transactions in connection with their operation of **Own Gold**. As particularly relevant here, **Skillern** testified in his own defense at trial, and his testimony spanned three days. At the end of his first day on the stand, after the jury was excused for the afternoon, his attorney asked the district court, "Your Honor, may I speak to Mr. **Skillern** about matters other than his testimony this evening?" The court granted the request, stating, "Yes, anything about the proceeding and so forth, who's coming, who is not coming, that's fine, but just not his testimony or his impending testimony." Skillern's attorney responded, "Fine, Your Honor." Nothing more was said about the issue that day.1

The jury found both **Skillern** and Nelson guilty of four counts of mail fraud, four counts of wire fraud, one count of conspiracy to commit mail fraud, and one count of conspiracy to launder money. **Skillern** was sentenced to 120 months in prison, and Nelson was sentenced to 96 months.

On appeal, **Skillern** principally asserts that the district court deprived him of the assistance of counsel in violation of the Sixth Amendment. According to **Skillern**, the court should have responded to his attorney's request to speak to him about "matters other than his testimony" by stating, *sua sponte*, that **Skillern** and his attorney could discuss any subject-including his testimony-during the overnight break. We now turn to a careful consideration of that issue.

II

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defense." U.S. Const. amend. VI. The Supreme Court first considered the parameters of that right in the context of trial recesses that occur during a criminal defendant's testimony in *Geders v. United States*, 425 U.S. 80, 96 S. Ct. 1330, 47 L. Ed. 2d 592 (1976). The Court held there that a defendant's Sixth Amendment rights were violated when he was precluded from consulting with his attorney "about anything" during an overnight recess between his direct- and cross-examination. *Id.* at 91. Similarly, in *United States v. Romano*, this Court found a Sixth Amendment violation when a district court allowed a defendant to speak with his lawyer about some topics, but not his testimony, during a five-day recess in the middle of his testimony. 736 F.2d 1432, 1434-38 (11th Cir. 1984), *vacated in part on other grounds*, 755 F.2d 1401 (11th Cir. 1985). More recently, though, the Supreme Court held in *Perry v. Leeke* that a district court did *not* violate the Sixth Amendment when it directed a defendant not to consult with his attorney during a 15-minute recess. 488 U.S. 272, 280-85, 109 S. Ct. 594, 102 L. Ed. 2d 624 (1989).

Where, then, does this case fall along the spectrum marked out by *Geders*, *Romano*, and *Perry*? The limitation on lawyer-client communication here was "worse," so to speak, than in *Perry*, in which the Supreme Court found no Sixth Amendment violation, in that its duration was longer: there, the recess lasted only minutes; here, it spanned an entire night. In two respects, though, the limitation in this case was not as bad as in *Geders* and *Romano*, both of which found violations: the limitation here was more narrowly circumscribed than in *Geders*, in that **Skillern** was permitted to talk to his lawyer about issues other than his testimony; and the limitation here persisted for only a fraction of the five days at issue in *Romano*. So we're somewhere in the middle: Does it violate the Sixth Amendment to prevent a criminal defendant from discussing his testimony, but not other topics, during a single overnight recess? Although no existing precedent resolves that precise question,

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even the Government seems to concede that the answer, at least as a general matter, is probably yes. *See* Br. of Appellee at 52 ("[T]he district court's limitation here impermissibly constrained Skillern's ability to consult with his attorney during the first overnight recess.").

But there's a wrinkle here-it was Skillern's attorney who actually proposed the limitation that **Skillern** now challenges. He specifically asked the district court for permission to speak to **Skillern** about "matters other than his testimony," and then, when the district court acceded to his request, he never expressed any regret, objection, or desire to clarify. The parties, naturally, have very different views about the consequences of the phrasing of Skillern's lawyer's request and his subsequent failure to alter it or otherwise object. For his part, **Skillern** asserts that a *Geders* violation is a "structural error"-for which "no objection is necessary" and which requires automatic reversal, no questions asked. The government, at the opposite pole, responds that the Court needn't even consider Skillern's Sixth Amendment argument because his own lawyer "invited" any error. At the very least, the government contends, we should review the issue only for "plain error" because neither **Skillern** nor his attorney lodged an objection to the limitation. Though the parties' competing arguments raise a number of important and unsettled questions about the relationship between the various "error" doctrines, we needn't answer them today. As explained below, because the trial record doesn't indicate that either **Skillern** or his lawyer had any intention or desire to discuss his testimony during the recess, **Skillern** can't show that he was actually deprived of his right to counsel, as required by our en banc decision in *Crutchfield*.

A

First, a brief word about Skillern's assertion that a *Geders*-like violation of the sort alleged here is a "structural error." If it is, then it "def[ies] analysis by harmless error standards." *United States v. Gonzalez-Lopez*, 548 U.S. 140, 148, 126 S. Ct. 2557, 165 L. Ed. 2d 409 (2006). Structural errors are those (comparatively few) that "affect the framework within which the trial proceeds, rather than being simply an error in the trial process itself." *Weaver v. Massachusetts*, 137 S. Ct. 1899, 1907, 198 L. Ed. 2d 420 (2017) (internal quotation marks omitted). Most errors don't fall into the narrow structural-error category and are instead deemed "trial errors"; they don't require reversal if the government "can show beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Id.* (internal quotation marks omitted).

So is **Skillern** right that a *Geders*-type Sixth Amendment violation is necessarily a structural error? Tough to say. When in *Geders* itself the Supreme Court held that a district court had violated the Sixth Amendment by flatly precluding a defendant from consulting with his lawyer (about any topic) during an overnight recess, and reversed on that basis, it did so without invoking the structural-error doctrine-but also, conspicuously, without pausing to examine whether or not the error might have been harmless. 425 U.S. at 91. So too, when a few years later the former Fifth Circuit reversed a conviction on the ground that the district court had violated a defendant's Sixth Amendment rights by preventing him from consulting with his attorney (again, at all) during a brief recess, it did so without calling the error structural-but again, without bothering to assess harmlessness. *See United States v. Conway*, 632 F.2d 641, 645 (5th Cir. 1980).2 In the same way, when we held more recently that a district court violated a defendant's Sixth Amendment right to counsel by preventing him from conferring with his attorney during two overnight recesses, we did so without mentioning structural error, but also without considering harmlessness. *See United States v. Cavallo*, 790 F.3d 1202, 1213-18 (11th Cir. 2015).

The plurality opinion in *Crutchfield* arguably inched closest to actually addressing the structural-error issue when it said that "any deprivation of assistance of counsel constitutes reversible error and necessitates a new trial" and then went on to state that "[o]ur rule does not include a harmless error

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concluded: "Because the trial record does not reflect-by objection, motion, or request-that [the defendant] and his counsel actually desired to confer during the recess, we find that [the defendant] was not deprived of the right to assistance of counsel within the meaning of the sixth amendment." 803 F.2d at 1109. In his concurring opinion, Judge Edmondson agreed: "In this case, the trial record does not show that the defendant and defense counsel actually desired to confer during the pertinent recess and would have conferred but for a restriction placed upon them by the trial judge. Consequently, the trial record in this case shows no deprivation of defendant's right to counsel." *Id.* at 1118-19 (Edmondson, J., concurring).

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. That actual-deprivation rule, the plurality explained, "satisfies our concerns for the important constitutional right of assistance of counsel, provides for the orderly conduct of trials, and makes sense." *Id.* It also, we note, squares with the decisions of two of our sister circuits. *See Stubbs v. Bordenkircher*, 689 F.2d 1205, 1207 (4th Cir. 1982) ("[I]n order to obtain relief a petitioner must show a 'deprivation' of his Sixth Amendment rights by demonstrating that he wanted to meet with his attorney but was prevented from doing so by the instruction of the trial judge."); *Bailey v. Redman*, 657 F.2d 21, 23-24 (3d Cir. 1981) (holding there was no Sixth Amendment violation where the defendant "fail[ed] to demonstrate that he was actually 'deprived' of his right to consult with his attorney").

The trial record here reflects no such "actual deprivation." At the end of the first day of Skillern's testimony, after the jury was excused, the following exchange occurred:

> [Attorney]: And, Your Honor, may I speak to Mr. **Skillern** about matters other than his testimony this evening -
>
> The Court: Yes.
>
> [Attorney]: - that may come up?
>
> The Court: You can talk about the weather. What do you mean, other than may come up? [sic] Not his testimony or his impending testimony.
>
> [Attorney]: Right, Your Honor, but maybe witness problems or things like that?
>
> The Court: Yes, anything about the proceeding and so forth, who's coming, who is not coming, that's fine, but just not his testimony or his impending testimony.
>
> [Attorney]: Fine, Your Honor.Trial Tr., Doc. No. 431-9, at 208-09.

The issue here isn't just that Skillern's lawyer failed to object to the district court's limitation. Instead, the problem is that the record is entirely devoid of *any* indication-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." We therefore leave aside issues about trial error, harmless error, structural error, plain error, and invited error, and instead hold, under *Crutchfield*, that **Skillern** hasn't shown that he was actually deprived of his Sixth Amendment right to counsel.4

C

Skillern and Nelson have raised other issues on appeal. First, both contend that they should have been acquitted on all counts because the jury was required to accept their argument that they relied in good faith on the advice of an attorney. Second, they challenge the sufficiency of the evidence

APPENDIX 2

supporting the mail-fraud counts. Finally, Nelson argues that there was no legally sufficient evidence that he had an intent to defraud. All of these boil down to sufficiency-of-the-evidence challenges, and after careful review of the record, we reject them.

III

For all of the reasons explained above, we affirm Skillern's and Nelson's convictions.

AFFIRMED.

Footnotes

*

1

At the end of the second day of Skillern's testimony, the district court noted that it had "somewhat of a dilemma" because Skillern was still on the stand but might need to discuss certain facts about another witness with his attorney. The court asked the parties whether they objected to Skillern speaking with his attorney during the overnight break, and they indicated that they did not. The court then instructed Skillern that he was "free to talk to [his] lawyer" about anything that evening. That ruling is not at issue in this appeal.

2

In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Circ. 1981) (en banc), we adopted as binding precedent all decisions of the former Fifth Circuit handed down before October 1, 1981. We also note that the part of *Conway* holding that it is a Sixth Amendment violation to restrict communications during a brief recess is no longer good law in light of the Supreme Court's later decision in *Perry v. Leeke*, 488 U.S. 272, 109 S. Ct. 594, 102 L. Ed. 2d 624 (1989).

3

To be clear, we do not hold that there must always be a formal objection where a district court prevents attorney-client communication during an overnight recess. To the extent that unpublished decisions from this Court might be read to suggest a hard-and-fast requirement that a defendant formally object in order to preserve a *Geders*-type Sixth Amendment argument, or that the plain-error standard necessarily applies absent such an objection, *see, e.g., United States v. Jubiel*, 377 F. App'x 925, 934-35 (11th Cir. 2010), we are not bound by them.

4

In a supplemental brief, Skillern seems to suggest that the absence of any desire to confer is not dispositive. Instead, he argues, we must consider the "totality of the facts," including that the district court instructed *other* witnesses not to discuss their testimony with anyone. To the extent that Skillern means to say that the district court's instructions to other witnesses had some sort of "chilling effect" that caused his own lawyer to ask to speak only about "matters other than [Skillern's] testimony," we disagree. The mere fact that other, non-party witnesses were instructed not to discuss their testimony with anyone has no particular bearing on Skillern's rights as a defendant.

APPENDIX 2

102 LED2D 624, 488 US 272 PERRY v LEEKE

DONALD RAY PERRY, Petitioner

vs.

WILLIAM D. LEEKE, Commissioner, South Carolina Department of Corrections, et al.

488 US 272, 102 L Ed 2d 624, 109 S Ct 594

[No. 87-6325]

Argued November 8, 1988.

Decided January 10, 1989.

DECISION

Court order directing accused not to consult attorney during brief recess, called while accused is on witness stand, held not to violate accused's right to counsel under Federal Constitution's Sixth Amendment.

SUMMARY

During a trial in a South Carolina court, a person accused of participating in an abduction and homicide took the witness stand to testify in his own defense. At the conclusion of the accused's direct testimony, the trial judge declared a 15-minute recess and, without advance notice to counsel, ordered that the accused not be allowed to talk to anyone, including his attorney, during the break. When the trial resumed, the accused's attorney moved for a mistrial. The judge denied the motion, and the accused was convicted. The Supreme Court of South Carolina, affirming the conviction (278 SC 490, 299 SE2d 324), said that the case was not controlled by the United States Supreme Court's opinion in Geders v United States (1976) 425 US 80, 47 L Ed 2d 592, 96 S Ct 1330, where it was held that a trial court's order directing an accused not to consult his attorney during an overnight recess, called while the accused was on the witness stand, violated the accused's right to the assistance of counsel under the Federal Constitution's Sixth Amendment. The accused subsequently sought a writ of habeas corpus in the United States District Court for

APPENDIX 4

No. 16-14253-EE

In the United States Court of Appeals for the Eleventh Circuit

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JON CRAIG NELSON & MICHAEL SKILLERN,
Defendants-Appellants.

On Appeal from the United States District Court
for the Middle District of Florida
No. 8:14-cr-58

BRIEF FOR THE UNITED STATES

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n.11 (11th Cir. 2011). Skillern briefly asserts (Br. 50) that "no objection [wa]s necessary" below because his claim implicates the Sixth Amendment. He is wrong. This Court "review[s] constitutional issues *de novo*, but reverse[s] only for plain error where the defendant fails to object at the district court." *United States v. Nash*, 438 F.3d 1302, 1304 (11th Cir. 2006); *see also United States v. Jubiel*, 377 Fed. Appx. 925, 934 (11th Cir. 2010) (applying plain error review to forfeited claim challenging the district court's limitations on attorney-client consultations during an overnight recess).

1. Skillern cannot show a deprivation, much less a plain or obvious deprivation, of his Sixth Amendment rights.

The Sixth Amendment affords criminal defendants the right to assistance of counsel. In *Geders v. United States*, 425 U.S. 80 (1976), the Supreme Court held that a district court's order prohibiting a defendant from consulting with his attorney "about anything" during a 17-hour overnight recess trenched on that guarantee. *Id.* at 82. The Court acknowledged the possibility that the attorney might improperly influence or coach his client's testimony during this period, *id.* at 89, but held that such concerns could not override the defendant's right to the assistance of counsel, *id.* at 91; *see also Perry v. Leake*, 488 U.S. 272, 284 (1989) (affirming "the defendant's right to unrestricted access to his lawyer for advice

APPENDIX 5

*** in the context of long recess," even if "such discussions will inevitably include some consideration of the defendant's ongoing testimony").

This Court has applied *Geders* to settings where the district court more narrowly constrained counsel's ability to confer with the defendant. Of note, in *United States v. Romano*, 736 F.2d 1432 (11th Cir. 1984), *vacated in part on other grounds*, 755 F.2d 1401 (11th Cir. 1985), the district court instructed the defendant—who was then in the middle of his trial testimony—to avoid discussing his testimony with his attorney during an overnight recess. *Id.* at 1436. This Court held that the limitation violated *Geders* notwithstanding the fact that it implicated only consultations about the defendant's trial testimony. *Id.* at 1436-1437. Other circuits, reviewing similar limitations, have reached the same conclusion. *See, e.g.*, *United States v. Triumph Capital Group, Inc.*, 487 F.3d 124, 133 (2d Cir. 2007); *United States v. Sandoval-Mendoza*, 472 F.3d 645, 651 (9th Cir. 2006); *United States v. Santos*, 201 F.3d 953, 965 (7th Cir. 2000); *United States v. Cobb*, 905 F.2d 784, 791-792 (4th Cir. 1990); *Mudd v. United States*, 798 F.2d 1509, 1512 (D.C. Cir. 1986). Under these authorities, the district court's limitation here impermissibly constrained Skillern's ability to consult with his attorney during the first overnight recess.

Yet the inquiry does not end. To prevail on this claim, "a defendant or the defendant's counsel must indicate, on the record, a desire to confer" and

APPENDIX S

further demonstrate "that the prohibition actually prevented the opportunity to confer with counsel." *Crutchfield v. Wainwright*, 803 F.2d 1103, 1109-1110 (11th Cir. 1986) (en banc) (plurality op.). In *Crutchfield*, the Court determined that no *Geders*-type deprivation of counsel occurred because "the record *** d[id] not reflect a desire to consult or an objection to the trial court's admonition." *Id.* at 1111; *see also id.* at 1118-1119 (Edmonson, J., concurring) (agreeing that, because "the trial record d[id] not show that the defendant and defense counsel actually desired to confer during the pertinent recess," there was "no deprivation of defendant's right to counsel").[19]

Other circuits have similarly held that to establish a *Geders*-type deprivation, a defendant must show that he would have conferred with his counsel in the absence of the trial court's limitation on communication. *See, e.g.*, *Mudd*, 798 F.2d at 1515 (agreeing "with those circuits that require the defense counsel to make a timely objection" to the restriction); *Stubbs v. Bordenkircher*, 689 F.2d 1205, 1207 (4th Cir. 1982) ("[I]n order to obtain relief a petitioner must show a 'deprivation' of his Sixth Amendment rights by demonstrating that he

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[19] The en banc Court in *Crutchfield* unanimously voted to affirm the defendant's conviction, but issued three separate opinions. The six-judge plurality opinion and Judge Edmonson's concurrence nevertheless agreed that the defendant was not entitled to relief because the record below did not show the defendant's or his counsel's desire to confer during the recess.

APPENDIX S

December 9 2018

Supreme Court of the United States
Office of the Clerk
1 First Street, N.E.
Washington, DC 20543

Re: No. 18-6046
Michael Skillern v. United States of America
Motion to Proceed In Forma Pauperis; Motion for Rehearing from denial of Petition For Writ of Certiorari; Appendix Documents

Dear

Please find herewith Michael Skillern's, Motion to Proceed In Forma Pauperis, Petition For Motion for Rehearing from denial of Petition for Writ of Certiorari and Appendix, which I respectfully request that you file in the normal course. This Motion is filed pursuant to your letter dated November 28, 2018, which I received on December 4, 2018. (See Exhibits A, A1 & A2 hereto). Please set on the Court's docket for disposition. Please return a file stamped copy of this letter to the undersigned. I have included a postage paid, addressed envelope for your use. Thanking you in advance for your assistance in this matter.

cc: (1) Chief Justice Roberts;
Justices: Alito, Breyer, Ginsburg
Gorsuch, Kavanaugh, Sotomayor
Stevens, and Thomas.

(2) Solicitor General of the United States
Room 5616
Department of Justice
950 Pennsylvania Ave N.W.
Washington, DC 20530-0001

Sincerely,

Michael Skillern
Reg. No. 44656-379
FPC Beaumont
P.O. Box 26010
Beaumont, Texas 77720

Additional material from this filing is available in the Clerk's Office.

No. 18-6046

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

CERTIFICATE OF COMPLIANCE

As required by the Supreme Court Rule 34.2, I, Michael Skillern certify that the Petition for Rehearing from the Denial of Petition for Writ of Certiorari, contains less than 1,500 words, and does not exceed five pages excluding the parts of the Petition that are exempted by the Supreme Court Rule 33.1(d). Further I certify in compliance with Supreme Court Rule 44.2 that this Motion for Rehearing pressents grounds, not previously presented, that are:

(i) the federal rules governing a testifying defendant in a criminal trial are constitutionallly vague and as such lead to arbitrary and subjective enforcement;

(ii) the Crutchfield rule of requiring a testifying defendant in a criminal trial, impermissiblely gives rise to an unconstitutional presumption that a defendant's fundamental Sixth Amendment right of access to counsel is subject to an evidentiary showing of entitlement to Sixth Amendment rights.

I declare under penalty of perjury, pursuant to 28 USC § 1746 that the foregoing is true and correct. This Motion is not made for delay.

Executed on this 9 day of December 2018.

Michael Skillern
Reg. No. 44656-379
FPC Beaumont
P.O. Box 26010
Beaumont, TX 77720

Additional material from this filing is available in the Clerk's Office.