No. 20-8299

IN THE SUPREME COURT OF THE UNITED STATES

IN RE: MICHAEL SKILLERN, PETITIONER

ON PETITION FOR WRIT OF MANDAMUS TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

ORIGINAL

PETITION FOR WRIT OF MANDAMUS

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OPINIONS BELOW

a. United States v Nelson, Skillern et al, 884 F.3d 1103(11th Cir. 2018); Direct Appeal. (*Appendix A*)

b. Skillern v United States, Petition for Writ of Certiorari- denied (2019).

c. Skillern v United States, District Court Denial of 28 U.S.C. Section 2255 Motion. (*Appendix A.1*).

d. Skillern v United States, United States Court of Appeals for the Eleventh Circuit denying Application for Certificate of Appealability. (*Appendix B*).

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. 1651. In the alternative the jurisdiction of this Court is invoked under 28 U.S.C. 1254. The judgment of the Court of Appeals denying Petitioner's Application for a Certificated of Appealability (COA), was issued on July 15, 2015.

TABLE OF AUTHORITIES

Supreme Court Cases

FEDERAL CIRCUIT COURT CASES

Petitioner has filed a Motion for Reconsideration or alternatively For Review *En Banc* of the Eleventh Circuit's opinion filed on April 16, 2021, No. 20-13380-H.

INTRODUCTION--RELEVANT BACKGROUND FACTS

During the course of a jury trial in late January 2016-February 3, 2016, at the conclusion of the first day of Michael Skillern's (hereinafter Petitioner) testimony, the presiding judge, United States District Court Judge, Hon. Mary S. Scriven issued a sequestration order that limited Petitioner's full access to Petitioner's counsel during the first overnight recess, after that day of trial, that is, numerical day 10 of the trial. There is no dispute as to the effect of the sequestration order, nor the language used by Judge Scriven, that is, the order denied Petitioner the opportunity to engage in an overnight discussion regarding his testimony given at trial and his impending testimony, with his lead trial counsel, Stanley G. Schneider,

FULFILLING MICHAEL SKILLERN'S SIXTH AMENDMENT GUARANTEE TO A FAIR TRIAL.

WRIT OF MANDAMUS QUESTION PRESENTED

DOES THE ELEVENTH CIRCUIT'S RULE ENUNCIATED IN *CRUTCHFIELD v WAINWRIGHT*, 803 F3d1103 (11th Cir. 1986) ABROGATE OR MODIFY THE SUPREME COURT DECISION AS STATED IN *GEDERS v UNITED STATES*, 425 U.S. 80 (1976), AND IF NOT IS PETITIONER ENTITLED TO HAVE THIS COURT ISSUE A WRIT OF MANDAMUS TO THE ELEVENTH CIRCUIT'S UNITED STATES CIRCUIT JUDGE BARBARA LAGOA, TO REVERSE HER DECISION DENYING PETITIONER'S APPLICATION FOR COA, **AND GRANT PETITIONER'S APPLICATION COA FOR THE ISSUES REQUESTED.**

STATEMENT OF THE CASE

1. Petitioner was convicted, (four (4) counts of mail fraud(18 USC Sec.1341), four (4) counts of wire fraud(18 USC Sec. 1343), one (1) count of conspiracy to commit mail and wire fraud(18 USC Sec. 371), one (1) count of conspiracy of conspiracy to commit money laundering 18 USC Sec. 1956(h), and (acquitted of three substantive money laundering charges), after a (2-3 week duration) jury trial in the United States District Court for the Middle District of Florida, (Tampa Division), the Honorable Mary S. Scriven, United States District Judge, presiding. Petitioner, a first time offender, was sentenced to a term of imprisonment of 120 years, three (3) years supervised release, restitution in the amount of $6,862,579.16 and a

3.2 The District Court apparently realized the constitutional error and withdrew her sequestration order on day two of Petitioner's testimony. (See finding by this Court's Panel during oral argument of the direct appeal of Petitioner's case).

3.3 Petitioner was denied access to counsel overnight between day one of his trial testimony and day two of his trial testimony. Atty. Schneider for fear of being perceived to have violated the District Court's sequestration Order refused to dine with Petitioner or discuss any subject with Petitioner during the overnight recess.

STANDARD OF REVIEW

4. To show that a Certificate of Appealability (COA) should issue under 28 USC Sec. 2253(c), a defendant need only to make a substantial showing that jurists of reason could disagree with the district court's resolution of his constitutional claims. (See *Miller-El v Cockrell*, 537 U.S. 336 (2003). Courts of Appeals ask only if the district court's decision was debatable. Id. see also *Bradshaw v Estelle*, 463 U.S. 880, 893 n.4 (1983). Further the inquiry for a COA is a threshold inquiry and a separate proceeding, one distinct from the underlying merits determination. (Miller-El citing *Slack v McDaniel, 529 U.S. 472 (2000)*.

Further, this Court holds:

"In an appeal challenging a [Section] 2255 ruling, we review the legal issues de novo and the factual findings for clear error". (See *Murphy v United States,* 634 F.3d 1303, 1306 (11th Cir. 2011).

5. Petitioner is a federal prisoner serving a sentence of 120 months imprisonment and is currently imprisoned at the Federal Prison Camp located in Beaumont, Texas. Petitioner's Application for Certificate of Appealability (COA) was denied by United States Circuit Judge, Honorable Barbara Lagoa, conclusion holding :

"As such, Skillern's motions for a COA are DENIED because he has failed to make a substantial showing of a constitutional right." 28 USC Section 2253(c)(2).

The trial judge did not state factually the basis for her conclusion that Petitioner had failed to a constitutional issue.

Pursuant to the Supreme Court of the United States (hereinafter referred to as Supreme Court) opinion in, *Slack v McDaniel,* 529 U.S. 472 (2000), which held the following:

> "Second, when the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a COA should issue (and an appeal of the district court's order may be taken) if the prisoner shows at least, that jurist of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right, and that jurists of reason would find it debatable whether the district was correct in its procedural ruling."

Petitioner respectfully requests that this Court grant Petitioner's request for reconsideration or alternatively review this case, *en banc,* because denial of access to counsel during an overnight recess is a violation of Petitioner's fundamental Sixth Amendment rights to access of counsel. As demonstrated below, jurists of reason have found this issue debatable and the circuits have split in regard to the Eleventh Circuit's analysis under their "common sense rule" (see *Crutchfield*), requiring a defendant or counsel to request in some, (still not succinctly defined), dialog for permission to confer over long recesses and overnight during a testifying defendant's trial.

6. Petitioner's Application for Certificate of Appealability (COA) sought review of two issues as set out above on pages 3 and 4 of this petition.

ARGUMENT AND AUTHORITIES

7. Circuit Judge Lagoa's opinion addressed the first issue and found as follows:

"As to his argument that he had been denied counsel by the district Court's recess instructions, we held that, under our *en banc* decision in *Crutchfield v Wainwright*, 803 F.2d 1103 (11th Cir. 1986), Skillern had not shown that he was actually deprived of his Sixth Amendment right to counsel because, notwithstanding the district court's recess instruction, the record was "entirely devoid of *any* indication---in any form---that Skillern or his attorney planned or wanted to confer about his testimony during the recess." (See *Exhibit A* hereto; Circuit Judge Barbara Lagoa's opinion at page 11).

such holding is in accord with the Eleventh Circuit rule announced in a plurality opinion, decided by the *Crutchfield* Court, holding:

"The defendant must show that the prohibition actually prevented the opportunity to confer with counsel". (citations omitted). "Once the defendant makes the requisite showing, a new trial is warranted." (citations omitted).

Problematic with the decision denying Petitioner's application for a COA, is that it addresses only the ineffective assistance of counsel question and does not consider that even if there was no conduct that would support a claim of ineffective assistance of counsel, the Sixth Amendment deprivation wrought by the District Court's sequestration order preventing Petitioner and counsel from conferring regarding Petitioner's testimony over the approximate 17 hour night recess, is a constitutional question that was not addressed. The record demonstrates that both Petitioner and counsel sought clarification to the District Court's sequestration order, although inartfully articulated, for demonstrating that there was a desire to confer over the night

recess, there can be no question as the record is complete and demonstrates that there was a clear and concise prohibition of access to and assistance from counsel in regard to discussing Petitioner's first day of testimony and the next upcoming day of testimony, that lasted throughout the night recess and the next day's trial recesses.

8. Petitioner's claim that his Sixth Amendment constitutional rights were violated by a court order, restricting communication between Petitioner and his trial counsel, is governed by two Supreme Court precedents, *Geders v United States*, 425 U.S. 80 (1976), and *Perry v Leeke*, 488 U.S. 272 (1989). In Geders, the Court held that:

> "an order preventing petitioner from consulting with his 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". (425 U.S. at 91, 96 S. Ct. 1330).

Further the Court recognized that district courts have broad discretion to limit witnesses' communications while they are testifying in order to prevent improper influence and coaching, but concluded that when the witness is also the defendant, the Sixth Amendment significantly curtails this discretion, *Id*, at 88, 96S. Ct. 1330. In addition the Court concluded and held that:

> "...a defendant's right to counsel was violated, requiring automatic reversal, when the trial court prevented him from consulting with his attorney during an overnight recess." *Id.* at 88, 96 S. Ct. at 1335.

In the case before this Court it is undisputed that for the first overnight recess (during Petitioner's testimony), Petitioner's access to counsel was restricted in regard to discussing his first day of testimony, and his upcoming testimony the next day of trial. The Supreme Court and every other circuit court that have addressed the issue of denial of a defendant's right to access

of counsel, recognize such issue is a fundamental constitutional right of criminal defendants. (*Id.* Perry).

District Court's Sequestration Order Prohibited Petitioner's Access to Counsel Over-Night And During Lunch Breaks On The Second Day of Petitioner's Testimony

9. In the most fundamental terms, Petitioner's Sixth Amendment right to access of counsel was prohibited by the District Court's sequestration order, imposed, on the first day of Petitioner's testimony, which included lunch breaks and the first (approximately 17 hour) overnight recess, while Petitioner was testifying. The Supreme Court and many circuit courts recognize this error as a "Constitutional error" and when present requires automatic reversal, because prejudice is presumed and the error is not cognizable under harmless analysis. In the case of *United States v Triumph Capital Group, Inc.* et al, 487 F.3d 124 (2d Cir. 2007), in regard to a ban on communications between a testifying defendant and trial counsel, stated:

"But as we have seen under Geders and Perry this interest will not justify a substantial interference with constitutionally protected communications. Geders, 425 U.S. at 91, 96S.Court 1330. **And since banning discussion of testimony over an overnight recess substantially albeit indirectly, interferes with communication of constitutional quality, and overnight ban on discussion of testimony falls squarely within the rule of Geders. Nor can the fact that the ban was later rescinded provide post-hoc justification for the initially unjustified order."** (emphasis added).

10. Multiple circuit courts of appeal that have opined in similar cases involving Petitioner's Sixth Amendment issue of access to counsel being abrogated by a court order restricting unfretted access to counsel, have split on the appropriate remedy and few if any have the Eleventh Circuit's "common sense rule" which essentially operates as a rebranding of harmless

error analysis, that modifies the rule in *Geders*. (See *United States v Bryant*, 545 F.2d 1035 (6th Cir. 1976), extending *Geders* to cover one-hour recesses; see *United States v Dilapi,* 651 F.2d 648 (2d Cir. 1981), requiring harmless error analysis; see also *Mudd v United States*, 798 F.2d 1509 (DC Cir. 1986), holding:

"We find that a *per se* rule best vindicates the right to the effective assistance of counsel. To require a showing of prejudice would not only burden one of the fundamental rights enjoyed by the accused, see *Powell,* 287 US at 68-69, 53 S. Ct. at 64, but would also create an unacceptable risk of infringing on the attorney - client privilege."

It is the fact that different courts have held different tests analysis and methodology for utilizing the rule in *Geders'* or the rule in *Perry,* that demonstrates beyond speculation, that jurist of reason do and could find it debatable whether Petitioner's petition states a valid claim of the denial of a constitutional right, and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.

CONCLUSION

The District Court erred in denying Petitioner a Certificate of Appealability on his claims presented in his habeas petition. As held in *Slack*, an applicant for a certificate of appealability need not show the appeal will succeed on the merits. Based upon the record, and upon consideration of the foregoing, a Certificate of Appealability should issue to consider the merits of Michael Skillern's claims. Petitioner seeks this Court to insure that the Eleventh Circuit Judges follow, the rule in Geders, without the requirement of a harmless error analysis established in Crutchfield that is labeled their "common sense rule" which requires the defendant to demonstrate entitlement to the guarantees afforded under the Sixth