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# SUPREME COURT OF ALABAMA

OCTOBER TERM, 2015-2016

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Ex parte State of Alabama

PETITION FOR WRIT OF CERTIORARI  
TO THE COURT OF CRIMINAL APPEALS

(In re: Devonte Cortes Acosta

v.

State of Alabama)

(Morgan Circuit Court, CC-13-897;  
Court of Criminal Appeals, CR-13-1763)

STUART, Justice.

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Devonte Cortes Acosta was convicted of first-degree burglary and was sentenced to 156 months in prison. The Court of Criminal Appeals reversed his conviction and sentence. Acosta v. State, [Ms. CR-13-1763, May 29, 2015] \_\_\_ So. 3d \_\_\_ (Ala. Crim. App. 2015). The State petitioned for certiorari review of the Court of Criminal Appeals' decision. We reverse and remand.

The evidence presented at trial indicates that on the day of the burglary, James W. Benford, Sr., and two of his three sons were in their house when three armed black men entered the house, demanded to know where Benford's absent son was, and stated that they wanted their "property" back from the absent son. The men left after rummaging through the house. Benford and the two sons who were present during the burglary testified that they recognized Acosta and R.J.<sup>1</sup> as two of three armed men who had entered Benford's house.

Detective Josh Fisher testified that, during his investigation, Benford, the two sons who were present during the burglary, and R.J. provided statements. On cross-examination, Detective Fisher testified that Benford's trial

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<sup>1</sup>Because R.J. was granted youthful-offender status, we are using initials instead of his name.

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testimony differed from his statement given during the investigation. Fisher testified that, unlike Benford's trial testimony in which Benford identified Acosta and R.J. as two of the three men who entered his house, in the statement he gave on the day of the incident Benford stated that he could not identify any of the men who had entered his house.

In his defense, Acosta maintained that he was not involved in the burglary. In support of his defense, Acosta testified that at the time of the burglary he was with his brother and that he did not participate in the burglary. R.J.'s mother testified that Acosta was not with R.J. at the time of the burglary. She stated that Acosta and his younger brother arrived at her house shortly after R.J. had left. According to R.J.'s mother, Acosta waited at her house awhile, then left her house minutes before R.J. and "a couple of other little fellows" returned. Acosta's brother testified that he and Acosta were together at the time of the burglary, confirmed the testimony of R.J.'s mother, and stated that he and Acosta did not burglarize Benford's house. Acosta called R.J. as a witness, but R.J. refused to answer any questions, instead invoking his Fifth Amendment right against self-

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incrimination. Acosta then called Detective Fisher as a defense witness and asked him if R.J. had indicated to him whether Acosta was involved in the burglary. The State entered a hearsay objection, and Acosta argued that R.J., in light of his invocation of his Fifth Amendment rights, was unavailable but that testimony as to his statement should be admitted into evidence through Detective Fisher. After much discussion, including a statement by Acosta's counsel that "Acosta has every right to maintain a defense," the trial court determined that Detective Fisher's testimony about the contents of R.J.'s statement was hearsay and that it was not admissible under any exception to the general hearsay rule.

A jury found Acosta guilty of first-degree burglary. Acosta moved the trial court to set aside the jury's verdict and to order a new trial. In his motion, Acosta argued that he was denied his constitutional right to present a defense when the trial court refused to admit Detective Fisher's hearsay testimony to the effect that R.J. had told him that Acosta was not present during the burglary. After citing Chambers v. Mississippi, 410 U.S. 284 (1973), and Ex parte Griffin, 790 So. 2d 351 (Ala. 2000), Acosta argued:

"[Acosta] contends that [R.J.'s] statement was due to be heard by the jury. They should have been given the opportunity to consider this exculpatory statement regarding [Acosta]. This was an essential element of his defense -- [R.J.'s] statement being admitted into evidence. The statement was to the effect that [Acosta] was not present with [R.J.] at a burglary. The statement was also given following a confession, which will likely be relied upon by the State in the subsequent prosecution. The cases cited herein reference the court's rulings that the accused has the right to present a defense, and the inadmissibility of [R.J.'s] statement in this case, was essential to that defense. It was exculpatory, and the witness was unavailable due to his claiming his privileges extended to him by the 5th Amendment of the U.S. Constitution[;] thus, [Acosta] had no other means by which to introduce this statement. Without the admission of that exculpatory statement by the unavailable [R.J.], [Acosta] was denied his right to present a defense, inherent in the United States Constitution."

The trial court summarily denied Acosta's motion to set aside the jury's verdict.

Before the Court of Criminal Appeals, Acosta contended that the trial court improperly prevented him from presenting his defense that he was not present during the burglary at trial by refusing to admit into evidence Detective Fisher's hearsay testimony concerning R.J.'s statement. After concluding that Acosta's argument was properly preserved for appellate review, the Court of Criminal Appeals held that the trial court erred in refusing to admit into evidence Detective

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Fisher's hearsay testimony regarding R.J.'s statement. That court reasoned that the trial court's strict application of the hearsay rule deprived Acosta of the ability to present a complete defense. The State petitioned this Court for certiorari review of the decision of the Court of Criminal Appeals.

First, the State maintains that the Court of Criminal Appeals erred in holding that Acosta preserved his argument that the trial court's strict application of the hearsay rule to exclude Detective Fisher's hearsay testimony rendered his trial fundamentally unfair and deprived him of his constitutional right to present a defense. We agree with the State that Acosta's general statement that he had a right to maintain a defense did not sufficiently apprise the trial court of his constitutional argument that the strict application of the hearsay rule to prohibit the admission of Detective Fisher's testimony regarding R.J.'s statement would render his trial fundamentally unfair and deprive him of his constitutional right to present a defense. See Ex parte Works, 640 So. 2d 1056, 1058 (Ala. 1994) ("The purpose of requiring a specific objection to preserve an issue for

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appellate review is to put the trial judge on notice of the alleged error, giving an opportunity to correct it before the case is submitted to the jury.").

However, upon review of the entirety of Acosta's argument when seeking to admit Detective Fisher's hearsay testimony and his argument in his motion for a new trial, we conclude that the Court of Criminal Appeals properly held that this issue was preserved for appellate review. "'[A] motion for a new trial ... is not sufficient to preserve the issue where no timely objection was made at the time the evidence was offered and admitted.'" Smith v. State, 756 So. 2d 892, 905 (Ala. Crim. App. 1997) (quoting Newsome v. State, 570 So. 2d 703, 717 (Ala. Crim. App. 1989)). In this case, when attempting to admit the evidence, Acosta did argue that Detective Fisher's hearsay testimony to the effect that R.J., who had admitted to law-enforcement officers that he had participated in the burglary, had told him that Acosta was not present at the burglary was important to develop Acosta's defense that he was not present during the burglary. Therefore, Acosta did, at the time the evidence was admitted, argue that the evidence was integral to his defense. Then, in his motion for a new

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trial, Acosta further developed the argument, cited caselaw, and unequivocally argued that the trial court's strict application of the hearsay rule to exclude Detective Fisher's hearsay testimony deprived him of his defense, rendered his trial fundamentally unfair, and deprived him of due process. Cf. Chambers, 410 U.S. at 290 n. 3. Upon consideration of the entirety of the argument made by Acosta's counsel when seeking to admit Detective Fisher's hearsay testimony at trial and the additional development of the argument in Acosta's motion for a new trial, we conclude that Acosta adequately presented to the trial court the argument he made on appeal, that he provided the trial court with an opportunity to address the alleged error, and that he properly preserved the argument for appellate review.

Next, the State maintains that, even if the issue was preserved, the Court of Criminal Appeals erred in holding that the trial court's refusal to admit into evidence Detective Fisher's hearsay testimony to the effect that R.J. had stated that Acosta was not present during the burglary prohibited Acosta from presenting a complete defense, rendered his trial fundamentally unfair, and deprived him of due process.

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According to the State, the holding of the Court of Criminal Appeals conflicts with Chambers.

In Chambers, the United States Supreme Court held that "where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice." 410 U.S. at 302. In Chambers, the trial court's application of the rules of evidence prohibited Leon Chambers, the defendant, from presenting evidence of a third party's culpability. Chambers was charged with killing Aaron Liberty. At trial, Chambers maintained that he did not shoot Liberty. In support of his defense, Chambers presented testimony from Gable McDonald, who had given a sworn statement to Chambers's counsel, that McDonald had shot Liberty. On cross-examination by the State, McDonald repudiated his confession and testified that he did not shoot Liberty and that he confessed to the crime in order to receive favorable treatment from law enforcement. When Chambers attempted to challenge McDonald's renunciation of his confession by having him declared an adverse witness, the trial court, applying Mississippi's rules of evidence, denied Chambers's request. Additionally, the

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trial court, applying Mississippi's rules of evidence, refused to admit testimony from individuals to whom McDonald had admitted that he shot Liberty. In reaching its conclusion that the trial court's application of the rules of evidence prevented Chambers from developing his defense that another, not he, shot Liberty, the United States Supreme Court stated that the evidence the trial court refused to admit was critical to Chambers's defense. The United States Supreme Court reasoned that because the strict application of Mississippi's rules of evidence had prohibited the admission of critical evidence in Chambers's defense, the trial court's strict application of those rules to exclude the critical evidence denied Chambers a trial that complied with due process. 410 U.S. at 302.

In Ex parte Griffin, 790 So. 2d 351 (Ala. 2000), this Court applied Chambers. In Ex parte Griffin, the State charged Louis Griffin with the murder of Christopher Davis after he had admitted, while pleading guilty to various offenses in federal court, that he had participated in the murder. At trial, Griffin's defense was that he did not kill Davis and that he had lied to the federal court in his

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allocution to receive favorable treatment. To support this defense, Griffin attempted to present evidence indicating that two other men had been charged with killing Davis; that one of the men, Anthony Embry, had admitted under oath in court that he had killed Davis; that Embry had been convicted of Davis's murder; that Embry had been incarcerated for the conviction; and that a state court had dismissed Embry's conviction ex mero motu. The trial court, applying the Alabama Rules of Evidence, refused to admit the evidence of Embry's culpability. This Court, recognizing that the evidence of Embry's confession and conviction was critical in establishing Griffin's defense that another, not he, killed Davis, held that the trial court's ruling excluding the evidence with regard to Embry's confession and conviction prohibited Griffin from presenting his defense to the jury and violated his due-process rights under the 5th and 6th Amendments.

The holdings in both Chambers and Griffin rest upon the fact that the trial court's strict application of the rules of evidence excluded critical evidence proffered by the defense, and the exclusion of the critical evidence resulted in the

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defendants' being denied their constitutional right to a fair trial and due process. Critical evidence is defined as "[e]vidence strong enough that its presence could tilt a juror's mind." Black's Law Dictionary 674 (10th ed. 2014). In both Chambers and Griffin, the excluded evidence was critical to the defense because each defendant had denied participation in the offense and the excluded evidence indicated that another individual had admitted to committing the offense. When a defendant denies participation in an offense, evidence indicating that someone else has admitted to committing the offense and that that admission excludes the defendant as the offender, as it did in Chambers and Griffin, may be strong enough to influence a juror. Thus, depending on the facts of the case, the strict application of the rules of evidence to exclude critical evidence may render a trial fundamentally unfair.

Upon review of the record, we conclude that Acosta's fundamental rights to a fair trial and to due process were not violated by the trial court's refusal to admit into evidence Detective Fisher's hearsay testimony because Detective Fisher's hearsay testimony was not critical to Acosta's

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defense. The testimony at trial indicated that three men were involved in the burglary of Benford's house. Witnesses identified both Acosta and R.J. as two of the men who entered Benford's house. Acosta, in his defense, testified that he was not present during the burglary. In addition to his testimony, Acosta presented testimony from R.J.'s mother and from his brother indicating that he was not with R.J. during the commission of the burglary. Detective Fisher's hearsay testimony that R.J. told him that Acosta was not present during the burglary, if admitted, would have been cumulative evidence. Therefore, Detective Fisher's hearsay testimony was not critical evidence. Unlike the evidence in Chambers and Griffin, which was the only means the defendants in those cases had of presenting their defenses, Detective Fisher's hearsay testimony was not the only means Acosta had of presenting his defense. Because Detective Fisher's hearsay testimony was not critical evidence for Acosta's defense, the trial court's exclusion of Detective Fisher's hearsay testimony did not deny Acosta a "trial in accord with traditional and fundamental standards of due process." Chambers, 410 U.S. at 302.

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Conclusion

Based on the foregoing, the judgment of the Court of Criminal Appeals is reversed and this case is remanded to that court for proceedings consistent with this opinion.

REVERSED AND REMANDED.

Bolin, Parker, Main, and Wise, JJ., concur.

Shaw, J., concurs in the result.

Moore, C.J., and Murdock and Bryan, JJ., dissent.

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MOORE, Chief Justice (dissenting).

I agree with the Court of Criminal Appeals that the trial court's "strict application of the hearsay rule deprived [Devonte Cortes] Acosta of the ability to present a complete defense to the jury." Acosta v. State, [Ms. CR-13-1763, May 29, 2015] \_\_\_ So. 3d \_\_\_, \_\_\_ (Ala. Crim. App. 2015). "[T]he Constitution guarantees criminal defendants a "meaningful opportunity to present a complete defense."" Holmes v. South Carolina, 547 U.S. 319, 324 (2006) (quoting Crane v. Kentucky, 476 U.S. 683, 690 (1986)); see also McWhorter v. State, 142 So. 3d 1195, 1255-56 (Ala. Crim. App. 2011) (recognizing a criminal defendant's right to present a complete defense). In this case, I believe that, under Chambers v. Mississippi, 410 U.S. 284 (1973), and Ex parte Griffin, 790 So. 2d 351 (Ala. 2000), the trial court applied the hearsay rule "'mechanistically to defeat the ends of justice.'" Griffin, 790 So. 2d at 354 (quoting Chambers, 410 U.S. at 302). I therefore respectfully dissent.

In Chambers, Leon Chambers was accused of murdering a police officer named Aaron Liberty. However, another person, Gable McDonald, provided a sworn statement confessing to the

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crime for which Chambers had been charged. McDonald also made three other statements declaring that he shot Liberty. One month later, McDonald changed his story and repudiated his prior sworn confession. The case against Chambers went to trial. Chambers wanted to admit McDonald's confession, but the trial court would not allow it because it was hearsay. When the State refused to call McDonald as a witness, Chambers called him and asked the court for permission to treat him as a hostile witness. The trial court denied Chambers's request under a Mississippi rule of evidence forbidding a party from cross-examining his own witness.

Chambers was convicted, and his case eventually went to the United States Supreme Court, which held:

"Few rights are more fundamental than that of an accused to present witnesses in his own defense. E.g., Webb v. Texas, 409 U.S. 95 (1972); Washington v. Texas, 388 U.S. 14, 19 (1967); In re Oliver, 333 U.S. 257 (1948). In the exercise of this right, the accused, as is required of the State, must comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence. Although perhaps no rule of evidence has been more respected or more frequently applied in jury trials than that applicable to the exclusion of hearsay, exceptions tailored to allow the introduction of evidence which in fact is likely to be trustworthy have long existed. The testimony rejected by the trial court here bore persuasive assurances of trustworthiness

and thus was well within the basic rationale of the exception for declarations against interest. That testimony also was critical to Chambers' defense. In these circumstances, where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice.

"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, 410 U.S. at 302-03 (emphasis added).

Similarly, in Griffin, Louis Griffin was convicted of murdering Christopher Davis. Another man, Anthony Embry, had pleaded guilty to Davis's murder. However, almost four years later, Griffin stated in an allocution that he had participated in Davis's murder. As a result, the State exonerated Embry and charged Griffin with Davis's murder. At trial, Griffin claimed that he lied in his allocution so that he would receive favorable treatment. Griffin also sought to

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introduce Embry's guilty plea into evidence, but the trial court refused.

Griffin's case ultimately reached this Court, which determined that the trial court violated Griffin's constitutional right to present a defense. Griffin, 790 So. 2d at 353. The Court noted that Alabama had long recognized a defendant's right to prove that somebody else committed the crime, but it held that the evidence must be probative, not speculative. To that end, the Court developed the following three-element test to determine whether such evidence was admissible: "(1) the evidence 'must relate to the "res gestae" of the crime'; (2) the evidence must exclude the accused as a perpetrator of the offense; and (3) the evidence 'would have to be admissible if the third party was on trial.'" Griffin, 790 So. 2d at 354.

As to the claim that Embry's guilty plea was hearsay, this Court cited Chambers for the proposition that, "'[i]n these circumstances, where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the

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ends of justice.'" Griffin, 790 So. 2d at 354 (quoting Chambers, 410 U.S. at 302). This Court then held:

"We are faced with the same general situation here [as was the Supreme Court in Chambers]. Without Embry's plea, Griffin will not be able to place his defense before a jury; to bar him from placing his defense before the jury would violate his due-process rights under the 5th and 6th Amendments. Furthermore, as we have noted above, this alternative theory of the crime that Griffin sought to present is not speculative, but probative, and Embry's plea, along with the evidence of the arrests and the exoneration, is some of the strongest evidence Griffin could present to the jury to prove that someone else committed the crime. Rather than violate Griffin's right to due process, we follow the United States Supreme Court's holding in Chambers and hold that Griffin's constitutional rights supersede the hearsay rule in the Alabama Rules of Evidence. However, in doing so, we note that not in every case will the defendant's right to present his defense supersede the hearsay rule; it will supersede that rule only in those cases that, as indicated by the first two elements of the test stated above, have a probative alternative theory of culpability and not an alternative theory that is merely speculative and meant only to confuse the jury."

Griffin, 790 So. 2d at 355.

Like the defendants in Chambers and Griffin, Acosta attempted to present evidence indicating that R.J. committed the crime instead of him. Also like Chambers and Griffin, this case involves "'constitutional rights directly affecting the ascertainment of guilt,'" which means that "'the hearsay rule

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may not be applied mechanistically to defeat the ends of justice.'" Griffin, 790 So. 2d at 354 (quoting Chambers, 410 U.S. at 302). R.J.'s statement would have been admissible under Griffin's three-element test and would have been "some of the strongest evidence [Acosta] could present to the jury to prove that someone else committed the crime." Griffin, 790 So. 2d at 355. Moreover, if R.J.'s statement were admitted, the State still would have had the right to cross-examine Detective Fisher regarding R.J.'s statement, which would have allowed the jury to determine whether the evidence was credible. Thus, under those circumstances, I believe that R.J.'s statement should have been admitted in order to guarantee Acosta's right to present a "complete defense." Holmes, 547 U.S. at 324.

The main opinion reads Chambers and Griffin more narrowly, reasoning that their holdings "rest upon the fact that the trial court's strict application of the rules of evidence excluded critical evidence ...." \_\_\_ So. 3d at \_\_\_ (emphasis added). The main opinion then provides a definition of what constitutes "critical" evidence and concludes that the evidence in this case was not "critical." See \_\_\_ So. 3d at

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\_\_\_\_. However, even though Chambers described the evidence in that case as "critical," the rule enunciated in Chambers was not limited solely to "critical" evidence. As the Supreme Court enunciated in Chambers: "In these circumstances, where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice." 410 U.S. at 302. This is the rule from Chambers that was followed in Griffin, which likewise did not limit Chambers's application to "critical" evidence. See Griffin, 790 So. 2d at 354-55. I therefore believe that the main opinion construes Chambers and Griffin too narrowly.

Moreover, even if Chambers and Griffin apply only to "critical" evidence, I believe that R.J.'s statement would qualify as "critical" evidence in this case. The main opinion defines "critical evidence" as "'[e]vidence strong enough that its presence could tilt a juror's mind.'" \_\_\_\_ So. 3d at \_\_\_\_ (quoting Black's Law Dictionary 674 (10th ed. 2014)). The main opinion concludes that Detective Fisher's testimony regarding R.J.'s statement was not critical because it was cumulative. However, as Griffin noted, an admission from an assailant "is

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some of the strongest evidence [a defendant] could present to the jury to prove that someone else committed the crime." Griffin, 790 So. 2d at 355. The jury already had conflicting testimony in this case, but a statement from R.J. that he committed the crime and that Acosta was not with him when he committed it might have created the reasonable doubt necessary to acquit Acosta. I therefore cannot agree that Detective Fisher's testimony regarding R.J.'s statement was not critical evidence.

For these reasons, I respectfully dissent.

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MURDOCK, Justice (dissenting).

I respectfully dissent. Of particular concern, in my view, is the issue whether the United States Supreme Court's decision in Chambers v. Mississippi, 410 U.S. 284 (1973), is apposite to a case such as this (as presumed by the parties and the main opinion) where the potential exculpation of the defendant is not a function of a hearsay declarant's inculcation of himself.

Whether Chambers and Similar Cases are Apposite

It might be argued that the holding in Chambers v. Mississippi was limited to the unusual facts of that case. Chambers involved an arguably antiquated evidentiary "voucher" rule that prohibited the defendant, Chambers, from impeaching through "cross-examination" the trial testimony of his own witness, McDonald. At trial, McDonald had repudiated his earlier out-of-court statement that he, rather than Chambers, had committed the criminal act at issue. This bar to the cross-examination of McDonald as a hostile witness, when combined with the exclusion on hearsay grounds of testimony from several other prospective witnesses as to similar out-of-court statements by McDonald, was held by the Supreme Court to

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violate Chambers's due-process right to present his defense. The Chambers Court appeared to emphasize that its holding was limited to the unique facts of that case, however:

"We conclude that the exclusion of this critical evidence [from other witnesses based on hearsay grounds], coupled with the State's refusal to permit Chambers to cross-examine McDonald [because of the 'voucher rule'], denied [Chambers] 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, 410 U.S. at 302-03 (emphasis added).

Consistent with this declaration, the State of Alabama argues here that Chambers should in fact be limited to the facts of that case. There is much from a policy standpoint -- particularly with respect to the integrity of rules of evidence designed to promote reliable outcomes -- to commend the State's argument. And without question this is a confusing area of the law. The United States Supreme Court itself has evidenced its own uncertainty as to the reach and meaning of Chambers. In Montana v. Egelhoff, 518 U.S. 37, 53

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(1996), the Supreme Court cautioned against reading Chambers too broadly, stating:

"Thus, the holding of Chambers -- if one can be discerned from such a fact-intensive case -- is certainly not that a defendant is denied 'a fair opportunity to defend against the State's accusations' whenever 'critical evidence' favorable to him is excluded, but rather that erroneous evidentiary rulings<sup>2</sup> can, in combination, rise to the level of a due process violation."

(Emphasis added.)

The problem for the State in this regard is that Chambers has been followed in decisions such as Green v. Georgia, 442 U.S. 95, 97 (1979), and this Court's decision in Ex parte Griffin, 790 So. 2d 351 (Ala. 2000), which do not involve the same facts as did Chambers. The State obviously cannot ask us to overrule Green, and it does not seek to distinguish that case from the present one. Nor does it ask us to overrule Griffin or seek to distinguish it on a viable ground.

In Green, the United States Supreme Court invoked Chambers in holding that due process was violated during the penalty phase of a capital trial by the exclusion of a

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<sup>2</sup>The Egelhoff Court's baffling reference to "erroneous evidentiary rulings" in Chambers is itself at odds with the factual premise of Chambers and is perhaps a further reflection of the confusion and uncertainty engendered by Chambers.

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statement by third party that he had killed the victim. The statement inculpated the third party as the killer and thereby exculpated the defendant.

In Griffin, this Court invoked Chambers and held that due process was violated when otherwise applicable rules of evidence prevented Griffin from introducing evidence that a third party had pleaded guilty to, and had even been convicted of, the murder with which Griffin was charged (although a state trial court subsequently dismissed the third party's guilty-plea conviction after the State decided to prosecute Griffin for the murder). This Court noted that, as a general rule, Alabama courts had, long before Chambers, recognized "the right of a defendant to prove his innocence by presenting evidence that another person actually committed the crime," 790 So. 2d at 353-54, with the caveat that evidence that another person committed the crime "is admissible only when it is probative and not merely speculative." Griffin, 790 So. 2d at 354 (emphasis added). We further noted:

"Three elements must exist before this evidence can be ruled admissible: (1) the evidence 'must relate to the "res gestae" of the crime'; (2) the evidence must exclude the accused as a perpetrator of the offense; and (3) the evidence 'would have to be admissible if the third party was on trial.' See

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Ex parte Walker, 623 So. 2d [281] at 284 [(Ala. 1992)]."

Id.

Taking into consideration the circumstances presented in Chambers, Green, Griffin, and other federal cases that have invoked Chambers, a sound argument can be made that, if Chambers is not to be viewed as sui generis, it is at least properly viewed as limited to those cases where a defendant seeks to defend against a criminal prosecution by offering proof that some particular third party committed the specific criminal act of which he is accused. That is not the situation presented in the case now before this Court.

In West v. Bell, 550 F.3d 542 (6th Cir. 2008), the United States Court of Appeals for the Sixth Circuit explained that, in Chambers, there was only one perpetrator and, thus, the inculcation of another particular person logically served to exculpate the defendant. 550 F.3d at 558. In contrast, in West, the evidence indicated that there were two perpetrators. Thus, the evidence implicating another particular party did not necessarily exculpate West. As a result, the Sixth Circuit distinguished Chambers from the case before it and found that the decision of the Tennessee Supreme Court was not

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contrary to Chambers. 550 F.3d at 558. See generally Smith v. Gordy (No. 7:14-CV-1420-AKK-TMP) (N.D. Ala. Sept. 4, 2015) (not reported in F. Supp. 3d) (denying federal habeas corpus petition after state conviction for trafficking in marijuana and finding no error in excluding evidence of a guilty plea by another person to possession of the same marijuana at issue in Smith's case; Smith was unable to meet the second prong of the Griffin test because drugs can be possessed jointly and the third party's guilty plea did not exclude Smith's participation in the crime).

In United States v. Thomas, 62 F.3d 1332 (11th Cir. 1995), the United States Court of Appeals for the Eleventh Circuit aptly observed:

"The second issue relating to the exclusion of the McCoys' out-of-court statements is whether, even though the statements were outside the ambit of Rule 804(b)(3), [Fed. R. Evid.,] the exclusion of them from evidence denied the Thomases their right to a fair trial. The Thomases contend that without the McCoys' statements, they could not put forth their defense that they lacked the requisite intent to defraud. The Thomases cite three cases for support: Green v. Georgia, 442 U.S. 95, 97 (1979); Chambers v. Mississippi, 410 U.S. 284, 302 (1973); and United States v. Benveniste, 564 F.2d 335, 337 (9th Cir. 1977). In all three, the defendant's constitutional rights were violated by the trial court's decision to exclude 'testimony from a witness concerning statements made by another person to that witness

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which tended to incriminate the other person and exculpate the defendant.' Benveniste, 564 F.2d at 342. See also Green, 442 U.S. at 96."

62 F.3d at 1338 (emphasis added).

In other words, Chambers has been understood to be apposite in cases involving of out-of-court declarations that inculcate the declarant in such a way that necessarily exculpates the defendant. See also, e.g., Thomas v. State, 539 So. 2d 375, 396 (Ala. Crim. App.), aff'd, 539 So. 2d 399 (Ala. 1988) ("The most important distinction between this case and Chambers is the effect of the excluded evidence on the guilt or innocence of the person on trial. In Chambers, the hearsay statements which pointed to the guilt of McDonald also pointed to the innocence of Chambers.").

As this Court explained in Griffin:

"The United States Supreme Court has held that a defendant has a right to put on a defense and that that right includes the opportunity to present evidence proving that another person committed the offense for which he has been charged. See Chambers v. Mississippi, 410 U.S. 284 ... (1973); Washington v. Texas, 388 U.S. 14 ... (1967)."

Griffin, 790 So. 2d at 353.

Thus, Chambers arguably represents a narrowly carved niche of cases in which a defendant seeks to prove his or her

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own innocence as to a certain criminal act by introducing evidence of another particular person's commission of that same act. To expand the Chambers holding beyond this category of cases holds the potential to threaten a wide array of carefully framed evidentiary rules designed to limit the presentation of evidence at trial to evidence with a sufficient likelihood of reliability.

Here, R.J.'s out-of-court statement that Acosta simply was not present during the crime was not testimony that some particular person other than Acosta actually filled the role of the third participant in the crime. Unlike Chambers, there were multiple participants in the crime here. Therefore, insofar as R.J.'s out-of-court statement served to inculcate R.J., it did not in that aspect logically exculpate Acosta. And, for that matter, R.J.'s out-of-court declaration did not identify any particular third person as filling the role in the crime that Acosta was accused of filling. Thus, for this case to be decided on R.J.'s testimony that Acosta was not present during the burglary would make use of the very type of "speculative" evidence as to who actually did commit the acts in question disavowed in Griffin. (And, even if R.J.'s

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statement had identified a particular person as the third participant in the crime, I see no basis for concluding that such a declaration would be admissible in the trial of that third person as would be required under the third prong of Alabama's general rule for the admission of such evidence as described in Griffin.)

In short, I question the premise of the main opinion, i.e., that Chambers is apposite to a case of this nature and might require the reversal of the defendant's conviction in this case if only the facts (the other evidence offered by Acosta) had been a little different (less) so as to make Acosta's defense more dependent upon the hearsay testimony in question. By positing our willingness to consider the Chambers holding in cases that do not fall within the narrow line of cases contemplated by Chambers and its progeny and this Court's own holding in Griffin, I fear we risk undermining important evidentiary rules designed to assure the reliability of evidence and setting the stage for improper reversals of criminal convictions in a broader array of cases than the Chambers holding contemplated.

The State's "Other-Evidence" Argument

Unfortunately for the State, however, it does not argue that the hearsay testimony at issue in this case fails to qualify for favorable treatment under Chambers (and its progeny) and Griffin on the ground that this testimony is not actually testimony that inculcates a particular third person and thereby logically exculpates Acosta. The State ignores the failure of the evidence in this regard and, instead, argues simply that the hearsay evidence at issue here is not "critical evidence" for Acosta's defense. Specifically, the State pins its hope for a reversal on an argument that the hearsay evidence at issue is not "critical" to Acosta because, the State says, it is "cumulative" of "other evidence" upon which Acosta could and did rely. Therefore, I will proceed, like the parties and the main opinion, to assume that Chambers is apposite and consider this "other-evidence" argument of the State within that assumed context.

The main opinion agrees with the State's argument that the testimony of the investigating police officer -- that R.J. told him that R.J. participated in the crime but that Acosta did not -- is not "critical evidence" because there is

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"other evidence" Acosta can use in an attempt to prove his defense that he was not present. Because I do not find support in Chambers and its progeny for this "other-evidence" rationale, I respectfully disagree with the conclusion reached by the main opinion that Acosta is not entitled to relief under those cases, including Griffin.

In Chambers, the United States Supreme Court noted that due process includes "the right to a fair opportunity to defend against the State's accusations," 410 U.S. at 294, and specifically the right "of an accused to present witnesses in his own defense." 410 U.S. at 302. Chambers held that where testimony is critical to a defense, and "where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice." Id. at 302.

The main opinion appears to acknowledge these principles but concludes that there was no violation of due process here because, it concludes, R.J.'s statement exonerating Acosta was not "critical" evidence. The main opinion defines "[c]ritical evidence ... as '[e]vidence strong enough that its presence could tilt a juror's mind.'" Black's Law Dictionary 674 (10th

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ed. 2014)." \_\_\_ So. 3d at \_\_\_. Notwithstanding its invocation of this definition, the main opinion concludes that testimony about R.J.'s statement was not critical evidence because "Detective Fisher's hearsay testimony was not the only means Acosta had of presenting his defense." \_\_\_ So. 3d at \_\_\_.

I cannot agree that the evidence is not "critical" merely because there is "other evidence" to support the defense. First, in Chambers, the excluded evidence was held to be critical even though there was other evidence to support the defense. Chambers sought to prove that another person, McDonald, fired the shots that killed a police officer. The defense called McDonald as a witness and introduced a written confession from McDonald; on cross-examination, McDonald renounced his written confession. The defense was not allowed to cross-examine McDonald (under a rule that a party cannot impeach its own witness) and was not allowed to introduce testimony from three of McDonald's friends that McDonald had admitted to them that he shot the police officer. The Supreme Court held that Chambers was denied due process by the ruling that prevented his cross-examination of McDonald.

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Significantly, the excluded examination was not the only available evidence to support the defense: there was testimony from an eyewitness who testified that McDonald was the shooter, as well as McDonald's own written confession. The Supreme Court noted that

"all that remained from McDonald's own testimony was a single written confession countered by an arguably acceptable renunciation. Chambers' defense was far less persuasive than it might have been had he been given an opportunity to subject McDonald's statements to cross-examination or had the other confessions been admitted."

Chambers, 410 U.S. at 294.

In Griffin, the decision did not turn on the presence or absence of other evidence. It is noteworthy, however, that this Court observed, not that the evidence at issue was the only evidence, but that it was "some of the strongest evidence Griffin could present to the jury to prove that someone else [had] committed the crime." Griffin, 790 So. 2d at 355 (emphasis added).

The "other evidence" indicating that Acosta was not present during the crime does not eliminate the need for evidence of R.J.'s statement. The other evidence identified by the main opinion is (1) Acosta's own testimony,

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(2) testimony from Acosta's brother, and (3) testimony from R.J.'s mother that Acosta was at her house during the relevant period.

The testimony from Acosta and his brother is not an adequate substitute for R.J.'s statement. Their testimony easily could have been discounted by the jury as biased. The testimony from R.J.'s mother is also an inadequate substitute for at least two reasons.

First, because the mother was not at the scene of the crime, the jury was aware that, unlike R.J., she could not testify directly as to who did or did not commit the crime. Second, the mother's testimony is to some degree inconsistent, as to the relevant times, with a written statement given by Acosta to the police the day after the crime. This inconsistency, combined with the vagaries of memory and inherent ambiguity of some of the language in the mother's testimony, left room for the jury to discount that testimony.

In light of the foregoing, it seems that the testimony of Acosta's other witnesses -- which, lest we forget, was directly contradicted by the victims' testimony -- would have been greatly strengthened had it been corroborated by

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testimony from a police officer regarding the statement of a participant in the crime. In point of fact, the State actually concedes in its brief to the Court of Criminal Appeals that evidence as to R.J.'s statement "would have been a boon for Acosta." Nonetheless, the State then argues that the evidence was not critical because there was other, albeit weaker, evidence on the same point.

Aside from the aforesaid particulars of this case, I have more general concerns regarding the workability and propriety of an "other-evidence" test. First, how much is enough? How much "other evidence" is needed to warrant the exclusion of evidence that could make a the difference in the jury's perceptions? Should this sufficiency determination be left to the jury? I see no standard to guide trial and appellate court judges in this endeavor. What might be deemed by one judge to be "enough" "other evidence" of a fact to warrant a ruling barring a defendant from introducing any more evidence of that fact might be quite different from what might be deemed to be "enough" "other evidence" by another judge.

Moreover, the "other-evidence" approach seems even more problematic when one considers that it would require us to

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allow one defendant to introduce certain evidence because he or she has no other corroborating evidence, while denying that right to a defendant who can in fact gather corroborating evidence of the same fact. Does this make sense? In relation to evidence that could make the difference in the outcome of a criminal trial, why would we put the defendant who can gather corroborating evidence of the exculpatory fact in a worse position in relation to proving that fact than a defendant who is without any such corroborating evidence?

In fact, the approach of allowing otherwise inadmissible evidence if it is the only evidence supportive of an exculpatory fact while excluding it when other evidence is available that tends to prove the same fact actually inverts the role of corroborative evidence set out in Chambers. In Thomas v. State, supra, the Court of Criminal Appeals explained Chambers as follows:

"In determining that the hearsay statements of McDonald's three friends should have been allowed in evidence, the Supreme Court decided that the hearsay statements 'were originally made and subsequently offered at trial under circumstances that provided considerable assurance of their reliability.' Chambers, [410 U.S. at 300,] 93 S.Ct. at 1048.

"The reasons for this determination were that 'each of McDonald's confessions was made

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spontaneously to a close acquaintance shortly after the murder had occurred,' 'each one was corroborated by some other evidence in the case,' 'the sheer number of independent confessions provided corroboration for each' and 'each confession ... was in a very real sense self-incriminatory and unquestionably against interest.' Chambers, [410 U.S. at 300-01,] 93 S.Ct. at 1048."

539 So. 2d at 396 (emphasis added). The Thomas court then went on to hold that the evidence proffered in the case before it had been properly excluded by the trial court because it lacked sufficient "assurances of reliability," a finding reached largely based on the fact that the evidence was a "lone hearsay statement [that] was not corroborated by any other evidence":

"In the case at bar, we do not find any of the assurances of reliability that were present in Chambers. At the guilt phase of the trial, the lone hearsay statement was not corroborated by any other evidence and it was not 'unquestionably' against Billy's interest. Billy's statement was made to his and the appellant's mother. Moreover, Billy did not testify at this trial and thus could not be cross-examined by the State."

539 So. 2d at 396 (emphasis added).

In Green, supra, the United States Supreme Court found it important that there were "substantial reasons ... to assume [the] reliability" of the evidence at issue, including

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the fact there was other evidence corroborating the excluded testimony that itself was "ample":

"Regardless of whether the proffered testimony comes within Georgia's hearsay rule, under the facts of this case its exclusion constituted a violation of the Due Process Clause of the Fourteenth Amendment. The excluded testimony was highly relevant to a critical issue in the punishment phase of the trial, see Lockett v. Ohio, 438 U.S. 586, 604-605 (1978) (plurality opinion); id., at 613-616 (opinion of Blackmun, J.), and substantial reasons existed to assume its reliability. Moore made his statement spontaneously to a close friend. The evidence corroborating the confession was ample, and indeed sufficient to procure a conviction of Moore and a capital sentence. The statement was against interest, and there was no reason to believe that Moore had any ulterior motive in making it."

Green, 442 U.S. at 97.

In this case, unlike in Thomas where exclusion of the evidence was upheld on appeal, but like in Chambers and Green where the exclusion of the evidence was overturned on appeal, the hearsay statement has "assurances of reliability" because there is in fact corroborating "other evidence." The hearsay statement at issue here is one that was given to an investigating police officer, who would be the witness to testify at trial as to that statement and who would be subject to cross-examination by the State as to the circumstances under which the statement was made and the reliability of his

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memory or record of it. Although the declarant himself would not be available for cross-examination because of his invocation of the Fifth Amendment, as was the case in Chambers and Griffin his statement was against his own interest in that it involved an admission that he was a participant in the crime. Moreover, as in Chambers and Griffin, the fact that R.J.'s "hearsay statement was ... corroborated by ... other evidence" (in this case, the testimony of Acosta and two other witnesses) provides further "assurance of reliability" that supports the admission of the statement, not its exclusion.

In sum, I cannot conclude that evidence is not critical merely because there is "other evidence" on the same point. As to this particular case, I do not see how evidence the State concedes would be "a boon for [the defendant]" in a criminal case could not be considered "critical evidence."

Bryan, J., concurs.

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BRYAN, Justice (dissenting).

I join Justice Murdock's dissent. I write specially to emphasize that my dissent is based on the State's failure to argue to this Court that the "critical-evidence" test, as applied in Chambers v. Mississippi, 410 U.S. 284 (1973), is inapposite under the facts of this particular case.