08-99028

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

**ARMENIA LEVI CUDJO, JR.,**

Petitioner-Appellant,

**v.**

**ROBERT AYERS, JR.,**

Respondent-Appellee.

On Appeal from the United States District Court
for the Central District of California
No. CV 99-08089-JFW
The Honorable John F. Walter, Judge

# PETITION FOR REHEARING EN BANC

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**COURT RULES**

**TO THE HONORABLE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT:**

Respondent-Appellee ("Respondent") hereby petitions this Court for rehearing en banc pursuant to Rule 35 of the Federal Rules of Appellate Procedure.

Rehearing en banc should be granted because the September 28, 2012 published opinion (attached), critically misinterprets the United States Supreme Court's decision in *Chambers v. Mississippi*, 410 U.S. 284 (1973), and then compounds that error by determining that this case is "materially indistinguishable" from *Chambers*, rendering the California Supreme Court's rejection of the claim in issue contrary to clearly established law, within the meaning of 28 U.S.C. § 2254(d)(1). This issue—whether *Chambers* actually stands for any universally applicable rule of constitutional law—is also one of exceptional importance, as the federal appellate courts across the county have demonstrated great difficulty in consistently explaining exactly what rule, if any, is "clearly established" by *Chambers*.[1] Fed. R. App. P. 35, 40. In fact, the Supreme Court itself has

[1] The federal appellate courts have variously said: that *Chambers* holds that the exclusion of evidence in extreme circumstances violates due process, *DiBenedetto v. Hall*, 272 F.3d 1, 7 (1st Cir. 2001), *cert. denied sub* (continued…)

characterized *Chambers* as nothing more than "an exercise in highly case-specific error correction" and questioned whether *any* holding could be "discerned from such a fact-intensive case." *Montana v. Egelhoff*, 518 U.S. 37, 52 (1996) (plurality opinion of Scalia, J.). In light of the manner in which *Chambers* has been described by the high court, the "clearly established" rule extracted from that case by the panel majority is simply

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(…continued)
*nom.*, *DiBenedetto v. Spencer*, 122 S. Ct. 1622 (2002); that *Chambers* announced a three-part test for trustworthiness requiring admission of statements that (a) are made spontaneously to close friends shortly after the event, (b) are corroborated by other evidence, and (c) are self-incriminating and unquestionably against penal interest, *United States v. DeVillio*, 983 F.2d 1185, 1190 (2d Cir. 1993); that *Chambers* requires admission of exculpatory confessions by third parties, *Huffington v. Nuth*, 140 F.3d 572, 584 (4th Cir. 1998); that *Chambers* requires the admission of critical, exculpatory, and trustworthy evidence, *Turpin v. Kassulke*, 26 F.3d 1392, 1396 (6th Cir. 1994); that *Chambers* requires admission of reliable third-party confessions, despite the hearsay rule, where necessary to separate the guilty from the innocent, *United States v. Hall*, 165 F.3d 1095, 1113 (7th Cir. 1999); that *Chambers* requires admission of evidence that is highly relevant to a critical issue and has adequate indicia of reliability, *Davis v. Zant*, 36 F.3d 1538, 1544 (11th Cir. 1994); and that *Chambers* holds that, where constitutional rights affecting ascertainment of guilt are implicated, hearsay rules may not be applied mechanically, *United States v. North*, 910 F.2d 843, 907 (D.C. Cir. 1990). Courts have also cited *Chambers* when enforcing the right to present witnesses, *Gardner v. Barnett*, 199 F.3d 915, 919 (7th Cir. 1999), the right to present a defense, *United States v. Szur*, 289 F.3d 200, 217 (2d Cir. 2002), and the right to confront and cross-examine witnesses, *Mackey v. Dutton*, 217 F.3d 399, 407 (6th Cir. 2000); *Jones v. Goodwin*, 982 F.2d 464, 469 (11th Cir. 1993); *United States v. Begay*, 937 F.2d 515, 520 (10th Cir. 1991).

untenable. And even if the rule was as the panel majority believes, the conclusion that this case is "materially indistinguishable" from *Chambers* simply ignores quite obvious and significant differences.[2]

Finally, in determining that the exclusion of evidence deemed unreliable and incredible—by the state trial court, the California Supreme Court, and the United States District Court—was nevertheless somehow prejudicial to the point relief was warranted, the panel majority improperly considered a racial comment made by the prosecutor at closing arguments. In so holding, the panel majority overlooked the California Supreme Court's determination that the comment was harmless beyond a reasonable doubt, and that no federal court ever determined the comment to be error. Because of the importance of these issues, en banc review is warranted.

[2] The significance of the panel majority's determination that this case is "materially distinguishable" from *Chambers* is that "[a] state-court decision will also be contrary to [the Supreme Court's] clearly established precedent if the state court confronts a set of facts that are materially indistinguishable from a decision of [the Supreme Court] and nevertheless arrives at a result different from [Supreme Court] precedent." *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000).

## ARGUMENT

### REHEARING SHOULD BE GRANTED BECAUSE THE PANEL MAJORITY MISUNDERSTOOD THE SCOPE OF *CHAMBERS* AND ITS PROGENY, IN REGARD TO WHAT CONSTITUTES "CLEARLY ESTABLISHED" LAW AS CONTEMPLATED BY 28 U.S.C. § 2254(d)(1)

The majority opinion fatally derails in its very first sentence: "In *Chambers v. Mississippi*, 410 U.S. 284 (1973), the United States Supreme Court clearly established that the exclusion of trustworthy and necessary exculpatory testimony at trial violates a defendant's due process right to present a defense." Slip op. at 11869. Such a rule is *never* expressed in *Chambers* itself, is *never* expressed in any subsequent Supreme Court case, and is instead flatly contradicted by the Supreme Court in *Montana v. Egelhoff*, which described *Chambers* as "an exercise in highly case-specific error correction." 518 U.S. at 52 (Scalia, J., plurality opinion). Given the panel's misinterpretation of *Chambers*, en banc review is warranted.

#### A. Relevant Background

The claim in issue is that the trial court erroneously excluded John Culver's testimony about an inculpatory statement made by Gregory Cudjo while the two were in custody together. After a hearing, the trial court exercised its discretion to exclude the evidence under California Evidence Code sections 1230 (statement against penal interest) and 352 (more

prejudicial than probative). In essence, the trial court determined Culver's proposed testimony to be "unreliable and untrustworthy," thus rendering it excludable under state law. *People v. Cudjo*, 6 Cal. 4th 585, 606, 863 P.2d 635 (1999).

On appeal, the California Supreme Court held that the trial court had improperly excluded the evidence, but in doing so had only violated state law, and not the federal Constitution. Specifically, the California Supreme Court concluded that the statement satisfied the declaration-against-penal-interest exception to state hearsay law, and that Culver's inherent untrustworthiness was not a valid consideration in determining inadmissibility pursuant to California Evidence Code section 352. *Id*. at 607-11. But the California Supreme Court held that the error did not implicate the federal Constitution, since it was mere trial error in the application of state evidentiary rules. Citing *Chambers* and its progeny, the California Supreme Court observed that the United States Supreme Court had *never* held that a state trial court's exclusion of a defense witness on unreliability grounds amounts to an error of constitutional magnitude. *Id*. at 651-52.

The panel majority disagrees with the California Supreme Court's assessment of what *Chambers* commands, in terms of what might constitute

an unconstitutional exclusion of evidence at trial. But in light of what *Chambers* expressly holds, and the way the United States Supreme Court has since specifically characterized *Chambers*, the panel majority's interpretation of the *Chambers* "clearly established" rule is unsupportable.

### B. *Chambers v. Mississippi*, A Case Hardly "Materially Indistinguishable" From This One, Did Not Clearly Establish Any Rule That Compelled The California Supreme Court To Engage In Constitutional Analysis Of Petitioner's Claim That Evidence Was Improperly Excluded At Trial

The panel majority held that *Chambers v. Mississippi* is controlling Supreme Court precedent, and "clearly established" the following rule: "[T]he exclusion of trustworthy and necessary exculpatory testimony at trial violates a defendant's due process right to present a defense." Slip op. at 11869. Neither *Chambers* nor any other United States Supreme Court case remotely establishes or elevates such a proposition to the level of "clearly established" law. Further, and contrary to the conclusion of the panel majority, this case is not "materially indistinguishable" from *Chambers* for purposes of deciding whether the state court's denial of this claim was contrary to clearly established Supreme Court precedent. Rather, there are significant differences, overlooked or ignored by the panel majority, that belie its conclusion in this regard.

The constitutional significance of the holding of *Chambers* has been the subject of debate and misunderstanding for decades. The precise holding of *Chambers* expressly disavows the creation of any particular rule of constitutional law:

> We conclude that the exclusion of this critical evidence, coupled with the State's refusal to permit Chambers to cross-examine McDonald, denied him a trial in accord with traditional and fundamental standards of due process. In reaching this judgment, *we establish no new principles of constitutional law*. Nor does our holding signal any diminution in the respect traditionally accorded to the States in the establishment and implementation of their own criminal trial rules and procedures. Rather, we hold quite simply that under the facts and circumstances *of this case* the rulings of the trial court deprived Chambers of a fair trial.

*Chambers v. Mississippi*, 410 U.S. at 302-03 (italics added).

Consonant with the true holding in *Chambers*, in *Montana v. Egelhoff*, a plurality of the Supreme Court characterized *Chambers* as "an exercise in highly case-specific error correction." 518 U.S. at 52 (Scalia, J., plurality opinion). And, as explained above (*see* n.1., *supra*), the federal courts of appeals have distilled various and conflicting versions of the *Chambers* "rule." Nevertheless, the panel majority in this case discerned that (1) *Chambers* "clearly established" a constitutional rule requiring admission of evidence that is "trustworthy, necessary and exculpatory," and (2) this case is "materially indistinguishable" from *Chambers*. In light of these serious

errors, and the nationwide confusion about what, if anything, *Chambers* constitutionally requires, en banc review should be granted.

The defendant in *Chambers*, tried for being the sole killer of a police officer, attempted to show that McDonald had committed the murder instead. 410 U.S. at 285-89. He called McDonald to testify as a witness in the defense case. *Id.* at 291. On the stand, McDonald denied committing the murder, and recanted a previous sworn statement in which he had confessed to the murder. *Id.* at 291. Chambers attempted to question McDonald about his refutation and three statements he had made to friends, shortly after the murder and before the sworn statement, in which McDonald also had admitted being the shooter. *Id.* at 291-92. But the trial judge disallowed the examination under a State law "voucher rule" prohibiting the impeachment of one's own witness. *Id.* at 291-92, 295. This is the first critical distinguishing feature of *Chambers* ignored or overlooked by the panel majority. *Chambers* had involved an antiquated state evidentiary rule that *automatically* excluded evidence, regardless of reliability, because impeaching one's own witness was impermissible. *Chambers,* 410 U.S. at 297-98. No similar rule operates here.

Chambers also attempted to call McDonald's three friends to testify about the other statements McDonald had made to them acknowledging his

guilt. *Id.* at 292. The trial court excluded this evidence too, because the proposed testimony was hearsay and the state law exception for statements against interest was limited to statements against *pecuniary* interest. *Id.* at 292-93, 299. Here is the second critical distinguishing feature between *Chambers* and this case. Mississippi's antiquated statement-against-interest exception to the hearsay rule at the time *automatically* and "mechanistically" excluded all such statements unless related to a financial interest, regardless of reliability. *Chambers*, 410 U.S. at 302. No such rule is at issue in this case. The panel majority ignored or overlooked this critical distinguishing feature.

The Supreme Court held that the trial judge's enforcement of the State's voucher rule infringed the defendant's right to present a defense. 410 U.S. at 298. The Court noted that the State's proof excluded the theory that there was more than one shooter. *Id.* at 297. Also, the Court determined, McDonald's testimony refuting his confession was "seriously adverse" to the defendant. *Id.*

But the high court did not decide whether that error alone warranted reversal because the claimed violation of due process rested on that error "in conjunction with" the trial court's refusal to permit the defendant to call other witnesses. *Id.* at 298. Here is the third distinguishing feature between

this case and *Chambers*. In *Chambers*, the due process violation resulted from a combination of two, uncompromising state rules of evidence that arbitrarily excluded otherwise trustworthy evidence. Here, only one discretionary state law error resulted in relief being granted.

The Court concluded, therefore, that the State's hearsay rule had been applied "mechanistically" under the circumstances. *Id.* The automatic exclusion of critical evidence, coupled with the State's irrational and mechanistic refusal to permit Chambers to cross-examine McDonald, had denied the defendant his right to due process. *Id.*

In deciding *Chambers*, however, the Supreme Court took care to explain that it *was not* announcing any new rule of law, let alone "clearly establishing" one for courts throughout the nation to follow. The Court explained that "no new principles of constitutional law" were being established, and that the holding related to "the facts and circumstances" of the specific case. 410 U.S. at 302-03.

That the focus of *Chambers* was on specific facts and the automatic and "mechanistic" exclusion of multiple pieces of evidence by application of uncompromising rules, has been emphasized by the Supreme Court many times. *Sears v. Upton*, 130 S. Ct. 3259, 3263 n.6 (2010); *Oregon v. Guzek*, 546 U.S. 517, 526 (2006); *United States v. Scheffer*, 523 U.S. 303, 316

(1998). And *Egelhoff* seemingly would have removed all doubt, thus prohibiting the panel majority from resolving this case as it did. The *Egelhoff* plurality found the Montana Supreme Court erroneously concluded *Chambers* required admission of all relevant, reliable and helpful evidence. 518 U.S. at 52. Rather, even if *Chambers* established a rule (despite the Court's statement that it did not) the rule was simply that the application of state rules of evidence that automatically and arbitrarily operate to exclude otherwise reliable evidence can combine to violate due process. The plain language in *Chambers*, combined with the discussion in *Egelhoff*, demonstrates that the panel majority's understanding of what *Chambers* stands for, in terms of "clearly established" law, is simply wrong.[3]

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[3] It is noteworthy that the four dissenters in *Egelhoff*—Justices O'Connor, Stevens, Souter and Breyer—took no issue with the plurality's description of *Chambers*:

> The plurality's characterization of *Chambers* as "case specific error correction," . . . cannot diminish its force as a prohibition on enforcement of state evidentiary rules that lead, without sufficient justification, to the establishment of guilt by suppression of evidence supporting the defendant's case.

*Egelhoff*, 518 U.S. at 62-63 (O'Connor, J., dissenting). Thus, it appears that at least eight justices agreed that *Chambers* does not stand for the "clearly established" rule adopted by the panel majority. The dissenting Justices simply felt that the state rule in issue in *Egelhoff* operated to categorically exclude evidence, like the state evidentiary rules in *Chambers*. Of course, the state evidentiary rules at issue in this case do not operate that way at all.

Finally, *Chambers* and this case are clearly different in a materially *distinguishable* way. *Chambers* involved the application of multiple arbitrary rules to exclude otherwise reliable evidence; this case involved a single error in the exercise of discretion by a trial judge applying perfectly reasonable and valid evidentiary rules. The grave errors in the panel majority's opinion warrant en banc review.[4]

[4] The panel majority, in attempting to find meaningful similarity between this case and *Chambers*, mischaracterizes the California Supreme Court as concluding that Gregory Cudjo's statement to John Culver as "probably true." *See* Slip op. at 11888. What the California Supreme Court actually said was only that "the trial court had the discretion to conclude . . . it was probably true." *People v. Cudjo*, 6 Cal. 4th at 607. This observation, that the trial court would not have *abused its discretion* in reaching a particular conclusion, is a far cry from the characterization of the panel majority, which is that the state court had actually concluded Gregory's statement was "probably true." Contrary to the panel majority's belief, at no point did the California Supreme Court ever indicate that it believed that the statement was, as a matter of actuality, "probably true," or even credible. Quite the opposite: when explaining why exclusion of the evidence was harmless, the California Supreme Court clearly held that "as the trial court surmised, both Culver's testimony and the hearsay confession it recounted, had *obvious indicia of unreliability*." *Id*. at 613 (emphasis added). The state court then went on to explain how Gregory's statement to Culver was contradicted by the physical evidence, and Gregory's own earlier denials of culpability. *Id*. The panel majority's erroneous reliance upon the state supreme court's purported characterization of Gregory's statement as "probably true" is another significant error.

### C. The Prejudice Analysis Included An Impermissible Consideration Of An Allegation Of Prosecutorial Misconduct, Never Determined By Any Federal Court To Be Constitutional Error

Even assuming that the panel majority's "contrary to" holding was somehow supportable, the prejudice analysis fails. After concluding that the exclusion of the Culver evidence was contrary to some clearly established rule, the panel majority applied the test in *Brecht* to determine prejudice. Under *Brecht*, relief must still be denied if the alleged error did not have a substantial and injurious effect or influence in determining the jury's verdict. *Brecht v. Abrahamson*, 507 U.S. 619, 637-38 (1993). This Court has previously correctly acknowledged that the California standard for state law harmless error analysis is the equivalent of *Brecht*. *Bains v. Cambra*, 204 F.3d 964, 971 n.2 (9th Cir. 2000).

The California Supreme Court applied the state law standard for harmless error and found the exclusion of the *Culver* evidence non-prejudicial. In doing so, the state court emphasized the following facts: all physical and testimonial evidence supported a conclusion that there was only one intruder; the semen found at the scene excluded all suspects except Petitioner; Petitioner's version of events—that he traded the victim drugs for sex—was not supported by any evidence at all (no drugs in the victim's

system; victim never seen using drugs by her husband; no money ever unaccounted for); it was unlikely the victim would have had sex with a "stranger" in her living room while her son was present; Culver's testimony and the hearsay confession of Gregory "had obvious indicia of unreliability," as Culver was a friend to Petitioner and the confession attributed to Gregory was contradicted by physical details of the crime and Gregory's previous statements consistently denying involvement in the murder. *People v. Cudjo*, 6 Cal. 4th at 652-54.

The panel majority seemingly found this prejudice analysis unsatisfactory, and instead adopted Justice Kennard's dissenting analysis. Slip op. at 11893-94. Given the equivalent nature of the tests used to discern prejudice, even where no official deference is owed, this is yet another example of a federal reviewing court simply replacing the judgment of a state court with its own. But the more significant problem is the panel majority's impermissible consideration of another error found harmless beyond a reasonable doubt by the California Supreme Court in determining the evidentiary error to be prejudicial under *Brecht*.

During closing argument, the prosecutor referenced Petitioner's race while emphasizing why Petitioner's ridiculous sex-for-drugs story was simply incredible. The California Supreme Court found that the prosecutor

thereby erred, but was persuaded "beyond a reasonable doubt that the prosecutor's racial reference in argument did not affect the outcome." *People v. Cudjo*, 6 Cal. 4th at 626.

No federal court ever determined the prosecutor's racial reference to be constitutional error at all, including the panel majority. Granting relief on account of that event is unsupportable, given the daunting standard applicable on federal habeas corpus review. A prosecutor's actions constitute unconstitutional misconduct only if they "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Darden v. Wainwright*, 477 U.S. 168, 181 (1986) (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974)). No reasonable jurist could resolve that the *Darden* standard was satisfied here. At the very least, a reasonable jurist could surely conclude that it was not. And the California Supreme Court's determination of harmlessness beyond a reasonable doubt is something a federal reviewing court *must* defer to. *See* Slip op. at 11892 (citing authority and acknowledging AEDPA deference owed to such a determination by a state court). Thus, because any error was harmless beyond a reasonable doubt, the assertion that its occurrence would "weigh heavily" in an overall prejudice assessment makes no sense at all. Slip op. at 11894 (Panel majority proclaiming that "[t]he prosecutor's reference to

Petitioner's race during closing argument also weighs heavily on our prejudice analysis."). Any weighing of that factor was utterly impermissible.

In fact, the errors do not even impact the fairness of a trial in a way where cumulative error assessment is logical. As the California Supreme Court recognized, the danger in this type of prosecutorial misconduct is that the jury's impartiality might be compromised. *People v. Cudjo*, 6 Cal. 4th at 625-26. But the exclusion of the Culver testimony impacted the quality of the evidence, not the jury's ability to fairly and impartially evaluate the evidence. Even assuming error in both instances, it was improper to let the race issue inform the prejudice analysis as to evidentiary error at all, let alone to let it "weigh[] heavily." Thus, en banc review is warranted in this case.

## CONCLUSION

Given the confusion as to what *Chambers* and its progeny stand for, a confusion shared by the panel majority, and for the additional reasons explained in this petition, this Court should grant en banc review.

Dated: October 10, 2012

Respectfully Submitted,

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**CERTIFICATE OF COMPLIANCE**
**PURSUANT TO CIRCUIT RULES 35-4 AND 40-1**
**FOR 08-99028**

I certify that pursuant to Circuit Rule 35-4 or 40-1, the attached petition for rehearing en banc is: (check (x) applicable option)

[X] Proportionately spaced, has a typeface of 14 points or more and contains 3,578 words (petitions and answers must not exceed 4,200 words).

or

[ ] In compliance with Fed.R.App.P. 32(c) and does not exceed 15 pages.

10/10/12
Dated

s/ *A. Scott Hayward*
A. Scott Hayward
Deputy Attorney General

# CERTIFICATE OF SERVICE

Case Name: **Armenia Levi Cudjo, Jr. v. Robert Ayers, Jr.** No. **08-99028**

I hereby certify that on October 10, 2012, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

**PETITION FOR REHEARING EN BANC**

I certify that **all** participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on October 10, 2012, at Los Angeles, California.

| Sandra Fan | s/ *Sandra Fan* |
|---|---|
| Declarant | Signature |

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