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No. _____

_____

IN THE

SUPREME COURT OF THE UNITED STATES

_____

Mladen Mitrovic
_____ — PETITIONER
(Your Name)

vs.

United States of America
_____ — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

Eleventh Circuit Court of Appeals
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Mladen Mitrovic
(Your Name)
LSCI Allenwood (LOW)
P.O. Box 1000
(Address)
White Deer, PA 17887
(City, State, Zip Code)
None
(Phone Number)

QUESTION[S] PRESENTED

1) WHETHER THE DISTRICT COURT ERRONEOUSLY EXCLUDED THE STATEMENTS OF UNAVAILABLE WITNESSES, THEREBY DENYING PETITIONER THE RIGHT TO PRESENT A COMPLETE DEFENSE IN VIOLATIION OF THE FIFTH AND SIXTH AMENDMENTS TO THE UNITED STATES CONSTITUTION; AND

2) WHETHER THE EXCLUDED STATEMENTS THAT WERE MADE BY FOREIGN NATIONALS TO OFFICERS OF THE COURT IN ANTICIPATION TO LATER TESTIFY AT ANOTHER LEGAL PROCEEDING SHOULD HAVE BEEN ADMISSIBLE UNDER THE HEARSAY RULE OF EVIDENCE.

LIST OF PARTIES

[X] All parties appear in the caption of the case on the cover page.

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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Table of Authorities

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[X] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

[ ] reported at _____; or,
[X] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

[ ] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

JURISDICTION

[X] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was May 23, 2018.

[X] No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[ ] For cases from **state courts**:

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner was deprived of his Constitutional Right under the Due Process Clause protected by the Fifth Amendment and under the Fair Trial Clause protected by the Sixth Amendment. From his conviction pursuant the statutory provisions found in 18 USC §§1425(b) and 1451(e) in procuring naturalization and citizenship for himself by allegedly providing false and fraudulent information as to material facts in his application for naturalization and citizenship on his N-44 Form.

PRELIMINARY STATEMENT

This petition presents a case of first impression to a very complex issue of constitutional law that the United States Supreme Court has never before had an opportunity to debate. Specifically the question of law is whether Mr. Mitrovic was denied his right to "present a complete defense" as protected by the Fifth and Sixth Amendments to the United States Constitution. When the District Court erroneously excluded several favorable statements made to officers of the Court by ten (10) key witnesses who are foreign nationals who were outside of the District Court's subpoena power. Therefore the witnesses would not be compelled to testify in any manner for the Defense.

Although this Court has made rulings on hearsay evidence before pursuant to Federal Rules of Evidence 807. This Court has never had the chance to decide whether potential witness statements made by Foreign National who could not be compelled to testify or be deposed in a criminal case after the initial statements were made to officers of the Court who were investigating who had interviewed them. Therefore, this case presents a question of law that is materially distinguishable from Chambers v. Mississippi, 410 U.S. 284 (1973). That needs to be addressed by this Court given the aggressive and complex immigration cases now being argued within our Federal Court System.

STATEMENT OF THE CASE

On September 19, 2012, a Grand Jury sitting in the Northern District of Georgia returned a single count indictment charging Mr. Mitrovic with procuring "naturalization and citizenship for himself, to which he was not entitled [by] providing false and fraudulent information as to material facts in his Application for Naturalization, Form N-44, when he falsely represented that had [sic] never (1) persecuted any person because of race, religion, national origin, membership in a particular social group, or political opinion; (2) given false or misleading information to any U.S. government official while applying for any immigration benefit; and (3) lied to any U.S. government official to gain entry or admission into the United States, all in violation of Title 18 United States Code, Section 1425(b) and Title 8, United States Code, Section 1451(e)." (Doc. 1). In essence, the government's theory was that Mr. Mitrovic, during the 1990's war in Bosnia, was a guard at one of the prison camps where he beat prisoners because of their religion and/or ethnicity and that by answering "No" to a number of questions during his Naturalization process, he provided false or misleading information that led to his procuring citizenship. (See, Doc. 73).

On September 24, 2012, Mr. Mitrovic was arrested and brought before a United States Magistrate where he was arraigned on the Indictment, and counsel, Morad Fakhimi was appointed. (Doc. 5, 4, 17). Thereafter, on July 5, 2013, undersigned counsel, Jeffrey Ertel, entered a notice of substitution of counsel and assumed the representation of Mr. Mitrovic.[1] In preparation for trial, new counsel determined that out of the country investigation was necessary to prepare a defense. In an attempt to obtain the names of individuals who might provide useful

1 Mr. Fakhimi, because of sequestration, left the employment of the Federal Defender Program and could no longer represent Mr. Mitrovic.

information, Mr. Mitrovic served a subpoena on the International Committee of the Red Cross (ICRC).[2] Counsel for the ICRC successfully moved to quash Mr. Mitrtovic's subpoena. (Doc 59, 66).

Thereafter, on February 14, 2014, the district court conducted a status conference with the parties wherein counsel for Mr. Mitrovic indicated he had identified some witness that required international travel to interview but that he was having difficulty obtaining permission from the United States State Department. (Doc. 299 at 8-9). At an April 15, 2014 status conference, counsel for Mr. Mitrovic reported he had recently travelled to Bosnia and conducted an investigation that yielded at least fourteen (14) people he believed had material information and who would need to be deposed. (Doc. 300 at 6).

Also on April 15, 2014, Mr. Mitrovic filed a Motion for Bill of Particulars wherein he sought clarification on the second and third allegations contained in the indictment, namely how and when Mr. Mitrovic purportedly gave false or misleading information to any U.S. government official, and how and when did he lie to any U.S. government official. (Doc. 69). The government responded that the subject of the prosecution focused on responses on the Application for Naturalization Form N-400, which Mr. Mitrovic filled out in an attempt to obtain United States Citizenship. Specifically, the government asserted that as to the second and third allegations in the indictment, "the Defendant made several false or misleading written and oral representations, which he affirmed under penalty of perjury in an interview with a United States immigration officer, including:

> 1. Defendant falsely stated in response to Question 13 of the refugee application, Form I-590, that he only served in the catering units of the Yugoslavian National Army, from 1980-1982, when in fact Defendant knew he had served in the Army of the Republica Srpska, also called the Vojska Republike Srpske (VRS) during the Bosnian conflict, and;

2 The ICRC was involved in liberating those individuals held at camps during the Bosnian war and in that capacity obtained identifying information.

2. Defendant falsely indicated on the Sworn Statement of Refugee Applying for Entry in the United States Form G-646, that he had not committed a crime of moral turpitude, when in fact Defendant knew he had committed crime [sic] moral turpitude."

(Doc. 73, at 2-3).

On April 21, 2014, Mr. Mitrovic submitted a Motion to Allow Depositions Pursuant to F.R.Cr.P. 15. In that Motion Mr. Mitrovic outlined how all of the fourteen (14) witnesses he had interviewed were outside the subpoena power of the district court and how all of the proposed deponents indicated they would not voluntarily travel to the United States to testify at Mr. Mitrovic's trial. Further, Mr. Mitrovic outlined how the proposed testimony of each witness would be relevant--the deponents would refute that Mr. Mitrovic was a guard at the camp and refute that he persecuted anyone at all. (Doc.72). The government, upon reviewing the Motion, did not object to the depositions (Doc. 74), and the Court granted Mr. Mitrovic's motion. (Doc.75).[3] On July 15, 2014, after he had conducted further investigation in Bosnia, Mr. Mitrovic supplemented the previously filed Motion to Allow Depositions to include an additional eleven (11) witnesses, bringing the total to twenty-five witnesses he planned to dipose. (Doc.84).[4] Each of these witnesses were of Muslim ethnicity and each had been in the Trnopolje camp and each, upon being shown photographs of Mr. Mitrovic, said they could not identify him as being a guard at the Trnopolje camp. After the district court granted the Supplemental Motion to Take Depositions, Mr. Mitrovic began the "Letters Rogatory" process wherein

3 In the same order, the district court technically denied Mr. Mitrovic's Motion for Bill of Particulars, but the government's response effectively provided the information requested in the Motion.

4 While the government originally filed a response opposing Mr. Mitrovic's Supplemental Motion asserting Mr. Mitrovic failed to produce the names of the deponents or the dates and locations of the depositions (Doc. 86), after discussions between the parties, the government subsequently withdrew its opposition (Doc.90) and the district court granted the Supplemental Motion. (Doc.91).

the Bosnian government was petitioned to allow the parties to depose the witnesses identified by Mr. Mitrovic. (See, Doc. 303).

On November 18, 2014, a Grand Jury sitting in the Northern District of Georgia returned a superseding indictment that listed four (4) purported false entries on the Application for Naturalization, Form N-400, that Mr. Mitrovic had never:

1. Persecuted any person because of race, religion, national origin, membership in a particular group, or political opinion;
2. Committed a crime or offense for which he was not arrested;
3. Given false or misleading information to any U.S. government official while applying for any immigration benefit; and
4. Lied to any U.S. government official to gain entry or admission into the United States.

(Doc. 104)

Ultimately, permission was obtained for Mr. Mitrovic to obtain the deposition testimony of Bosnian witnesses. Prior to traveling to Bosnia for depositions, counsel for Mr. Mitrovic contacted all of the twenty five (25) potential witnesses. Each reaffirmed their prior statements and confirmed they would be willing to be deposed. Counsel for Mr. Mitrovic traveled to Bosnia immediately prior to the scheduled depositions and again made contact with potential witnesses. This time, however, ten of the witnesses refused to be deposed. All of those who refused were of Muslim ethnicity and were prisoners at the Trnopolje camp. (Doc. 164 at ¶8; Doc. 310 at 9-10).

Upon returning to the United States after taking the depositions of those witnesses who would comply, Mr. Mitrovic filed a Motion to Allow Testimony of Unavailable witnesses. (Doc. 164) In the motion, Mr. Mitrovic highlighted that, because of the agreement between the United States and Bosnian government, he did not have the authority to compel the witness to attend the depositions.

Thus, the witnesses were unavailable. ID.

In the motion, Mr. Mitrovic summarized the substance of the witnesses statements as follows:

> Denzila Besic: was in the Trnopolje camp on two different occasions for a total of 18 days; people were allowed to leave the camp if there were family or friends nearby; when shown various photographs from Mr. Mitrovic's A-file she said she did not recognize him as being a guard at the camp.
>
> Fatka Besic: was in the Trnopolje camp for two months and 24 days beginning on May 24, 1992; she was shown photographs from Mr. Mitrovic's A-File and did not recognize him as being a guard at the camp.
>
> Asim Dzamastagic: was in the Trnopolje camp from July 20 to July 28, 1992; he was shown photographs from Mr. Mitrovic's A-File and did not recognize him as being a guard at the camp.
>
> Tima Dzamastagic: (Asim's wife) was in the Trnopolje from July 20 to July 28, 1992; was shown photographs from Mr. Mitrovic's A-File and did not recognize him as being a guard at the camp.
>
> Hamdija Cirkin: was in the Trnopolje camp for ten days; when he was released, he continued to return to the camp to bring food for those who remained inside; was shown photograhs from Mr. Mitrovic's A-File and did not recognize him as being a guard at the camp.
>
> Sabahudin Garibovic: he is the current president of a "survivors club" in Kosorac and was a survivor of the "cliffs massacre" where more than two hundred prisoners en route from the camp at Trnopolje were taken by a special response team of the Public Security Center of Prijedor to the Koriciani Cliffs where they were lined up and shot, with the bodies falling into the ravine; he spent 88 days in the camp at Trnopolje and was twice beaten while there; he was shown various photographs from Mr. Mitrovic's A-File and did not recognize him as being a guard at the camp; he initially agreed to be deposed but when re-interviewed just prior to the depositions refused saying that he would lose people's trust, friendship and respect if it was perceived he said anything that could help a Serb.
>
> Sedat Islamovski: he is the brother of Sevdat Islamovski who was deposed; he was transferred to Trnopolje from Keratem in August of 1992 and was there until it closed; he was shown various photographs from Mr. Mitrovic's A-File and could not identify him as being a guard at the camp; he originally agreed to be deposed but immediately before the taking of depositions refused saying he was frightened of what other people might do to him if they knew he testified on behalf of a Serb.

> Zilhad Jakopovic: he was in Trnopolje the entire time the camp was in operation; he was interrogated repeatedly by the guards and he did not recognize the name Mladen Mitrovic and did not recognize any of the photos from Mr. Mitrovic's A-File as being someone who was a guard at the camp.
>
> Salih Kenjar: he was in Trnopolje for 60 days (6/15/92 - 8/30/92); he was shown various photographs from Mr. Mitrovic's A-File and did not recognize him as being a guard at the camp.
>
> Ildana Turkanovic: she and her son were in Trnopolje for three weeks; she was shown various photographs from Mr. Mitrovic's A-File and could not identify him as being a guard at the camp.

(Id.). Mr. Mitrovic requested that the individuals who conducted the interviews be allowed to testify to what the recalcitrant witnesses had said. (Id.). At the request of the district court, Mr. Mitrovic submitted a more detailed proffer along with the notes associated with the interview, of three of the most detailed interviews. (Doc. 190). The government opposed Mr. Mitrovic's motion but in so doing never asserted the witness statements were false. Rather, it referred to them as "facts" and conceded they were "arguably material." (Doc. 181). The district court denied the motion finding the hearsay statements lacked a sufficient indicia of reliability. (Doc. 312 at 20; Doc. 310 at 13; Doc. 9 at 1365-66).

Trial began May 12, 2016. After three days of jury selection, the trial began on May 17, 2016. On the third day of trial, after the testimony of the government's expert witness, Mr. Mitrovic requested the district court take judicial notice of the Geneva Convention, in particular the Fourth Geneva Convention, Articles 4 & 40. (Doc. 317 at 1082; Doc. 232) The district court ultimately refused. (Doc. 311 at 1365-66).

Over the course of the trial the government called eleven (11) witnesses, seven of whom testified they were prisoners at the prison camp in Trnopolje and they saw Mr. Mitrovic working as a guard at the camp. In addition, the government called an expert on the Bosnian conflict, two immigration officers who interviewed Mr. Mitrovic as part of the Naturalization process, and the

case agent. At the close of the government's case-in-chief, Mr. Mitrovic moved for a judgment of acquittal pursuant to F.R.Cr.P.29. (Doc. 319 at 1298). The district court reserved ruling on the motion. (Id. at 1303). Mr. Mitrovic presented testimony of 12 witnesses, eleven by way of deposition and one live. At the conclusion of the defense case, Mr. Mitrovic renewed his motion for judgment of acquittal, which was denied (Doc. 320 at 1424). The jury deliberated for approximately three hours[5] ultimately finding Mr. Mitrovic guilty. (Doc. 321 at 1502-03).

On August 25, 2016, the district convened to conduct a sentencing hearing. A Presentence Report (PSR) had been prepared utilizing Section 2L2.2 of the 2001 version of the United States Sentencing Guidelines. The probation officer found a base offense level of eight with no additions or reductions. Coupled with a criminal history category of I,[6] the appropriate Guidelines called for a sentence of zero (0) to six (6) months in custody, a fine range of one thousand to ten thousand dollars ($1,000.00 - $10,000.00), from one to three years of Supervised Release, and a mandatory one hundred dollar ($100.00) Special Assessment (See PRS. at pg. 13; U.S.S.G §2L2.2). The government requested an upward departure or variance to a sentence of "no less than 71 months imprisonment." (Doc. 258 at 1). Specificially, the government argued that a 71 month sentence would be at the high end of the Guideline range if the district court were to take into account the 2015 Guidelines which provided for an increase to offense level 25 where the misstatements

5 The jury began deliberations at 4:40p.m. on May 24, 2016, recessed for the day at 5:00p.m., resumed deliberations at 9:30a.m., on May 25, 2016 and returned a verdict at 11:20 a.m. the same day.

6 Mr. Mitrovic had never been arrested, no less convicted of a crime.

were to conceal his participation in an offense involving genocide or any other serious human rights violations. (See §2L2.2 of the 2015 United States Sentencing Guidelines). The district court granted the government's motion and sentenced Mr. Mitrovic to fifty seven (57) months in the custody of the Bureau of Prisons. Mr. Mitrovic timely filed his notice of appeal and after this Court has granted him extensions of time, this Brief is timely filed.

On appeal, Mr. Mitrovic argued the following:

I. The District Court Erroneously Excluded the Statements of Unavailable Witnesses Thereby Denying Mr. Mitrovic the Right to Present a Complete Defense in Violation of the Fifth and Sixth Amendments to the United States Constitution, and;

II. The District Court Erred in Failing to Take Judicial Notice of Articles 4 and 40 of the Fourth Geneva Convention and Thereby Denied Mr. Mitrovic of his Right to Present a Complete Defense in Violation of the Fifth and Sixth Amendments to the United States Constitution

On May 23, 2018, in a published opinion Case No. 16-16162 the Eleventh Circuit Court of Appeals affirmed Mr. Mitrovic's conviction. Therefore, Mr. Mitrovic now seeks redress from the United States Supreme Court for the grave miscarriage of Justice he has suffered from his unlawful conviction which has explicitly deprived him of his Fifth Amendment Right under the Due Process Clause and his Sixth Amendment Right under his Right to a Fair Trial.

REASONS FOR GRANTING PETITION

The primary reason for this Court granting Petitioner's request for a writ of Certiorari that even though this Court provided authority for the admissibility of the proffered hearsay testimony in Chambers v. Mississippi, 410 U.S. 284 (1973) the material factors are readily distinguishable for Chambers for example, Chambers, who was on trial for murder, this Court found that he was denied due process because a series of state evidence rules conspired to prevent him from eliciting powerful testimony regarding a confession by another individual (Mr. McDonald) to the murder for which Chambers stood trial.

As the Court explained in Chambers 410 U.S. at 300-01:

> The hearsay statements involved in this case were originally made and subsequently offered at trial under circumstances that provided considerable assurance of their reliability. First, each of McDonald's confessions was made spontaneously to a close acquaintance shortly after the murder had occurred. Second, each one was corroborated by some other evidence in the case--McDonald's sworn confession, the testimony of an eyewitness to the shooting, the testimony that McDonald was seen with a gun immediately after the shooting, and proof of his prior ownership of a .22 caliber revolver and subsequent purchase of a new weapon. The sheer number of independent confessions provided additional corroboration for each. Third, whatever may be the parameters of the penal-interest rationale, each confession here was in a very real sense self-incriminatory and unquestionably against interest...Finally, if there was any question about the truthfulness of the extrajudicial statements, McDonald was present in the courtroom and was under oath. He could have been cross-examined by the State, and his demeanor and responses weighed by the jury.

Each of the above factors critical to this Court's analysis in Chambers are materially distinguishable from the instant case.

First, the out of Court statement were made by potential witnesses to seasoned veteran investigators and officers of the Court who are sworn to uphold Justice in our Justice system. Further, these officers of the Court[7] do not have a vested interest in the outcome of these proceedings and it would be totally unethical even to suggest that these investigators would not testify truthfully as to exactly what was told to them by each potential witness. More importantly each witness gave their unsolicited statement in anticipation to further have to testify in a U.S. Federal Court or as an alternative being deposed to the content to their previous statements. Therefore, concluding that there was a credible assurance to the reliability to the potential witnesses statement.

Second, there were 10 witnesses who declined at the last minute to be deposed who had all basically provided the same information that Mr. Mitrovic was

7 The officers of the Court who participated in the interview with all potential defense witnesses were (1) Ms. Lindsay Bennett former Attorney for the Public Federal Defender's Office; (2) Ms. Leah Quinn, Public Federal Defender's Paralegal, and (3) Jeffrey Ertel, investigator for the Public Defender's Office.

not seen working as a camp guard by any of these witnesses, clearly demonstrating that the sheer number of each witness statement provided additional corrobration for the reliability of each statement.

Third, each of these potential witnesses were from ethnic Muslims, which giving testimony that could possibly exonerate an alleged Serb would unquestionably go against their self-interest.

Fourth, unlike Mr. McDonald (in the Chambers case) who was present in the Courtroom and could have been subpoenaed, Mr. Mitrovic's potential witnesses are Bosnian Nationals and are outside of the Federal Court's Jurisdiction power to subpoena. Therefore Mr. Mitrovic was helpless in compiling his potential witnesses in testifying or being deposed by his defense team.

The final reason this Court should grant Certiorari, is given our nation's current political debate concerning immigration of refugee status would make this case ripe to be heard on the Supreme Court level; where it is crystal clear that Petitioner Mitrovic was deprived of a meaningful opportunity to present a complete defense on his behalf that will be fully argued below.

LEGAL STANDARD

The Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense; Crane v. Kentucky 476 US 683 (1986) (quoting California v. Trombetta, US 479 (1984) "Whether rooted directly in the Due Process Clause of the [fifth] Amendment or the Compulsory Process or Confrontation clauses of the Sixth Amendment, the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense." Id. at 690. See also Chambers v. Mississippi, 410 U.S., 284, 294 (1973)("The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations."). While "state and federal rulemakers have broad latitude under the Constitution to establish rules excluding evidence

from criminal trials", that latitude is not unlimited. Rules that "infringe upon a weighty interest of the accused [or] that are arbitrary or disproportionate to the purposes they are designed to serve" must give way to a defendant's right to present a defense." Holmes v. South Carolina, 547 U.S. 319, 324 (2006). Particularly when the evidence is central to the defendant's claim of innocence, the Court has found categorical exclusion "infringe[s] upon a weighty interest of the accused," United States v. Scheffer, 523 U.S. 303, 308 (1998), and threatens "the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing," United States v. Cronic, 466 U.S. 648, 656 (1984).

An erroneous evidentiary ruling will rise to the level of a constitutional error when the omitted evidence [evaluated in the context of the entire record] creates a reasonable doubt that did not otherwise exist. Jones v. Stinson 229 F3d 112, 120 (2d Cir. 2000)(internal quotation marks omitted).

Here, the district court found the testimony sought to be introduced was inadmissible under FRE 801 (the hearsay rule), and the statements lacked sufficient indicia of reliability. As there was no assertion the statements of the unavailable witnesses were not true and there were sufficient indicia of reliability, the district court abused its discretion and Mr. Mitrovic was denied an opportunity to present a complete defense.

ARGUMENT AND AUTHORITY

Federal Rule of Evidence 801 defines "hearsay" as "as statement that (1) the declarant does not make while testifying at the current trial or hearing; and (2) a party offers in evidenced to prove the matter of the asserted statement." The Rules also provide that hearsay statements are not "admissible unless any of the following provides otherwise: a federal statute; these rules; or other rules prescribed by the Supreme Court." F.R.E. 802.

Federal Rule of Evidence 807

F.R.E 807 provides:

(a) In General. Under the following circumstances, a hearsay statement is not excluded by the rule against hearsay even if the statement is not specifically covered by a hearsay exception in Rule 803 or 804:

(1) The statement has equivalent circumstantial guarantees of trustworthiness;

(2) it is offered as evidence of a material fact;

(3) it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts; and

(4) admitting it will best serve the purposes of these rules and the interests of justice.

(b) Notice. The statement is admissible only if, before the trial or hearing, the proponent gives an adverse party reasonable notice of the intent to offer the statement and its particulars, including the declarant's name and address, so that the party has a fair opportunity to meet it.

The testimony proffered herein meets all of the criteria of F.R.E. 807.

A. The Witnesses Were Unavailable

The ten witnesses who refused to be deposed were unavailable. Each witness had been interviewed prior to Mr. Mitrovic filing his Motion to take Depositions. In order to conduct the depositions, however, Mr. Mitrovic was governed by an agreement between the United States and Bosnia which precluded him from compelling any witnesses to appear. Rather, the proposed deponents would have to agree to be deposed. With this provision in mind, each witness was contacted prior to counsel travelling to Bosnia for depositions. Each witness re-affirmed their prior statements and confirmed they would willingly be deposed. However, upon traveling to Bosnia and when attempting to prepare the witnesses for

depositions, ten of the witnesses now indicated they would not agree to be deposed. Id. Mr. Mitrovic could not compel the witnesses to attend thus the ten witnesses were unavailable.[8]

B. The Statements Were Reliable

1. There is no Contesting the Statements Were False

The statements of each of the ten witnesses boil down to essentially this: each was a prisoner in the Trnopolje camp for some period of time; and after being shown photographs of Mr. Mitrovic, each indicated they had not seen him working as a guard (or in any capacity) at the camp. The government has never contested this was not true. In fact, the government has admitted this testimony is "arguably material." Rather than contesting the truth (i.e. the reliability) of the statements, the government centered its objection on its inability to cross-examine the witnesses about their ability to perceive or the reasons they might not have seen Mr. Mitrovic at the camp (the camp was chaotic; there were thousands of prisoners; some prisoners tried to avoid contact with guards; prisoners could not move freely about the camp). The government's argument goes to the weight of the testimony, not the admissibility or reliability of the statement.

2. The Statements go above and Beyond Satisfying the Chambers v. Mississippi Requirements.

In Chambers v. Mississippi, 410 U.S. at 300, the Court found that the application of the hearsay rule violated the defendant's right to present a complete defense because there was sufficient indicia of reliability surrounding the hearsay statements he sought to admit. While the underlying factors are not identical, the circumstances surrounding the statements proffered here have indicia of reliability which go well beyond those found sufficient in Chambers.

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8 The government conceded this point. See Doc. 181, at 7 ("While Defendant concededly does not have a means of compelling these particular witnesses...")

First, the Chambers Court found the statements were made spontaneously to a close acquaintance shortly after the crime. Second, the hearsay statements were corroborated by other evidence. Third, the statements was "unquestionably against [the declarant's] interest." Lastly, there was no question about the truthfulness of the hearsay statements. Id. at 301.

While the statements here were not given spontaneously to a close acquaintance, they were given to individuals who were representing someone perceived to be a Serb. Each witness was told they were being interviewed by persons who represented Mr. Mitrovic and that Mr. Mitrovic was accused of being a guard at the Trnopolje camp and that he was being tried in the United States because of that. Thus, each witness was aware they were giving a statement about a guard in the Serbian controlled Bosnian army, and that guard was accused of abuses at the camp. As detailed more fully below, a Muslim in Bosnia, who had been imprisoned at one of the numerous camps during the war would not likely be giving a statement favorable to someone they believed to be a Serb.

More importantly each witness statement were given to three professional individuals who were officers of the Court. It would be absurd to even suggest that the hearsay testimony would not reflect a truthful and accurate rendering to the facts as stated by each potential witness. Therefore, there was no doubt to the truthfulness or trustworthiness of the proferred hearsay testimony.

Here, as similar in Chambers, there were other witnesses to corroborate the recalcitrant witnesses statements. Specifically, there were a number of witnesses who lived in Mr. Mitrovic's neighborhood who testified they saw him every day during the war at his home which was ten kilometers from the camp. In addition, there were a few prisoners who were at the camp for a very short period who testified they did not recognize Mr. Mitrovic as being a guard at the camp.

Third, the statements were against the personal interest of each of the ten witnesses. The Chambers Court noted that hearsay testimony has traditionally been excluded under the theory that untrustworthy evidence would not be introduced at trial. The Court noted, however, the exceptions to the hearsay rule have evolved over time based on "circumstances that tend to assure reliability and thereby compensate for the absence of the oath and opportunity for cross-examination." Chambers, 410 U.S. at 298-99. The Court recognized, "[a]mong the most prevalent of these exceptions is the one applicable to declarations against interest --an exception founded on the assumption that a person is unlikely to fabricate a statement against his own interest at the time it is made." Id. at 299. Clearly, a Muslim is unlikely to fabricate a story to benefit a perceived Serb if that Muslim is going to be subject to public scorn and reputation assassination. The statements of the ten recalcitrant witnesses were clearly against their personal interests. It is uncontested there was great discord, distrust and persecution during the Bosnian war based on ethnicity. The Serbs tried to create a "pure" Bosnia and in doing so engaged in "ethnic cleansing" by imprisoning and then deporting (or killing) Bosniaks and Croats. While the conflict ended in 1995, those ethnic divides persist in the Bosnia of today. Dorthea Hanson, the government's expert witness, testified about the continued tension between the Serbs and Muslims in Bosnia. Indeed, counsel for the government highlighted how potential witnesses feared reprisals based on ethnicity. When arguing in favor of a protective order, counsel for the government indicated:

> these are very small villages and communities that we're talking about where a lot of people know everyone. Everyone knows everybody else and word gets out very quickly. And these are the things that the witness that's traveling to Bosnia has expressed to us as well is that he's a witness in this particular case, there can be retribution. And it doesn't necessarily have --the defendant's doesn't necessarily have to have ties to the underworld.

> I think it's enough just to say that there was a horrific conflict that happened in Bosnia. There's still a lot of tension in Bosnia and people--and word gets out very quickly. And I think that's --those are the fears that witnesses have and that's the reason we want to protect their identity at this time.

This sentiment was expressed in the case of potential witness, Mr. Sabahudin Garibovic. After reaffirming his earlier statement to counsel for Mr. Mitrovic, Mr. Garabovic specifically said he would not agree to be deposed because he would suffer repercussions in the Muslim community, he would lose his position as president of a survivors (of the Bosnian camps) club, and his reputation would be tarnished if people believed he was testifying on behalf of a Serb.

Each of the ten witnesses who refused to testify were of Muslim ethnicity. Given the atmosphere in Bosnia at the time of the depositions, each of the ten witnesses in question were subject to the same community reprisals, and reputation sullying Mr. Garibovic described. Thus, the statements originally given by each of the ten recalcitrant witnesses were against their personal interest. A statement against interest is one that exhibits sufficient indicia of reliability.

Lastly, and relevantly different set of facts as in Chambers there is no question about the truthfulness of the statements. Indeed, the government conceded the statements were "arguably material" and contested their admission only on the grounds they would not be able to sufficiently cross examine anyone who testified about the statements (which, as detailed above, was not true).

C. Mr. Mitrovic was Prejudiced by the District Court's Erroneous Ruling

The thrust of Mr. Mitrovic's defense was that he was not serving as a guard in the Bosnian Army during the Bosnian War. While the general allegation against him was that he provided false information during his naturalization process, the real thrust of the government's case was that Mr. Mitrovic committed human rights violations while a guard at the Trnopolje camp. All of the government's

witnesses (with the exception of the two immigration officers who interviewed him) testified that Mr. Mitrovic was a guard at the camp. A number of them testified they had been at the camp for the entire time it was open (May to August 1992) and that they saw Mr. Mitrovic working as a guard nearly every day. In order to defend against these allegations Mr. Mitrovic had to find other prisoners to contradict the government witness.

Although Mr. Mitrovic did present the testimony of three (3) witnesses who were in the Trnopolje camp, they were only there for a short time (Mr. Islamovski--fifteen (15) days; Mr. Dzamastagic --one week; and Mr. Husic --15 days). In contrast, five of the ten recalcitrant witnesses had spent an extended period in the camp and, when shown photographs of Mr. Mitrovic, said they did not recognize him as being at the Trnopolje camp in any capacity. (Fatka Besic --in the camp for two months and twenty four (24) days; Hamjija Cirkin --in the camp for ten (10) days, but continued to return to bring food for those who remained; Ildana Turkanovic --in the camp for three (3) weeks; Salih Kenjar --in the camp from June 15 until August 30, 1992 (seventy five (75) days); and Sabahudin Garibovic, -survivor of the Cliff's Massacre, president of a "survivors club" and in the camp eighty-eight (88) days. The testimony of these witnesses differ in kind from the three witnesses who did agree to be deposed. Rather than the three witnesses who were in the camp for one or two weeks and agreed to be deposed, these witnesses were at the camp for an extended period yet did not see Mr. Mitrovic working as a guard.[9]

In addition, had Mr. Mitrovic been able to produce the testimony of thirteen (13) Muslim prisoners, he would have been able to convincingly argue the reliability of these witnesses statements. As outlined above, the hostilities between

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[9] The government exploited this in its closing argument when it pointed out "[o]ne of those witnesses was in Trnopolje, a camp with thousands of prisoners, all eight days." (Doc. 320 at 1460).

the Muslims and the Serbs that was present during the war persisted at the time the witnesses were interviewed by members of Mr. Mitrovic's defense team. if he had been allowed to introduce all of the statements, Mr. Mitrovic could have convincingly argued that those statements were more worthy of belief than the testimony of the government's witnesses, i.e. the twelve defense prisoner witnesses would have no reason to try to help Mr. Mitrovic (who was perceived to be a Serb), while the seven government witnesses had a grudge against anyone perceived to be a Serb. The trial court's ruling effectively denied Mr. Mitrovic an opportunity to present a complete defense. Crane v. Kentucky, 476 U.S. at 690.

Additionally, under the above 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. Chambers 410. U.S. at 302. Accordingly, regardless of whether the proffered testimony comes within the hearsay rule, certainly under the facts of this case the testimony exclusion constitute a clear and convincing violation of Mr. Mitrovic's due process rights. Therefore for the foregoing reasons this Court should grant Petitioner his application for a writ of Certiorari.

CONCLUSION

The material facts in the instant case are similar to those found in Chambers v. Mississippi. However, there are two key elements that are explicitly distinguishable here that this Court has never had a prior opportunity to decide; specifically (1) where the potential witnesses are Foreign Nationals and were outside of the District Court jurisdiction to subpoena, thus depriving the Defendant the ability to compel these factual witnesses to testify, and (2) when the potential witnesses provided a statement in good faith to officers of the Court in anticipation of testifying in the future. Those factors it would seem meet the standard of admissible evidence under the Rules of

Hearsay evidence found in Fed.R.Evid. 807. Yet the District Court denied the Defense motion to allow the interviews of 10 potential witnesses to testify to the fact that each witness had relayed to them. Further the Eleventh Circuit Court of Appeals upheld that decision.

Furthermore,with more and more immigration cases coming before our federal court system the question of law presented in the instant case is bound to be raised frequently, which certainly has implications of depriving defendants of their Fifth Amendment Due Process Clause and their Sixth Amendment Fair Trial Clause rights.

Therefore, for the above given reasons, this Court should grant Petitioner's application for a writ of Certiorari in order to decide the legal questions presented here within this brief and to correct the grave miscarriage of Justice that Petitioner has suffered for not being allowed to present a complete defense to the Jury on his behalf.

Respectfully Submitted,

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