No. _____

In The
Supreme Court of the United States

ASMERON GEBRESELASSIE,

Petitioner,

vs.

SCOTT FRAUENHEIM, Warden,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

DID THE NINTH CIRCUIT COURT OF APPEALS ERR IN FAILING TO GRANT A CERTIFICATE OF APPEALABILITY ON ANY OF THE FOUR ISSUES PRESENTED REGARDING FUNDAMENTAL FIFTH AND SIXTH AMENDMENT VIOLATIONS THAT WERE UNREASONABLY REJECTED BY THE CALIFORNIA COURT OF APPEAL:

– Reasonable jurists could differ as to whether petitioner's Sixth Amendment right to retained counsel of choice was violated when the trial court refused to permit retained counsel to assume representation in the case after the trial court had discharged predecessor counsel.

– Reasonable jurists could differ as to whether petitioner's Sixth Amendment right to self-representation was violated when the trial court denied a motion for a short continuance to prepare for trial after granting self-representation.

– Reasonable jurists could differ as to whether petitioner's Fifth Amendment right not to testify at his trial was violated by the trial court's ruling that petitioner had to testify first as a prerequisite to calling any other defense witnesses.

– Reasonable jurists could differ as to whether petitioner's Sixth Amendment right to present evidence in his defense was violated by the exclusion of evidence regarding the decedents' motive to preemptively attack petitioner.

LIST OF PARTIES

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

STATEMENT OF RELATED CASES

– *People* v. *Gebreselassie*, Alameda County Superior Court No. C158985A; judgment entered on May 31, 2011.

– *People* v. *Gebreselassie*, California Court of Appeal, First Appellate District, Division Three, No. A133350, judgment affirmed on September 2, 2015.

– *People* v. *Gebreselassie*, California Supreme Court No. S229900, review denied on November 18, 2015.

– *In re Gebreselassie*, California Supreme Court, No. S239249, petition denied June 14, 2017.

– *Gebreselassie* v. *Frauenheim*, Warden, United States District Court, N.D. Cal. No. 16-cv-6195; judgment entered on October 9, 2018; Rule 60(b) motion denied on April 22, 2019.

– *Gebreselassie* v. *Frauenheim*, Warden, Ninth Circuit Court of Appeals, No. 18-17161 certificate of appealability denied on August 22, 2019; request for reconsideration denied on September 30, 2019.

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STATUTES CITED

IN THE SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Asmerom Gebreselassie petitions for a writ of certiorari issue to review the denial of a certificate of appealability by the Ninth Circuit Court of Appeals.

OPINIONS BELOW

The Ninth Circuit opinion denying the request for a certificate of appealability is reported at 2019 U.S. App. LEXIS 25232 and is set forth at p. 1a of the Appendix. The order of the Ninth Circuit denying reconsideration is set forth at p. 55a of the Appendix. The opinions of the United States District Court for the Northern District of California are set forth at p. 3a and p. 15a of the Appendix. The opinion of the California Court of Appeal is reported at 2015 Cal. App. Unpub. LEXIS 6397 and is set forth at p. 59a of the Appendix.

JURISDICTION

The Ninth Circuit denied the application for a certificate of appealability on August 22, 2019, and denied a timely petition for reconsideration on September 30, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment V:

"No person . . . shall be compelled in any criminal case to be a witness against himself."

United States Constitution, Amendment VI:

"In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel".

STATEMENT OF THE CASE

I. COURT PROCEEDINGS.

Petitioner was charged by Information filed in Alameda County Superior Court on July 10, 2008 with three counts of first degree murder with a firearm use allegation; and with kidnapping and multiple-murder special circumstance allegations. 7CT 1830. The charges related to a November 23, 2006 shooting at the residence of a family with whom petitioner's family was related by marriage. Petitioner's brother Tewodros Gebreselassie was charged as a codefendant.

Trial began on January 3, 2011; the jury began deliberating on May 17, 2011; and guilty verdicts were returned on May 31, 2011. 10CT 2967.

The convictions were affirmed by the California Court of Appeal on September 2, 2015, *People v. Gebreselassie*, Court of Appeal Nos. A133350, A134246. App.

p. 59a. The California Supreme Court denied review on November 8, 2015.

Petitioner filed a habeas corpus petition in the California Supreme Court that was denied on June 4, 2017.

Petitioner filed a petition for habeas corpus relief in the Northern District of California, No. 16-cv-6195. That petition was denied by Order of October 9, 2018. App. p. 3a. A motion pursuant to Rule 60(b), F.R.C.P. was denied on April 22, 2019, and no certificate of appealability was issued.

Petitioner applied to the Ninth Circuit Court of Appeals for a certificate of appealability, but that request was denied on August 22, 2019. App. p. 1a. A timely motion for reconsideration was denied on September 30, 2019. App. p. 55a.

II. SUMMARY OF TRIAL EVIDENCE.

Petitioner and his family are immigrants from Eritrea, a small African country adjacent to Ethiopia. The decedents were members of the Mehari family, another Eritrean family also living in the Bay Area. One of petitioner's brothers Abraham was married to Winta, a member of the Mehari family. Petitioner's family helped the Meharis immigrate to the United States.

On Thanksgiving day, 2006, petitioner and his brother Tewodros visited the Meharis' apartment. A shooting occurred in which Regbe Mehari, her daughter

Winta, and Regbe's son Yonas were killed. Petitioner was arrested that day and told the police that the shooting had occurred in self-defense, and resulted from prior animosity between the two families.

Earlier in 2006, Abraham had spoken by phone with petitioner, who was then living in Las Vegas. Abraham told petitioner that Winta's brother Merhawi was homosexual and had molested Abraham's son Isaac. Within 24 hours, Abraham was found dead, and the pathologist could determine no cause of death. These circumstances – coupled with telephone records, conflicting versions of events, suspicious behavior by Winta and her brothers, and the existence of a $500,000 life insurance policy on Abraham's life – led petitioner to suspect that Abraham had been murdered. He alerted the Berkeley Police and the life insurance company.

The prosecutor and defense offered starkly divergent versions of what ensued. The prosecutor's theory was that petitioner conspired with his brother Tewodros and possibly other members of his family to murder the Mehari family and take custody of young Isaac. According to the prosecutor, Tewodros visited the Meharis' apartment on Thanksgiving; played with Isaac before sending a phone signal to someone who alerted petitioner; and then let petitioner into the apartment when he arrived. Petitioner entered with two handguns and opened fire, killing three Meharis. Tewodros took Isaac to his mother's nearby apartment.

Petitioner's version of events was dramatically different. He testified that, in addition to contacts with the insurance company, the Berkeley Police, and church leaders, he had several contacts with Winta and Merhawi between Abraham's death and Thanksgiving. Winta had conceded to petitioner that Merhawi was homosexual, as Abraham had previously told petitioner. Winta also seemed to acknowledge that Merhawi had molested Isaac.

In addition, Merhawi conceded not only his sexual orientation and molestation of Isaac, but his involvement with Winta and another family member in the fatal poisoning of Abraham.

Petitioner testified that on Tuesday, November 21, 2006, he had been invited by Winta to come to Regbe's apartment on Thanksgiving to discuss Merhawi's homosexuality and his conduct with Isaac. Winta told petitioner to come alone. Fearing he might meet the same fate as Abraham, petitioner took a gun he obtained from his brother Mulugeta's apartment. When petitioner was admitted to the Mehari apartment, he found Tewodros there, which he had not expected. Merhawi and Yehferom drew guns, and shots were fired. There was a struggle between petitioner and the Meharis, after which petitioner ran to his mother's apartment, calling 911 as he went, to report the shooting.

Tewodros, in turn, testified that he had stopped by the Meharis' apartment as a social visit. He had made no calls, but Isaac had been playing with Tewodros's

cell phone, which had speed-dial. Tewodros had not admitted petitioner into the apartment and had not known he was coming. When the first shot was fired, Tewodros immediately left the apartment with Isaac and took him to a place of safety.

REASONS FOR GRANTING THE PETITION

Petitioner seeks review of the order of the Ninth Circuit denying a certificate of appealability as to four of petitioner's federal constitutional claims raised in the district court. The Ninth Circuit failed to correctly apply this Court's standard for issuing a certificate of appealability (hereafter "COA"), and erred in denying the request.

I. STANDARD FOR DETERMINING ENTITLEMENT TO A CERTIFICATE OF APPEALABILITY.

To obtain a COA, a petitioner "must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong". (*Slack* v. *McDaniel*, 529 U.S. 473 (2000).) The showing required for a COA is "relatively low." (*Williams* v. *Woodford*, 384 F.3d 567, 583 (9th Cir. 2004).) The applicant need not prove that jurists would necessarily or even probably grant the habeas petition. (*Miller-El* v. *Cockrell*, 537 U.S. 322, 338 (2003).) The court should resolve any doubts about issuing a COA

in favor of the petitioner. (*Rhoades* v. *Henry*, 598 F.3d 511, 518 (9th Cir. 2010).)

II. PETITIONER'S ENTITLEMENT TO A CERTIFICATE OF APPEALABILITY.

A. Reasonable Jurists Could Differ as to Whether Petitioner's Sixth Amendment Right to Retained Counsel of Choice was Violated by the Trial Court's Refusal to Permit Retained Counsel to Assume Representation in the Case After the Trial Court Discharged Predecessor Counsel Due to a Conflict of Interest.

Petitioner made good faith efforts to retain and proceed to trial with retained counsel of choice, which was his Sixth Amendment right. *United States* v. *Gonzalez-Lopez*, 548 U.S. 140, 144 (2006). It "is the right of a defendant who does not require appointed counsel to choose who will represent him". The Alameda County Superior Court violated that right by refusing to permit counsel of choice to represent petitioner; the California Court of Appeal affirmed the judgment based on numerous unreasonable and erroneous determinations of fact that were contradicted by the evidence; and the federal courts erred in denying petitioner's request for a certificate of appealability.

1. The procedural history.

The homicide in this case occurred on November 23, 2006. Petitioner was arrested shortly afterward

and was initially represented by the Alameda County Public Defender. In September, 2008, petitioner retained attorney William DuBois, and a July 2009 trial date was set, which afforded DuBois 10 months to prepare for trial. However, DuBois had a jam-packed trial calendar, and when July 2009 arrived he moved for a continuance based on lack of preparation time and medical problems. The court granted a month continuance, during which DuBois moved to withdraw based on an irreconcilable conflict and breakdown in the attorney-client relationship. (Petitioner was justifiably concerned that DuBois had not conducted any trial preparation, and that he would proceed to trial without adequate preparation to avoid judicial repercussions). The trial court granted the motion to withdraw, and reappointed the public defender.

Petitioner and his family managed to retain a different attorney, William Cole, who appeared on October 19, 2009, to assume representation. Cole requested a trial date six or seven months off due to the voluminous discovery, but the court would not agree to a trial date more than five months off, and Cole withdrew. The court re-appointed the original public defenders.

The public defenders did not bring the case to trial within the time frame that Cole had requested. Rather, on June 21, 2010, the public defenders declared a doubt as to petitioner's competency. Petitioner denied the claim of incompetence, and sought to proceed to trial. No finding of incompetency was made. The court subsequently relieved the public defenders and re-appointed DuBois over petitioner's objection in light

of DuBois' prior declaration of an irreconcilable conflict.

Petitioner's family retained attorney Roy Lefcourt. On August 18, 2010, DuBois relinquished his appointment, and counsel from Lefcourt's office appeared to discuss trial timing and logistics. The case was continued to September 28 for Lefcourt to assume representation. However, on September 7, the court appointed a different attorney, Darryl Stallworth, on the condition that he answer ready for trial on January 3, 2011. Petitioner objected and specifically informed the court that he wanted to be represented by Lefcourt, his counsel of choice, to no avail. 1 RT 242.

On September 28, Lefcourt appeared and moved to substitute in, as had previously been contemplated. Lefcourt said that he would require six months to prepare for trial, i.e., March 2011, and would request no continuances. That request was denied based solely on the fact that the codefendant had withdrawn his time waiver and requested to go to trial. The trial court expressly acknowledged that Lefcourt's request for six months to prepare was reasonable:

> If that were a single defendant case with time waived I believe that I would agree with Mr. Lefcourt that he should come into the case and the case should go to trial in a six-month period. 2 RT 289.

Having been denied counsel of choice, petitioner requested to represent himself, which was granted, and Stallworth was appointed to be advisory counsel.

The case was called for trial on January 3, 2011, as previously scheduled, and jury selection began shortly after that. Opening statements were given on February 8, 2011. On February 15, there was a testy exchange between petitioner and the court relating to petitioner's cross-examination. On February 16, the court terminated petitioner's pro per representation, and attorney Stallworth tried the remainder of the case. The jury began deliberating on May 17, 2011, and returned guilty verdicts on May 31.

2. The unreasonable determinations of fact by the California Court of Appeal.

The California Court of Appeal rejected petitioner's claim of a violation of his right to retain attorney Lefcourt as his counsel of choice based on an untenable and unreasonable characterization of the factual record:

> Asmerom's dissatisfaction with a series of prior attorneys had already caused substantial delay by the time he moved to retain Mr. Lefcourt. He had filed at least three *Marsden* motions while represented by the public defender's office and fired two private attorneys, one of whom, Mr. DuBois, he later attempted to rehire. App. p. 87a.

Petitioner had indeed filed motions to discharge the originally appointed public defenders. However, petitioner never fired *any* retained attorney, contrary to the Court of Appeal characterization. The first retained attorney, DuBois, moved to withdraw based on

a conflict. The second retained attorney, William Cole, made an initial appearance but then unilaterally moved to withdraw when the trial court would not afford him between five and six months to prepare. The third retained attorney, Roy Lefcourt, was not permitted to substitute in because the trial court would not afford him six months to prepare. The Court of Appeal's determination that petitioner was using his right to retain counsel as a delaying tactic is roundly repudiated by the record.

For example, in October 2009, petitioner retained attorney William Cole, and on October 23, Cole entered a general appearance and various motion dates were set. On December 1, the record reflects that Cole moved to withdraw because he could not comply with the March 2010 trial date contemplated by the court. That motion to withdraw was granted, and the court re-appointed the public defender over petitioner's objection. 7 CT 2000.

The Court of Appeal opinion wrongly characterized this development as follows: "On December 1, 2009, *at Asmerom's request*, the court relieved Mr. Cole and again re-appointed the Public Defender to represent him". App. pp. 78a-79a (emphasis supplied). Petitioner had just retained attorney Cole, and certainly did not request on December 1, 2009, that he be relieved. That is a flat-out error that wrongly attributes dilatory or obstructionist conduct to petitioner. The Court of Appeal was apprised of the actual sequence of events in appellant's opening and reply briefs, to no avail, and in the petition for rehearing, also to no avail.

Another example of the unreasonable determinations of fact by the Court of Appeal occurred after the public defenders in June 2010 declared a doubt as to petitioner's competency to stand trial. The court suspended the criminal proceedings to address the competency issue. Petitioner vehemently *opposed* the competency proceedings, and declared himself mentally fit to proceed to trial with retained counsel. Petitioner's competency was quickly confirmed. Had petitioner been pursuing a strategy of delay, he would have embraced the competency proceedings, which could have delayed the trial setting for many months. Nowhere in the Court of Appeal's discussion of the procedural history in the case is there an acknowledgement that petitioner opposed the competency proceedings.

There are numerous other significant mistakes of fact in the Court of Appeal opinion, all of which were adverse to petitioner's claim for relief.

The Court of Appeal asserted in contradiction to the record that attorney Lefcourt had initially *declined* to assume representation, which the Court of Appeal relied on as a reason why the trial court's subsequent refusal to permit Lefcourt to substitute in was justified:

> [O]n August 4 [2011], Asmerom announced he had retained private counsel, Mr. Lefcourt. The court, however, had been informed that Lefcourt had declined to take the case, and continued DuBois as Asmerom's counsel subject to confirming that the appointed counsel

> panel could meet his requirements for fees and backup counsel. DuBois anticipated he would need four months to prepare for trial. Four days later, Mr. Lefcourt confirmed that he would not represent Asmerom. App. p. 81a.

There is nothing in the record that supports the statement that Lefcourt informed the court that he would not represent Asmerom on August 4, on August 8, or at any other time.

The Court of Appeal also contended that petitioner "attempted to rehire" DuBois, as further evidence of petitioner's fickleness or manipulativeness. App. p. 87a. To the contrary, the court unilaterally *appointed* DuBois in August 2010 *over petitioner's objection*, and petitioner responded to that appointment by retaining Lefcourt.

In sum, the record reflects that petitioner and his family made repeated and good faith efforts to retain counsel, but those efforts were thwarted by judicial myopia in refusing to provide adequate time to prepare. The reasons provided by the California Court of Appeal for affirming the denial of counsel of choice are rife with unreasonable determinations of the facts.

3. Petitioner's entitlement to a certificate of appealability.

When the trial record is viewed accurately and correctly, a reasonable jurist would be compelled to conclude that petitioner was not dilatory, manipulative, or otherwise remiss in his quest for representation by

counsel of choice. There was no other legitimate reason for denying the request to let attorney Lefcourt substitute in. The Court of Appeal articulated certain unsupportable justifications for the trial court's refusal of counsel of choice: "the prejudice to [codefendant] Tewodros, the prosecution, and witnesses that would have resulted from allowing yet another substitution. Its ruling did not impinge on Asmerom's constitutional rights to counsel of his choice," App. p. 86a.

The reference to codefendant Tewodros relates to his pending request for a speedy trial. However, California law is clear that that good cause to continue one defendant's trial beyond the statutory period justifies continuance of the trial of an objecting codefendant, *People* v. *Sutton*, 48 Cal. 4th 553, 558 (2010). Moreover, on September 7, 2010, the prosecutor himself urged the trial court to grant a continuance of the trial over codefendant Tewodros's objection to permit petitioner's counsel sufficient time to prepare:

> [The Prosecutor]: I would ask the court to continue this case pursuant to Penal Code Section 1050.1. There's clearly good cause to continue the matter for Asmerom Gebreselassi so that Mr. Stallworth can adequately prepare for the case. And 1050.1 makes it clear where we have two properly joined defendants, good cause to one, good cause to the other. *So I'd ask the court to continue this matter*.
>
> [The Court]: The Court, again, has looked through various case law that applies to this type of case. *The case law is pretty clear this*

> *case is properly joined, that the time needed for one counsel to prepare is good cause for the continuance in this case*. 1 RT 240 (emphasis supplied).

Thus, the California Court of Appeal's rationale for upholding the trial court's refusal of substitution of counsel vanishes upon review of the actual record. Codefendant Tewodros had no cognizable speedy trial claim to override petitioner's quest for counsel of choice. The prosecutor *supported* a continuance to permit counsel to prepare, and made no claim of prejudice at all.

There was no showing in the record by any party or witness that a continuance to permit retained counsel to substitute in would cause any inconvenience, much less prejudice. Under these circumstances, petitioner has made a strong showing that reasonable jurists could differ as to the resolution of his claim, and he is entitled to a certificate of appealability. *Slack* v. *McDaniels*, supra.

B. Reasonable Jurists Could Differ as to Whether Petitioner's Sixth Amendment Right to Represent Himself was Violated by the Trial Court's Denial of Petitioner's Continuance Request to Obtain and Review the Basic Discovery Documents in the Case.

After the trial court refused to permit retained counsel to substitute in well before trial, and instead

appointed a different attorney who was unfamiliar with the case, petitioner requested to represent himself as the next best alternative to representation by counsel of choice. The trial court granted self-representation, but then denied a series of requests for continuances and other ancillary requests that were essential to meaningful self-representation, and then revoked self-representation in the middle of trial while petitioner was proceeding as best he could. The Alameda County Superior Court violated petitioner's Sixth Amendment right of self-representation by denying his well-founded motions for continuance; the California Court of Appeal affirmed the judgment based on numerous unreasonable and erroneous determinations of fact that were contradicted by the evidence; and the federal courts erred in denying petitioner's request for a certificate of appealability.

1. The procedural history.

On November 30, 2010, after the court had rejected Roy Lefcourt's request for six months to prepare for the complicated homicide trial, and after the court instead appointed conflict panel attorney Darryl Stallworth, petitioner made a timely assertion of his right of self-representation. 3 RT 319-320. The trial court granted petitioner's request for self-representation and appointed Stallworth as advisory counsel. 3 RT 331. Petitioner made a motion to continue the January 3, 2011 trial date, and the matter was set for hearing on December 16. 3 RT 328.

On December 3, 2010, the court explicitly instructed Stallworth to provide petitioner with a copy of the voluminous discovery materials that the prosecution had previously given to the defense. 3 RT 360.

At the December 16 hearing, there was fairly extensive discussion about the work necessary to prepare for trial. The prosecutor confirmed the large amount of discovery materials in the case. Petitioner asked for a three-month continuance. 4 RT 408. The court declined to continue the trial date of January 3, with the comment "[t]o go beyond that point, this is going to need to be litigated in the trial court." 4 RT 418.

On January 3, 2011, the date trial proceedings were scheduled to start, petitioner requested a continuance on the basis that Stallworth had not provided him with a copy of the discovery materials, notwithstanding the explicit directive from the court on December 3 that he do so. Those discovery materials were the fundamental building blocks of the case. That request was denied, as were petitioner's subsequent ones. 5 RT 439, 5 RT 444-47, 5 RT 598-99, 2 RT 362-64, 3 RT 721-23, 6 RT 1186-87, 7 RT 1583.

Stallworth and the defense investigator gave petitioner some additional discovery materials after the trial proceedings had begun. 5 RT 448-49. Petitioner was denied due process by the denial of a continuance where the record was undisputed that he had not been provided with extensive amounts of discovery materials until the trial was under way. No defense attorney would have been required to prepare for trial under

such circumstances. Forcing petitioner to do so violated his Sixth Amendment right to represent himself with reasonable access to the tools of justice.

Jeopardy had not attached when petitioner sought the continuance in order to properly prepare and try his case. Good cause for continuance was abundantly clear, yet the continuance was denied.

Jury selection began shortly afterward, and opening statements were given on February 8, 2011. Petitioner had been removed from the courtroom on one occasion during voir dire for an emotional outburst. On February 16, the court terminated self-representation based on friction between the court and petitioner, and based on petitioner's manner of cross-examining witnesses. 7 RT 1141-44.

2. The unreasonable determinations of fact by the California Court of Appeal.

The Court of Appeal opinion states that at the November 30, 2010 hearing when self-representation was granted, "Asmerom was fully cautioned that the January 3 trial date would not be continued "whether you're ready to go or not." App. p. 89a. That assertion is incompatible with the fact that the trial court set December 16 for a hearing on the continuance motion, as noted above. 4 RT 418. On December 16, the court hearing the motion denied the motion with the comment that it would "need to be litigated in the trial court." 4 RT 418. Thus, the Court of Appeal was incorrect in asserting that petitioner had unequivocally

agreed to a January 3, 2011 trial date as a condition of self-representation. To the contrary, the subject of a continuance was discussed at the November 30 *Faretta* hearing; at the December 3 hearing regarding discovery; and at the December 16 hearing specifically convened to discuss the continuance motion.

Next, the Court of Appeal incorrectly asserted that "Despite his complaints about access to discovery materials, both he and his advisory counsel assured the court in mid-December that they could be ready for trial by January 3." App. p. 90a. To the contrary, the December 16 hearing entailed a lengthy discussion of petitioner's reasons for *continuing* the January 3 trial date, *not* adhering to it.

The Court of Appeal further distorted the record by imputing to petitioner a devious motive to delay the trial based on his "tortuous history of changing representation" that "supported a reasonable inference that Asmerom was attempting to exploit the *Faretta* mandate as yet another means of delaying the trial," App. pp. 90a-91a. As noted in Claim I, supra, the Court of Appeal had a factually unfounded view that petitioner had fired multiple retained counsel and had been using his right to counsel of choice as a means of manipulating the system.

Finally, the Court of Appeal failed to acknowledge the undisputed fact established on the record that petitioner had not been given the basic discovery that the prosecution had previously given defense counsel. "During the first week of January 2011 Asmerom again

sought a continuance, this time to review discovery materials *he claimed had not been provided to him* and to hire an expert to examine the 911 tape." App. p. 89a, (emphasis supplied). The Court of Appeal failed to acknowledge that the January 3, 2011 hearing confirmed unequivocally that stand-by counsel had not complied with the court's directive to give petitioner the discovery materials. Petitioner did not merely "claim" that he had not been provided discovery materials; the record indisputably confirms that. The Court of Appeal never acknowledged the most basic and indisputable ground for a continuance – lack of timely access to the prosecution's anticipated evidence.

3. Petitioner's entitlement to a certificate of appealability.

When the trial record is accurately and correctly reviewed, it is abundantly clear that petitioner had a legitimate and clearly documented ground for continuing the trial. The premise of *Faretta* v. *California*, 422 U.S. 806 (1975), is that a defendant representing himself has the same access to witnesses and evidence as does a represented defendant, even if the self-represented defendant does not have the same training and skill to deploy them:

> The Sixth Amendment does not provide merely that a defense shall be made for the accused; it grants to the accused personally the right to make his defense. *It is the accused, not counsel, who must be "informed of the nature and cause of the accusation," who must be*

> *"confronted with the witnesses against him," and who must be accorded "compulsory process for obtaining witnesses in his favor."* Although not stated in the Amendment in so many words, the right to self-representation – to make one's own defense personally – is thus necessarily implied by the structure of the Amendment. 422 U.S. at 819 (emphasis supplied).

Moreover, there is clearly established federal law that a defendant representing himself has a right to adequate time to prepare for trial just as a represented defendant has. *Milton* v. *Morris*, 767 F.2d 1443, 1447 (9th Cir. 1985) granted habeas relief to a California inmate who had been granted self-representation but had been denied time to prepare and denied access to legal materials – " 'The rights to notice, confrontation, and compulsory process' mean, at a minimum, that time to prepare and some access to materials and witnesses are fundamental to a meaningful right of representation."

Given the reasonableness of petitioner's grounds for a continuance, the absence of actual evidence that he was making the request for dilatory reasons, and the California Court of Appeal's repeated mischaracterizations of the trial record to petitioner's detriment, petitioner is entitled to a certificate of appealability. *Slack* v. *McDaniels*, supra.

C. Reasonable Jurists Could Differ as to Whether Petitioner's Fifth Amendment Right Not to Testify at his Trial Was Violated by the Trial Court's Ruling that Petitioner Had to Testify First as a Prerequisite to Calling Any Other Defense Witnesses.

1. The procedural history.

The theory of defense was self-defense, i.e., that petitioner had been invited to the Mehari residence on Thanksgiving as a ploy to lull petitioner into a place of vulnerability where the Mehari brothers could assault and kill him. After the prosecution rested, the court and counsel discussed the prospective defense witnesses. Attorney Stallworth stated that he wanted to call two expert witnesses to lay the foundation for a self-defense argument, and then make a decision whether to call petitioner as a witness. Petitioner did not want to testify on his own behalf. However, the trial court ruled that the defense witnesses could not testify at all unless petitioner testified first to a self-defense scenario.

In the face of that Hobson's Choice, petitioner did testify prior to his other witnesses against his wishes and under the compulsion of the trial court's order. That was a clear violation of petitioner's Fifth and Sixth Amendment rights under *Brooks* v. *Tennessee*, 406 U.S. 605, 608 (1972). "Pressuring the defendant to take the stand, by foreclosing later testimony if he refuses, is not a constitutionally permissible means of ensuring his honesty. It fails to take into account the very

real and legitimate concerns that might motivate a defendant to exercise his right of silence." *Brooks*, supra, 406 U.S. at 611-12.

The California Supreme Court failed to address this claim on the merits, and denied the petition that alleged the *Brooks* violation as untimely. The federal district court and the Ninth Circuit erroneously deferred to the state default ruling.

2. Petitioner's entitlement to a certificate of appealability.

Martinez v. *Ryan*, 566 U.S. 1, 11, 132 S. Ct. 1309, 1317 (2012) confirmed that "an attorney's errors during an appeal on direct review may provide cause to excuse a procedural default; for if the attorney appointed by the State to pursue the direct appeal is ineffective, the prisoner has been denied fair process and the opportunity to comply with the State's procedures and obtain an adjudication on the merits of his claims."

That rule was not eliminated by *Davila* v. *Davis*, ___ U.S. ___, 137 S. Ct. 2058 (2017). *Davila* is distinguishable because the posture of the claim is different in this case from that in *Davila*. The petitioner in *Davila* had not presented the issue in question to the state court in a state post-conviction petition, while petitioner here clearly did.

Moreover, procedural default may be excused where, as here, the failure to consider the claim would result in a fundamental miscarriage of justice. (*House*

v. *Bell*, 547 U.S. 518, 536 (2006).) In light of the evidence supporting a self-defense claim, petitioner is entitled to a certificate of appealability as to this claim as well.

D. Reasonable Jurists Could Differ as to Whether the Trial Court's Exclusion of the Evidence that the Mehari Brothers Carried on a Covert Homosexual Lifestyle in Violation of the Laws of Their Church Violated Petitioner's Sixth Amendment Right to Present a Full Defense.

Petitioner sought to present evidence at trial that the Mehari brothers maintained a covert homosexual lifestyle in flagrant violation of the laws of the Eritrean Church to which they all belonged. The purpose of this evidence was to establish that the Mehari brothers had a strong motive to attack and kill petitioner to prevent him from disclosing their homosexuality to other church members. The trial court excluded any evidence as to whether the Mehari brothers were actually homosexuals. The court permitted petitioner to testify to his belief that they were so engaged, but nothing else.

That ruling deprived petitioner of his strongest argument as to why the Mehari brothers would have attacked him on Thanksgiving 2006, and thereby justifying petitioner's self-defense. The Court of Appeal rejected the claim as "nonsense" on the untenable and constitutionally unreasonable ground that petitioner's testimony that he *believed* them to be homosexual satisfied petitioner's right to present a full defense. The

federal courts erred in denying petitioner's request for a certificate of appealability.

1. The procedural history.

Petitioner told the police on the day of the homicide that he had been attacked by the Mehari brothers at their residence because they feared that he would reveal their covert homosexual lifestyle to the members of their church. Petitioner explained that homosexuality was taboo in the church, and that revelation of the brothers' homosexuality would cause dire consequences for the whole Mehari family, creating a motive to attack and kill Asmerom. 19 RT 4459-4463.

The investigating officers asked Merhawi Mehari about this four days later on November 27, 2006, and he denied being a homosexual. The prosecution was thus on notice from the outset of the case that petitioner's self-defense claim was predicated on presenting evidence that the Mehari family had a strong motive to attack and kill petitioner at the Thanksgiving meeting to prevent dire consequences to themselves within the Eritrean community generally and the Eritrean Orthodox Church in particular.

The prosecutor filed a motion in limine to exclude virtually all evidence relating to homosexuality with the narrow concession that petitioner could testify as to his beliefs on the subject. The motion was heard on February 3, 2011, and the court ruled that evidence of the Mehari brothers' homosexuality was relevant only to the self-defense claim, and nothing related to it

could be broached before the jury until petitioner testified to self-defense, a further violation of *Brooks* v. *Tennessee*, supra, see Claim C, supra. The court further ruled that "[t]he relevant part is not whether they're homosexuals or not"; but rather "[i]t's your belief that they are", 7 ART 1602, and excluded all evidence that the brothers did participate in covert homosexual activities.

When Merhawi Mehari was recalled as a defense witness, he was asked directly whether he was homosexual, and a prosecution relevance objection was sustained. 18 RT 3937. When Merhawi was asked whether he denied homosexuality because his church and community did not tolerate it, that question was also disallowed. 18 RT 3937. Nor were questions allowed regarding involvement in homosexual activities. 18 RT 3938.

2. The unreasonable determinations of fact and law by the California Court of Appeal.

The California Court of Appeal rejected this claim with a terse and totally untenable characterization of the record:

> Asmerom's central complaint seems to be that, while the jury heard a good deal about homosexuality, his defense was crippled because he was not permitted to question the Mehari twins about or offer other evidence to prove "the fact of" their homosexuality.

> Nonsense. As chronicled above, Asmerom was permitted to introduce more than ample evidence supporting his defense theory that the Meharis tried to kill him because he threatened to go public with his accusations about Angesom and Merhawi. While the court limited his ability to introduce evidence of their actual sexual orientation or activities, its rulings were well within its broad discretion to exclude evidence on the grounds that its probative value was substantially outweighed by the risk of undue delay, prejudice or confusion. App. p. 106a-107a.

What the Court of Appeal characterized as "more than ample evidence supporting his defense theory" was strictly limited to *petitioner's* testimony about his *belief* that they were homosexuals. The Court of Appeal further mischaracterized the record in stating that "the court *limited* his [petitioner's] ability to introduce evidence of their actual sexual orientation or activities." (emphasis supplied). The trial court *completely excluded* all of that evidence. The Court of Appeal characterization of the court's ruling as a mere "limitation," rather than a complete exclusion, is unreasonable in light of the record.

Petitioner's testimony was of course "some evidence" that supported the defense theory, but without corroborating evidence that the brothers were covertly practicing homosexuals with a great deal to hide in their community, petitioner's testimony standing alone could easily been dismissed as delusional or self-serving (as the prosecutor argued). *Brown* v. *Myers*, 137

F.3d 1154 (9th Cir. 1998) (issuing habeas relief in attempted murder case because counsel failed to investigate witnesses who would have corroborated petitioner's testimony – "As it was, without any corroborating witnesses, Melvin's bare testimony left him without any effective defense"). The Court of Appeal's rejection of this claim was a clear violation of petitioner's Sixth Amendment right to present relevant exculpatory evidence. *Crane* v. *Kentucky*, 476 U.S. 683 (1986).

3. Petitioner's entitlement to a certificate of appealability.

When the record is viewed in a fair and accurate manner, it is clear that petitioner's Sixth Amendment right to present a full defense was violated. Petitioner was permitted to present only the objectively weakest and most impeachable fraction of the available evidence, i.e., his own testimony. That may have been important, but by itself was all too subject to prosecutorial attack. The evidence of actual homosexuality and of a covert homosexual lifestyle was essential to demonstrate that the Meharis had an actual motive to launch a preemptive homicidal attack on petitioner.

Olden v. *Kentucky*, 488 U.S. 227 (1988), granted relief to a state petitioner because the trial court had excluded evidence of a motive to lie on the part of the complaining witness. The justification for the exclusion was that the motive evidence reflected poorly on her character in the community where the incident occurred. In rural Kentucky, the complaining witness

(Matthews) alleged that she was raped by two black men; the defense was consent. The Kentucky court excluded evidence that the complaining witness was cohabitating with a man (Russell) who had seen the defendant as he dropped the complaining witness off, and who would likely have been angry with the complaining witness if she admitted having consensual sex with other men.

The Kentucky court excluded the evidence because the complaining witness was white and the man she was cohabitating with was black – "[T]here were the undisputed facts of race; Matthews was white and Russell was black. For the trial court to have admitted into evidence testimony that Matthews and Russell were living together at the time of the trial may have created extreme prejudice against Matthews." 488 U.S. at 231. This Court criticized that position – "without acknowledging the significance of, or even adverting to, petitioner's constitutional right to confrontation, the court held that petitioner's right to effective cross-examination was outweighed by the danger that revealing Matthews' interracial relationship would prejudice the jury against her," id. at 232. This Court reversed the judgment, commenting "Speculation as to the effect of jurors' racial biases cannot justify exclusion of cross-examination with such strong potential to demonstrate the falsity of Matthews' testimony." Ibid.

Similar conclusions as to the constitutional right to present corroborating evidence were reached in *Washington* v. *Texas*, 368 U.S. 14 (1967), and *Chambers* v. *Mississippi*, 410 U.S. 284 (1973). Defendant Washington

was charged with murder, admitted being present, but testified that he tried to persuade the actual shooter – Fuller – not to do it. The trial court permitted Washington to testify to that sequence of events, but precluded him from calling Fuller as a corroborating witness based on a state evidentiary rule. This Court reversed the conviction because "the State arbitrarily denied him the right to put on the stand a witness who was physically and mentally capable of testifying to events that he had personally observed, and whose testimony would have been relevant and material to the defense", id. at 23.

Chambers also reversed a murder conviction where the defense presented testimony from an eyewitness that a man named MacDonald killed the victim. The trial court precluded the defense from introducing evidence that MacDonald had confessed to the killing due to a state evidentiary rule. This Court reversed the conviction because the "testimony also was critical to Chambers' defense", id. at 302.

The same analysis demonstrates the unreasonable determination of facts by the California Court of Appeal. The Court of Appeal never acknowledged the importance of the evidence that the Mehari brothers in fact practiced a covert homosexual lifestyle; rather, the court concluded that it was irrelevant to the self-defense claim, and that only petitioner's *belief* was relevant. That is untenable – if the Mehari brothers were not homosexual, they might have been angry but not homicidal if they thought petitioner was about to spread a false rumor about them. In stark contrast, if

they were homosexual and knew that petitioner was about to reveal not just a rumor but indisputable documentary evidence that they engaged in a covert homosexual lifestyle, the jury would be far more likely to credit the self-defense claim. Petitioner is entitled to a certificate of appealability. *Slack* v. *McDaniels*, supra.

CONCLUSION

WHEREFORE, for the foregoing reasons Petitioner requests that this Court grant certiorari, and remand to the Ninth Circuit Court of Appeal with directions to issue a certificate of appealability.

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Respectfully submitted,

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