

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

MOTION FOR STAY OF MANDATE

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On November 5, 2012, this Court denied Respondent-Appellee's Petition For Rehearing En Banc in the above-entitled case. Pursuant to Rule 41 of the Federal Rules of Appellate Procedure, Respondent-Appellee hereby requests a stay of the issuance of the mandate in this case for ninety days, to allow Respondent-Appellee to determine whether to file, and to potentially prepare and file, a petition for writ of certiorari in the United States Supreme Court. This motion is made for good cause, as set forth below.

In the view of Respondent-Appellee's counsel, the Court's published opinion filed on September 28, 2012, presents a substantial question as required by Federal Rule of Appellate Procedure 41(d). In the opinion, the majority held that the California Supreme Court acted contrary to clearly established United States Supreme Court authority, within the meaning of 28 U.S.C. § 2254(d)(1), in concluding that the exclusion of unreliable and incredible hearsay evidence did not violate the federal Constitution. This Court's holding was dictated because, in the majority's view, "[i]n *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.

The majority opinion presents at least one issue potentially worthy of certiorari, namely: whether *Chambers v. Mississippi*, 410 U.S. 284 (1973), clearly established the rule relied upon by the panel majority, despite the fact that the *Chambers* Court explicitly held that "no new principles of constitutional law" were being established, and that the holding related to "the facts and circumstances" of the specific case,¹ and where the Supreme Court has subsequently explained that *Chambers* was nothing other than "an exercise in highly case-specific error correction" and questioned whether *any* holding, let alone a clearly established rule of constitutional law, could be "discerned from such a fact-intensive case." *Montana v. Egelhoff*, 518 U.S. 37, 52 (1996) (plurality opinion of Scalia, J.).

Thus, a petition for writ of certiorari may be appropriate in this case because there is at least one "important question of federal law that has not been, but should be, settled by [the Supreme] Court." *See* S. Ct. R. 10(c). Moreover, certiorari may be appropriate because there is wide diversity amongst the federal circuits as to what rule *Chambers v. Mississippi* actually

¹ *Id.* at 302-03.

established.² See S. Ct. R. 10(a). For these reasons, Respondent-Appellee requests that this Court stay the issuance of the mandate in this case for ninety days to allow Respondent-Appellee to determine whether to file, and

² In addition to the rule held to be clearly established by the majority in this case, 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); 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).

to potentially prepare and file, a petition for writ of certiorari in the United States Supreme Court.

Dated: November 5, 2012

Respectfully Submitted,

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CERTIFICATE OF SERVICE

Case Name: **Armenia Levi Cudjo, Jr. v.
Robert Ayers, Jr.**

No. **08-99028**

I hereby certify that on November 7, 2012, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

MOTION FOR STAY OF MANDATE

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 November 7, 2012, at Los Angeles, California.

Sandra Fan
Declarant

s/ Sandra Fan
Signature

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