UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ASMEROM GEBRESELASSIE, Petitioner-Appellant, v. SCOTT FRAUENHEIM, Warden, Respondent-Appellee.	No. 18-17161 D.C. No. 3:16-cv-06195-WHO Northern District of California, San Francisco ORDER (Filed Aug. 22, 2019)

Before: SCHROEDER and PAEZ, Circuit Judges.

This appeal is from the denial of appellant's 28 U.S.C. § 2254 petition and subsequent motion for reconsideration. The request for a certificate of appealability (Docket Entry No. 10) is denied because appellant has not shown that "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see also* 28 U.S.C. § 2253(c)(2); *Gonzalez v. Thaler*, 565 U.S. 134, 140-41 (2012); *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003); *United States v. Winkles*, 795 F.3d 1134, 1143 (9th Cir. 2015), *cert. denied*, 136 S. Ct. 2462 (2016); *Lynch v. Blodgett*, 999 F.2d 401, 403 (9th Cir. 1993) (order).

Any pending motions are denied as moot.

DENIED.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

ASMEROM GEBRESELASSIE, Petitioner, v. SCOTT FRAUENHEIM, Warden, Respondent.	Case No. 3:16-cv-06195-WHO (PR) **ORDER DENYING MOTION FOR RELIEF** (Filed Apr. 22, 2019) Dkt. No. 39

INTRODUCTION

Petitioner Asmerom Gebreselassie moves for relief from the order denying his habeas petition, noting mistakes I made in the recitation of the facts in my Order Denying Petition. (Dkt. No. 33.) I have reconsidered his petition in light of the corrected record, and conclude again that he is not entitled to habeas relief. The evidence of his guilt is strong. His motion also reargues claims that I have already rejected. For these reasons, Gebreselassie's motion is DENIED.

BACKGROUND

Gebreselassie's federal habeas petition was denied, and judgment entered in favor of respondent, on October 9, 2018. (Dkt. Nos. 33 and 34.) He then simultaneously filed a Notice of Appeal and a motion for relief from the judgment. (Dkt. Nos. 37 and 39.)

In his motion, Gebreselassie correctly contends that I made some errors in my recitation of the facts. The factual summary below omits those errors. I will address the lack of legal significance of my mistakes, given the strength of the evidence against Gebreselassie, in the Discussion section of this Order.

While the Mehari family was gathered at Winta's house on Thanksgiving Day in 2006, Gebreselassie shot to death Winta Mehari, his deceased brother Abraham's widow; Regbe Bahrenegasi, Winta's mother; and Yonas Mehari, Winta's brother;.[1] (Ans., State Appellate Opinion, Dkt. No. 26-24 at 352.)[2] He also shot Yehferom Mehari, Winta's brother, who was wounded but survived. (*Id.* at 356.) Angesom Mehari, another brother, was seriously injured when he jumped out a window to escape. (*Id.*)

Gebreselassie believed that Winta and her family had murdered his brother Abraham, who died the previous March. (*Id.* at 354.) Although there was no evidence of foul play in Abraham's death, Gebreselassie always suspected the Mehari family of murder.[3] (*Id.*)

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[1] The Mehari and Gebreselassie families, both native to Ethiopia, were very close, "like one family," and lived in the same apartment complex in Oakland. (Ans., Dkt. No. 26-24 at 353-354.)

[2] *People v. Gebreselassie*, Nos. A133350 and A134246, 2015 WL 5146199 (Cal. Ct. App. Sept. 2, 2015), as modified by denial of reh'g (Sept. 25, 2015).

[3] Gebreselassie contends there was evidence of homicide. He alleges Winta lied during the 911 call she made when Abraham was ill. (Traverse, Dkt. No. 31-5 at 5-7.) According to petitioner, she told the 911 operator that she was alone with Abraham, but an audio expert who reviewed the 911 recording testified that he

He testified at trial that Winta "was the most evil wife and the most evil human being on this earth" and that the Meharis were the "most evil family in the whole world." (Ans., Dkt. No. 26-17 at 555, 559.) He pressed the police to investigate further, but they declined. (*Id.*, Dkt. No. 26-24 at 354.) Because of his continued accusations, the Meharis banned Gebreselassie from their house. (*Id.* at 355.) They agreed that they would call the police if he ever came there again. (*Id.*)

The theory of the prosecution was that Gebreselassie murdered Winta and the others as revenge for Abraham's death. It asserted that Gebreselassie's co-defendant (and brother) Tewodros helped him by signaling to him when the Meharis were gathered and then by letting him into their house.[4] (*Id.* at 357.) Yehferom Mehari, Winta's brother, testified that

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heard other voices during that call, one of which used the Amharic word "gelagliw." This word, in the expert's description, has multiple meanings, including "to separate two fighting parties, or it could mean to relieve someone who is in distress or pain." (Ans., Reporter's Transcript, Dkt. No. 26-16 at 833.) "It has appeared in Amharic literature in the past when say a wounded army colleague would ask another one for mercy killing." (*Id.*) However, "the common meaning of the word would be first to separate two or more parties who are fighting." (*Id.* at 843.) Even if Winta had lied during the telephone call, it is not evidence of homicide, or "at least not evidence on which a reasonable investigation and prosecution could be based. Also, another person allegedly used "gelagliw," not Winta. Criminal intent cannot be assigned to her merely because someone else (might have) said that word in her presence, a word of multiple meanings.

[4] On appeal, the judgment as to Tewodros Gebreselassie was reversed and the matter was remanded to the trial court for further proceedings. (Ans., Dkt. No. 26-24 at 394.)

Gebreselassie, while wielding a gun, came in saying, "Everybody here killed Abraham, I'm going to kill you." (*Id.* at 359.) Yehferom and his brothers Angesom and Merhawi, all testified that they saw Gebreselassie, without provocation, shoot at the family. (*Id.* at 357-359.) Gebreselassie's gun was empty of bullets when the firing stopped. (*Id.*, Dkt. No. 26-15 at 874.) Gebreselassie testified that, prior to that day, he had practiced shooting at a range roughly six or seven times, and that he made sure the gun was loaded before he went to the Meharis' house. (*Id.*, Dkt. No. 26-17 at 202-205.)

Gebreselassie told a different story at trial. He said that he came to the Meharis' house at Winta's invitation, which he regarded as suspect, and was attacked by her brothers Yehferom and Merhawi soon after he entered. (*Id.*, Dkt. No. 26-24 at 361-62.) They "started cursing at him" and Merhawi threatened to "knock [him] down." (*Id.* at 361.) As Gebreselassie started to leave, Merhawi "drew a gun from his waistband." (*Id.*) Gebreselassie "pulled out his own gun, told Merhawi to put his weapon down, and fired a warning shot toward the window." (*Id.*) He testified that he acted in self-defense. (*Id.*)

There was no evidence that the Meharis fired a single shot. A second gun was found at the scene; it was discovered to have been reported stolen and was never

tied to anyone present.[5] (Ans., Reporter's Transcript, Dkt. No. 26-16 at 293-294.) It had six live rounds in the magazine, the maximum such a gun could hold, indicating that no shot had been fired. (*Id.*, Dkt. No. 26-15 at 874.) Gebreselassie concedes that the Meharis never fired a shot. (Mot. for Relief, Dkt. No. 39 at 28-29.)

In 2011, an Alameda County Superior Court jury found Gebreselassie guilty of murder, premeditated attempted murder, and false imprisonment by violence. (*Id.*, Dkt. No. 26-24 at 364.) The jury found true various sentencing allegations. He was sentenced to three terms of life in prison without the possibility of parole, a life term, an indeterminate term of 75 years to life, and a determinate term of 57 years. (*Id.*, Dkt. No. 26-6 at 139-144.)

Gebreselassie's attempts to overturn his convictions in state court were unsuccessful. He then filed a habeas petition in this Court. Many claims were denied, while others were dismissed as procedurally defaulted. The petition was denied and judgment entered in favor of respondent. The present motion followed.

STANDARD OF REVIEW

Where, as here, the court's ruling has resulted in a final judgment or order, a motion for reconsideration may be based either on Rule 59(e) or Rule 60(b) of the

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[5] Gebreselassie contends it belonged to Yehferom, as evidenced by "Yehferom's various contradictory statements for placing his gun in my possession." (Dkt. No. 39 at 27.)

Federal Rules of Civil Procedure. "Under Rule 59(e), it is appropriate to alter or amend a judgment if '(1) the district court is presented with newly discovered evidence, (2) the district court committed clear error or made an initial decision that was manifestly unjust, or (3) there is an intervening change in controlling law.'" *United Nat. Ins. Co. v. Spectrum Worldwide, Inc.*, 555 F.3d 772, 779 (9th Cir. 2009) (quoting *Zimmerman v. City of Oakland*, 255 F.3d 734, 740 (9th Cir. 2001)).

Rule 60(b) provides for reconsideration where one or more of the following is shown: (1) mistake, inadvertence, surprise or excusable neglect; (2) newly discovered evidence that by due diligence could not have been discovered before the court's decision; (3) fraud by the adverse party; (4) voiding of the judgment; (5) satisfaction of the judgment; (6) any other reason justifying relief. *See* Fed. R. Civ. P. 60(b); *School Dist. 1J v. ACandS Inc.*, 5 F.3d 1255, 1263 (9th Cir. 1993). Although couched in broad terms, subparagraph (6) requires a showing that the grounds justifying relief are extraordinary. *See Twentieth Century-FoxFilm Corp. v. Dunnahoo*, 637 F.2d 1338, 1341 (9th Cir. 1981).

DISCUSSION

A. Factual Errors

Gebreselassie alleges that I misstated that: (i) Gebreselassie testified that the Meharis fired at him first; (ii) the second gun found at the scene was registered to Gebreselassie's brother Mulugeta; (iii) Yehferom testified that Gebreselassie said, "Everybody here killed

Abraham, I'm going to kill you" while wielding two guns; and (iv) Gebreselassie changed counsel five times prior to trial. He is correct, but whether considered separately or together, the corrected facts and the factual record still do not support his habeas petition.

In the Order, I wrote that Gebreselassie testified that the Meharis fired at him first. (Order Denying Petition, Dkt. No. 33 at 2.) That was wrong. In fact, he testified that soon after he entered the apartment, Merhawi threatened to knock him down and drew a gun from his waistband. (Ans., State Appellate Opinion, Dkt. No. 26-24 at 361-62.)

I relied on the mistaken fact in part to support my conclusion that Gebreselassie's self-defense contentions were "severely undermined." (Dkt. No. 33 at 3.) Absent the mistaken fact, my conclusion remains unchanged because there was other strong evidence of guilt. The record supports that: Gebreselassie fiercely hated the Meharis; the Meharis banned him from their house because of his continued accusations against him and said they would call the police if he came there again; he came armed with a gun to their house uninvited on Thanksgiving, when he knew the family would be gathered; and, according the Mehari brothers, he fired shots without provocation, killing several and wounding others.

In my Order, I stated that the second gun found at the scene was registered to Gebreselassie's brother Mulugeta. (Dkt. No. 33 at 3; Mot. for Relief, Dkt. No. 39 at 4.) That was a mistake. Mulugeta was the registered

owner of the gun Gebreselassie used to kill and wound the members of the Mehari family. The second gun had been reported stolen by its registered owner, and it is unclear who brought it to the Meharis apartment.

I also made an error regarding Yehferom's testimony. I wrote, "Yehferom testified that Gebreselassie, while wielding two guns, came in saying, 'Everybody here killed Abraham, I'm going to kill you.'" (Dkt. No. 33 at 2.) Yehferom did indeed testify that Gebreselassie said "Everyone here killed Abraham, I'm going to kill you" as he strode into the room. (Ans., Dkt. No. 26-15 at 385.) But he did not testify that Gebreselassie entered while wielding two guns. Rather, Yehferom testified that petitioner entered "carrying a gun in his right hand and a plastic bag in his left hand." (*Id.*, Dkt. No. 26-24 at 359.)[6]

None of these factual errors, considered separately or together, entitles Gebreselassie to relief. As I wrote earlier, the evidence of his guilt was strong. To repeat, the record supports that: Gebreselassie fiercely hated the Meharis; the Meharis banned him from their house because of his continued accusations against him and said they would call the police if he came to their house again; he came armed with a gun to their house

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[6] I misread the following passage from the state appellate court opinion: "[During the initial police investigation,] Yehferom said Asmerom [Gebreselassie] entered holding two silver handguns. When asked whether Asmerom fired both of the guns or just one, Yehferom said just one, and added that Asmerom was carrying a gun in his right hand and a plastic bag in his left." (Dkt. No. 26-24 at 359.)

uninvited on Thanksgiving, when he knew the family would be gathered; and, according the Mehari brothers, he fired shots without provocation, killing several and wounding others. That he only wielded one gun instead of two, that the second gun was stolen rather than registered to his brother, and that he told the jury that the Meharis did not shoot at him does not materially diminish the strength of the evidence against Gebreselassie.

Finally, I erroneously stated that he changed counsel five times, and it appears that he had as many as six changes of counsel.[7] Whatever the final number, Gebreselassie has not shown how that mistake could entitle him to relief.

B. Legal Claims

The other contentions Gebreselassie raises in his motion reiterate claims he presented before and that I have considered and rejected. These reiterated contentions make no showing of newly-discovered evidence, or that I committed clear error or made an initial

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[7] Gebreselassie was first represented by two public defenders (Plumhoff and Lew); next he was represented by a private attorney, Dubois; Dubois was relieved and Lew reappointed; Lew was relieved and Cole, another private attorney, was appointed; Cole was relieved and the public defender reappointed; the public defenders were relieved and Dubois was reappointed; Dubois was relieved and Stallworth appointed and he remained counsel through trial. That makes six changes of counsel: (1) public defenders to Dubois; (2) Dubois to Lew; (3) Lew to Cole; (4) Cole to public defender; (5) public defender to Dubois; and (6) Dubois to Stallworth.

decision that was manifestly unjust, or that there was an intervening change in controlling law.[8] *See* Fed. R. Civ. P. 59(e); *United Nat. Ins. Co. v. Spectrum Worldwide, Inc.*, 555 F.3d 772, 779 (9th Cir. 2009) (quoting *Zimmerman v. City of Oakland*, 255 F.3d 734, 740 (9th Cir. 2001)). Nor do these reiterated contentions make a showing of newly-discovered evidence or of any mistake, inadvertence, surprise, excusable neglect, fraud by the adverse party, or voiding of the judgment; plaintiff offers no other reason justifying relief. *See* Fed. R. Civ. P. 60(b); *School Dist. 1J v. ACandS Inc.*, 5 F.3d 1255, 1263 (9th Cir. 1993). I also find no reason to reconsider its dismissal of many claims as procedurally defaulted.

One point is worth noting. Gebreselassie asserts that "the case was a credibility contest between the key prosecution witnesses (the Mehari brothers), on the one hand, and my co-defendant (my brother Tewodros) and me, on the other," (Dkt. No. 39 at 6), an idea he repeats often in his papers. That assertion dooms his habeas petition. He essentially asks me to credit his account of events and, unlike the jury, to reject the prosecution's case as not credible. This I

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[8] The Court dismissed as procedurally defaulted Gebreselassie's claims that appellate counsel rendered ineffective assistance. The default should have been excused, according to Gebreselassie, based on the equitable rule in *Martinez v. Ryan*, 566 U.S. 1 (2012). (Dkt. No. 39 at 45.) *Martinez* applies only to claims of ineffective assistance of trial counsel, however. *Davila v. Davis*, 137 S. Ct. 2058, 2061 (2017).

cannot do. I cannot redetermine credibility.[9] I can look only to see whether the state court's rejection of Gebreselassie's claims was reasonable. To prevail on this standard, Gebreselassie must show that there was "no reasonable basis for the state court to deny relief." *Harrington v. Richter*, 562 U.S. 86, 102 (2011). This he has not done. There was strong evidence to support the state court's decision, as detailed in the factual background of this section, which *omitted* the factual errors Gebreselassie raises in his motion for relief.

CONCLUSION

The motion for relief is DENIED. (Dkt. No. 39.)

A certificate of appealability will not issue. Gebreselassie has not shown "that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

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[9] A federal habeas court in general does not question a jury's credibility determinations, which are entitled to near-total deference. *Bruce v. Terhune*, 376 F.3d 950, 957 (9th Cir. 2004). Indeed, if confronted by a record that supports conflicting inferences, a federal habeas court "must presume—even if it does not affirmatively appear in the record—that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution." *Jackson v. Virginia*, 443 U.S. 307, 326 (1979).

The Clerk shall terminate Dkt. No. 39.

IT IS SO ORDERED.

Dated: April 22, 2019

/s/ William H. Orrick
WILLIAM H. ORRICK
United States District Judge

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

ASMEROM GEBRESELASSIE, Petitioner, v. SCOTT FRAUENHEIM, Respondent.	Case No. 16-cv-06195-WHO (PR) **ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS** (Filed Oct. 9, 2018)

INTRODUCTION

Petitioner Asmerom Gebreselassie seeks federal habeas relief from his state convictions for murder and other crimes on the grounds that he received ineffective assistance of counsel and the trial court made various errors. None of his claims has merit. His petition for habeas relief is DENIED.

BACKGROUND

Gebreselassie shot to death Winta Mehari, his brother Abraham's wife; Regbe Bahrenegasi, Winta's mother; and Yonas Mehari, Winta's brother; while the Mehari family was gathered at Winta's house on Thanksgiving Day in 2006.[1] (Ans., State Appellate

[1] The Mehari and Gebreselassie families, both native to Ethiopia, were very close, "like one family," and lived in the same apartment complex in Oakland. (Ans., Dkt. No. 26-24 at 353-354.)

Opinion, Dkt. No. 26-24 at 352.)[2] He also shot Yehferom Mehari, Winta's brother, who was wounded but survived. (*Id.* at 356.) Angesom Mehari, another brother, was seriously injured when he jumped out a window to escape. (*Id.*) Gebreselassie believed that Winta and her family had murdered Abraham, who had died the preceding March. (*Id.* at 354.)

There was no evidence of foul play in Abraham's death but Gebreselassie always suspected the Mehari family of murder.[3] (*Id.*) He pressed the police to investigate further, but they declined. (*Id.*) The Meharis banned Gebreselassie from their house because of his continued accusations against them. (*Id.* at 355.) They also agreed they would call the police if he ever came to their house again. (*Id.*) Petitioner testified at trial that Winta "was the most evil wife and the most evil human being on this earth" and the Meharis were the "most evil family in the whole world." (Ans., Dkt. No. 26-17 at 3864, 3868).

At trial, the prosecutor contended that Gebreselassie murdered Winta and the others as revenge for Abraham's death and that his co-defendant (and brother) Tewodros Gebreselassie helped him first by signaling to him when the Meharis were gathered and

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[2] *People v. Gebreselassie*, Nos. A133350 and A134246, 2015 WL 5146199 (Cal. Ct. App. Sept. 2, 2015), as modified by denial of reh'g (Sept. 25, 2015).

[3] Also, Gebreselassie was worried that Merhawi Mehari, Winta's brother, a homosexual, was molesting Isaac Gebreselassie, Abraham and Winta's son.

second by letting him into their house.[4] (*Id.*, Dkt. No. 26-24 at 357.)

Angesom, Merhawi, and Yehferom Mehari, Winta's brothers, all testified that they saw Gebreselassie, without provocation, shoot at the family. (*Id.* at 357-359.) Yehferom testified that Gebreselassie, while wielding two guns, came in saying, "Everybody here killed Abraham, I'm going to kill you." (*Id.* at 359.) Evidence was presented that the gun was empty of bullets when the firing stopped. (*Id.*, Dkt. No. 26-15 at 2556.) Gebreselassie testified that he had practiced shooting at a range roughly six or seven times and that he made sure the gun was loaded before he went to the Meharis' house. (*Id.*, Dkt. No. 26-17 at 3549-552.)

Gebreselassie testified at trial that he acted in self-defense. (*Id.*) He came to the Mehari house at Winta's invitation, which he regarded as suspect, and was attacked by her brothers Yehferom and Merhawi soon after he entered. (*Id.*, Dkt. No. 26-24 at 361-62.) The Meharis fired at him first. (*Id.* at 362.) He shot to defend himself, he says.

This defense was severely undermined. There was no evidence that the Meharis fired a single shot. The second gun found at the scene, the one allegedly used by the Meharis, was registered to Gebreselassie's brother Mulugeta. (*Id.* at 357.) Police found it had six live rounds in the magazine, the maximum such a gun

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[4] On appeal, the judgment as to Tewodros Gebreselassie was reversed and the matter was remanded to the trial court for further proceedings. (Ans., Dkt. No. 26-24 at 394.)

could hold, indicating that no shot had been fired. (*Id.*, Dkt. No. 26-15 at 2556.)

In 2011, an Alameda County Superior Court jury found Gebreselassie guilty of murder, premeditated attempted murder, and false imprisonment by violence. (*Id.* at 364.) The jury found true various sentencing allegations. He was sentenced to three terms of life in prison without the possibility of parole, a life term, an indeterminate term of 75 years to life, and a determinate term of 57 years. (*Id.*, Dkt. No. 26-6 at 3136-3141.)

Gebreselassie's attempts to overturn his convictions in state court were unsuccessful. This federal habeas petition followed.

STANDARD OF REVIEW

Under the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), this Court may entertain a petition for writ of habeas corpus "in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). The petition may not be granted with respect to any claim that was adjudicated on the merits in state court unless the state court's adjudication of the claim: "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of

the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d).

"Under the 'contrary to' clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state court decides a case differently than [the] Court has on a set of materially indistinguishable facts." *Williams (Terry) v. Taylor*, 529 U.S. 362, 412–13 (2000).

"Under the 'unreasonable application' clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from [the] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Id.* at 413. "[A] federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." *Id.* at 411. A federal habeas court making the "unreasonable application" inquiry should ask whether the state court's application of clearly established federal law was "objectively unreasonable." *Id.* at 409.

DISCUSSION

I. Assistance of Trial Counsel

Gebreselassie changed counsel five times during the course of his criminal proceedings. He also

represented himself for a time until the trial court terminated his pro se status, owing to his disruptive behavior.

Gebreselassie claims defense counsel Darryl Stallworth rendered ineffective assistance by (i) failing to object to Sergeant Morris's testimony that he did not believe petitioner's version of events; (ii) failing to object to the admission of two entries in Winta's diary; (iii) failing to move for a mistrial; (iv) providing defense strategy and work product to the prosecutor; (v) being unprepared for trial; and (vi) failing to file another motion for a mistrial.

These claims were not raised on direct appeal but rather on state collateral review. The state supreme court rejected the claims as untimely.[5] (Ans., Dkt. No. 26-24 at 735.) The state appellate court summarily denied the claims. (*Id.* at 459.) The state superior court denied them as procedurally barred and on the merits. (*Id.* at 456.) Because the claims were denied on the merits, the deferential AEDPA standard applies. But,

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[5] Respondent contends that these claims are procedurally defaulted, the state court having denied them as untimely. Procedural default can be excused for ineffective assistance of *trial* counsel claims, if certain conditions are met. *Martinez v. Ryan*, 566 U.S. 1, 11-12 (2012). In determining whether the conditions are met, the Court must engage in some review of the merits. *Trevino v. Thaler*, 133 S. Ct. 1911, 1918 (2013) (to excuse procedural default, the claim of ineffective assistance of counsel must be "substantial"). To simplify matters, I will address the claims on their merits, without considering whether the claims are procedurally defaulted.

even if the claims were reviewed de novo, they would still fail.

In order to prevail on a claim of ineffectiveness of counsel, a petitioner must establish that counsel's performance was deficient, i.e., that it fell below an "objective standard of reasonableness" under prevailing professional norms, *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). He must also show that he was prejudiced by counsel's deficient performance, i.e., that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. Where the defendant is challenging his conviction, the appropriate question is "whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." *Id.* at 695. "The likelihood of a different result must be substantial, not just conceivable." *Harrington v. Richter*, 562 U.S. 86, 112 (citing *Strickland*, 466 U.S. at 693).

The standards of 28 U.S.C. § 2254(d) and *Strickland* are "highly deferential . . . and when the two apply in tandem, review is doubly so." *Richter*, 562 U.S. at 105 (quotation marks and citations omitted). "The question [under § 2254(d)] is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard." *Id.*

i. Failure to Object to Morris's Testimony

At trial, Sergeant Morris, who interviewed petitioner after the killings, testified that he did not believe Gebreselassie's account of the events at the Mehari house. Gebreselassie claims counsel rendered ineffective assistance by failing to object. (Pet., Dkt. No. 1 at 11.)

When presented with a state court decision that is unaccompanied by a rationale for its conclusions, a federal court must conduct an independent review of the record to determine whether the state court decision is objectively reasonable. *See Delgado v. Lewis*, 223 F.3d 976, 982 (9th Cir. 2000). This review is not de novo. "[W]here a state court's decision is unaccompanied by an explanation, the habeas petitioner's burden still must be met by showing there was no reasonable basis for the state court to deny relief." *See Harrington v. Richter*, 562 U.S. 86, 98 (2011).

Gebreselassie has failed to show prejudice. The evidence of guilt was quite strong: Gebreselassie sought revenge for the purported murder of his brother Abraham; he came armed with a gun to the Mehari house, from which he had been barred owing to his hostility toward the family; and Angesom, Merhawi and Yehferom Mehari testified that they saw Gebreselassie, without provocation, fire shots at the family until the gun was empty. On such robust evidence, counsel's failure to object to Morris's testimony cannot be thought to constitute ineffective assistance.

Under an independent review of the record, the Court concludes that the state court's rejection of this claim was not objectively unreasonable. Under de novo review, the claim fails. The claim is DENIED.

ii. Failure to Object to the Admission of Diary Entries

Gebreselassie claims defense counsel rendered ineffective assistance for failing to object to the admission of two entries from Winta's diary. (Pet., Dkt. No. 1 at 17.) In those entries, which were written after Abraham's death, Winta expresses her love for Abraham and her concern about his family's poor treatment of her. (Ans., Dkt. No. 26-17 at 3418-3419, 3422-3423.) Before trial, Gebreselassie's prior counsel, not Stallworth, objected to their admission. The trial court allowed their admission only if Gebreselassie testified that Winta murdered Abraham. He so testified and the entries were admitted. Stallworth objected to the admission of the second diary entry as hearsay. (*Id.* at 3421, 3423.)

Their admission was permissible, despite petitioner's hearsay objections, according to the state appellate court. "[Gebreselassie] all but concedes, however, that the first entry regarding Winta's feelings about Abraham were [*sic*] admissible to prove her state of mind, and we agree." (*Id.*, Dkt. No. 379.) The second was admissible on similar grounds. (*Id.* at 379-380.)

The claim regarding the second entry is meritless because Stallworth did in fact object. The claim

regarding the first entry shows neither deficient performance nor prejudice. The state appellate court's approval of its admission forecloses any plausible finding that counsel's performance was deficient. It is both reasonable and not prejudicial for defense counsel to forgo a meritless objection. *See Juan H. v. Allen*, 408 F.3d 1262, 1273 (9th Cir. 2005). Furthermore, the evidence against Gebreselassie was strong, as detailed above.

Under an independent review of the record, the Court concludes that the state court's rejection of this claim was not objectively unreasonable. Under de novo review, the claim fails. The claim is DENIED.

iii. Failure to Move for a Mistrial

The trial court ordered Gebreselassie removed from the courtroom because of his disruptive behavior and his failure to follow the court's instructions. As this happened, petitioner accused the court of "acting like a DA." (Ans., Dkt. No. 26-14 at 209.) There was a disagreement later, outside the presence of the jury, whether he said "DA." The prosecutor heard "bitch" or "dick" while the clerk heard "DA." (*Id.* at 237.) The prosecutor then said that petitioner "might think DA and bitch are synonymous." (*Id.* at 240.) Gebreselassie firmly stated that he said "DA." (*Id.* at 253.) The trial court later stated that he had said "DA." (*Id.* at 258.)

Gebreselassie claims Stallworth should have moved for a mistrial based on the prosecutor's comments. (Pet., Dkt. No. 1 at 22.) He claims that

Stallworth refused to do so because he had a close relationship with the prosecutor. (*Id.* at 24-25.)

A defendant's due process rights are violated when a prosecutor's conduct "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Darden v. Wainwright*, 477 U.S. 168, 181 (1986) (citation and internal quotation omitted). Under *Darden*, the first issue is whether the prosecutor's conduct was improper; if so, the next question is whether such conduct infected the trial with unfairness. *Tan v. Runnels*, 413 F.3d 1101, 1112 (9th Cir. 2005).

Habeas relief is not warranted here. Counsel likely thought a mistrial motion based on prosecutorial misconduct would have been futile. It is not plausible that the prosecutor's comment deprived Gebreselassie of a fair trial. The statement was made outside the presence of the jury. And the weight of the evidence against him, as detailed above, weighs firmly against any finding of prejudice. Counsel likely thought any motion would be denied. It is both reasonable and not prejudicial for defense counsel to forgo a meritless objection. *See Juan H.*, 408 F.3d at 1273.

Under an independent review of the record, the Court concludes that the state court's rejection of this claim was not objectively unreasonable. Under de novo review, the claim fails. The claim is DENIED.

iv. Providing Defense Strategy and Work Product to Prosecutor

Gebreselassie claims Stallworth rendered ineffective assistance by providing the defense's strategy and work product to the prosecutor. (Pet., Dkt. No. 1 at 26.) He bases this claim on the following. For a while, Gebreselassie represented himself at trial, with Stallworth acting as advisory counsel. After he had been removed from the courtroom for disruptive behavior, Stallworth asked the court whether he would represent petitioner temporarily or permanently. Such clarification was important "because I would have a different defense in a number of different areas." (Ans., Dkt. No. 26-14 at 236.) When asked to comment, the prosecutor said her only concern, "and I think Mr. Stallworth has dealt with the issue based on the research he has done, is that the distinctions in the defenses could cause a potential issue with regard to continuing the trial without a mistrial." (*Id.* at 237.)

Habeas relief is not warranted here. It is not plausible to infer, based on the prosecutor's comment, that Stallworth gave Gebreselassie's defense strategy and work product to the prosecutor. A more likely reading is that the prosecutor was echoing Stallworth's concerns. She knew the strategies would be different because she heard Stallworth announce in court that very fact. She also knew that a clash of defenses might lead to concerns about the fairness of the trial. Gebreselassie's claim lacks merit. Other than his jaundiced interpretation of the prosecutor's comments, he provides no evidence for this claim.

Under an independent review of the record, the Court concludes that the state court's rejection of this claim was not objectively unreasonable. Under de novo review, the claim fails. The claim is DENIED.

v. Lack of Preparedness

Gebreselassie claims that Stallworth rendered ineffective assistance because he was not prepared for trial and knew nothing about the case. (Pet., Dkt. No. 1 at 28.) With two exceptions, his allegations are conclusory and generalized complaints about a lack of preparedness.[6] Rather than posing general allegations, a federal habeas petition "is expected to state facts that point to a real possibility of constitutional error." *Mayle v. Felix*, 545 U.S. 644, 655 (2005) (internal quotation marks and citation omitted). Conclusory allegations are not sufficient.

His specific allegations are that Stallworth did not ask co-defendant Tewodros Gebreselassie any questions and did not consult with petitioner before trial, thereby depriving petitioner of representation at a critical stage of trial.

The first claim is refuted by the record. Stallworth did ask Tewodros questions. (Ans., Dkt. No. 26-17 at 977-978.) Gebreselassie also fails to detail what

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[6] For example, Gebreselassie says that Stallworth could answer only 1 of 15 questions about the case petitioner put to him. (Pet., Dkt. No. 1 at 28.) He does not state what these questions were or how Stallworth's alleged inability to answer them affected the trial.

questions should have been asked, what information would have been elicited by such questions, nor how such information would have affected the trial.

The second claim is conclusory. Gebreselassie does not state what information Stallworth would have obtained at such meetings, nor how such information would have been useful at trial.

Furthermore, the trial court made explicit findings about Stallworth's preparedness. During the trial, the court required the prosecution, on a daily and weekly basis, to provide counsel with a list of the next day's witnesses and a prediction for when the case-in-chief would conclude. The court noted Stallworth spent a considerable amount of time visiting his client in jail:

> the Court further takes judicial notice of all the weekend days Mr. Stallworth went to the jail, consulted with [Gebreselassie] through – and the Court knows this because the court appointed records the Court had to review and sign off on during the entirety of the trial were given to the Court. The Court reviewed those records and they indicated that Mr. Stallworth went to the jail on the weekends in addition to in court appearances. There is no specificity in the allegation made that [Gebreselassie] didn't have an adequate opportunity to consult with the attorneys.

(Ans., Dkt. No. 26-18 at 667.)

Under an independent review of the record, the Court concludes that the state court's rejection of this

claim was not objectively unreasonable. Under de novo review, the claim fails. The claim is DENIED.

vi. Failure to File Another Mistrial Motion

Gebreselassie wanted counsel to file another motion for a mistrial, this one based on the trial court's alleged misconduct. He alleges that the trial judge's "body language" improperly influenced the jury and that the court's "ridiculing and badgering" of him constituted misconduct. Counsel declined to file such a motion, which Gebreselassie regards as ineffective assistance. (Pet., Dkt. No. 1 at 31.) At a hearing on a motion to change counsel, Gebreselassie moved on his own for a mistrial on the grounds of trial court misconduct. The motion was denied. (*Id.* at 34.)

Habeas relief is not warranted here. Stallworth likely did not file such a motion because he knew it to be futile. Because a later motion based on such grounds was denied, it is clear that Stallworth's declination made no difference. With this in mind, Stallworth's performance cannot be thought deficient or prejudicial.

Under an independent review of the record, the Court concludes that the state court's rejection of this claim was not objectively unreasonable. Under de novo review, the claim fails. The claim is DENIED.

II. Assistance of Appellate Counsel

Gebreselassie claims appellate counsel rendered ineffective assistance by failing to raise the following six claims: (i) he was denied the right to be tried by jurors of his choice; (ii) the trial court abused its discretion; (iii) he was denied the right for compulsory process to obtain witnesses; (iv) the trial court refused to allow him to recall certain witnesses; (v) the prosecutor presented false testimony; and (vi) the trial court was biased.

Respondent contends that these claims should be dismissed as procedurally defaulted, the state supreme court having denied the claims as untimely. I agree.

These claims were not raised on direct appeal, but rather by way of state habeas petitions. The state supreme court's decision reads in full as follows: "The petition for writ of habeas corpus is denied. (*See In re Robbins* (1998) 18 Cal. 4th 770, 780 [courts will not entertain habeas corpus claims that are untimely].)" (Ans., Dkt. No. 26-24 at 735.)

A. Procedural Default

1. Procedural Default Principles

Federal habeas relief is barred on grounds of procedural default if a state denied claims because a petitioner failed to comply with the state's requirements for presenting them. *Coleman v. Thompson*, 501 U.S. 722, 731-32 (1991). The state's grounds for denying the

claim "must be independent of the federal question and adequate to support the judgment." *Id.* at 729. A state procedural bar is "adequate" if it is "clear, consistently applied, and well-established at the time of the petitioner's purported default." *Calderon v. U.S. Dist. Ct. (Bean)*, 96 F.3d 1126, 1129 (9th Cir. 1996) (quoting *Wells v. Maass*, 28 F.3d 1005, 1010 (9th Cir. 1994)).

The state carries the initial burden of adequately pleading "the existence of an independent and adequate state procedural ground as an affirmative defense." *Bennett v. Mueller*, 322 F.3d 573, 586 (9th Cir. 2003). If the state meets this requirement, the burden then shifts to the petitioner "to place that defense in issue," which the petitioner may do "by asserting specific factual allegations that demonstrate the inadequacy of the state procedure, including citation to authority demonstrating inconsistent application of the rule." *Id.*

When the Ninth Circuit has determined that a rule is adequate, the petitioner then must cite cases "demonstrating subsequent inconsistent application" to meet his burden under *Bennett*. *King v. LaMarque*, 464 F.3d 963, 967 (9th Cir. 2006). If the petitioner meets this burden, "the ultimate burden" of proving the adequacy of the state bar rests with the state, which must demonstrate "that the state procedural rule has been regularly and consistently applied in habeas actions." *Bennett*, 322 F.3d at 586.

To overcome a claim of procedural default, petitioner must establish either (1) cause for the default,

and prejudice, or (2) that failure to consider the defaulted claims will result in a "fundamental miscarriage of justice." *Harris v. Reed*, 489 U.S. 255, 262 (1989). To show cause for a procedural default, the petitioner must "show that some objective factor external to the defense impeded" his efforts to comply with the state procedural rule. *Murray v. Carrier*, 477 U.S. 478, 488 (1986). For cause to exist, the external impediment must have prevented the petitioner from raising the claim. *See McClesky v. Zant*, 499 U.S. 467, 497 (1991). To show prejudice, a petitioner bears "the burden of showing not merely that the errors [complained of] constituted a possibility of prejudice, but that they worked to his actual and substantial disadvantage, infecting his entire [proceeding] with errors of constitutional dimension." *White v. Lewis*, 874 F.2d 599, 603 (9th Cir. 1989) (citing *United States v. Frady*, 456 U.S. 152, 170 (1982)). If the petitioner fails to show cause, the court need not consider whether the petitioner suffered actual prejudice. *Engle v. Isaac*, 456 U.S. 107, 134 n.43 (1982).

To show a "fundamental miscarriage of justice," a petitioner must show that the constitutional error of which he complains "has probably resulted in the conviction of one who is actually innocent." *Bousley v. United States*, 523 U.S. 614, 623 (1998) (citing *Murray*, 477 U.S. at 496). "Actual innocence" is established when, in light of all the evidence, "it is more likely than not that no reasonable juror would have convicted [the petitioner]." *Id.* at 623 (quoting *Schlup v. Delo*, 513 U.S. 298, 327-28 (1995)). "'[A]ctual innocence' means

factual innocence, not mere legal insufficiency." *Id.* A petitioner can make a showing of "actual innocence" by presenting the court with new evidence that raises a sufficient doubt as "to undermine confidence in the result of the trial." *Schlup*, 513 U.S. at 324.

2. Analysis

Respondent has carried the initial burden of adequately pleading the existence of an independent and adequate state procedural ground as an affirmative defense. As respondent points out, the state supreme court denied Gebreselassie's habeas application as untimely with a citation to *In re Robbins*. The United States Supreme Court has held that California's timeliness rule, as announced in *In re Robbins*, is an adequate and independent state ground for the denial of federal habeas corpus relief. *Walker v. Martin*, 562 U.S. 307, 310, 312, 316-21 (2011).

Gebreselassie has not met his burden "to place that defense in issue." *Bennett*, 322 F.3d at 586. He has not asserted any "specific factual allegations that demonstrate the inadequacy of the state procedure." *Id.* Accordingly, his claims of ineffective assistance of appellate counsel are procedurally defaulted.

To overcome this procedural default bar, Gebreselassie must establish either cause and prejudice, or that a failure to consider his claims will result in a fundamental miscarriage of justice. *Harris*, 489 U.S. at 262. He has not established cause. Rather than articulating reasons showing that some objective factor

external to the defense impeded his ability to comply with state procedure, he declares that appellate counsel was ineffective for failing to raise these claims. Ineffective assistance of appellate counsel does not excuse the failure to show cause. *Davila v. Davis*, 137 S. Ct. 2058, 2065 (2017). Because he has not shown cause, the Court need not determine whether he suffered prejudice. *Isaac*, 456 U.S. at 134 n.43.

Nor has Gebreselassie shown that a failure to consider the merits of his claims will result in a miscarriage of justice. There was substantial evidence of guilt, as discussed above. Gebreselassie's own testimony establishes that he hated the Meharis and blamed them for Abraham's death; he went to their house while armed with a gun, a gun he made sure to fully load before he arrived; and he fired shots at them. His self-defense contentions were heavily undercut at trial. In sum, there is no claim or showing that the constitutional error of which he complains "has probably resulted in the conviction of one who is actually innocent." *Bousley*, 523 U.S. at 623 (citing *Murray*, 477 U.S. at 496).

Respondent's motion to dismiss petitioner's claims of ineffective assistance of appellate counsel as procedurally defaulted is GRANTED. These claims are DISMISSED.

III. Denial of Continuance

Gebreselassie claims that the trial court unjustly denied a continuance, thereby violating his right to due

process. (Pet., Dkt. No. 1 at 84, 94.) He alleges that because of the denial, he did not have time to prepare for trial and was not timely provided with discovery materials. (*Id.*)

The relevant facts are as follows. The first day of trial was supposed to be November 29, 2010. (Ans., Dkt. No. 26-24 at 371.) On that day, the trial was continued (to January 3) because co-defendant's counsel had a conflict. (*Id.*) At that same hearing, Gebreselassie moved to change counsel. (*Id.*) When that motion was denied, he asked to represent himself. (*Id.*) The trial court granted the motion; appointed Stallworth as advisory counsel and directed him to provide petitioner with the cases files; and "fully cautioned" petitioner that the January 3 trial date would not be continued "whether you're ready to go or not." (*Id.* at 371-372.)

On December 16, Gebreselassie asked for a three-month continuance so that he could investigate "newly discovered evidence," that is, the recording of the 911 call from the night Abraham died. (*Id.* at 372.) Petitioner said that he was still ready to go to trial on January 3 or even "tomorrow." (*Id.*) Stallworth said that the defense would be ready by January 3 or 10, 2011. (*Id.*) The court continued the trial to January 10, but denied the 3-month continuance. (*Id.*) The defense had known of the recording for eight months and would have enough time to review it by January 10. (*Id.*)

On January 3, 2011, Gebreselassie asked for a continuance so that he would have time to study the 911 recording. (*Id.*, Dkt. No. 26-13 at 150.) This request was

denied because the recording was not new evidence. (*Id.* at 150-151.) Petitioner said he had not received discovery. (*Id.* at 156.) Stallworth said he and an investigator were preparing the defense materials for him. The court ordered Stallworth and the investigator to come to court the next day to discuss the matter. (*Id.* at 167-169.)

On January 4, the court ordered Gebreselassie and the investigator to review the 1500 pages of materials Stallworth had brought to the hearing to ensure that petitioner had what he needed. The prosecutor stated that she had brought 1500 pages of materials, much of which had been subpoenaed by the defense. (*Id.*, Dkt. No. at 214-215.)

On January 5, Gebreselassie asked for a continuance so that he could hire an audio expert to review the 911 tape. He also asked to retain a new attorney. He said nothing about discovery. The trial court denied the motions. (*Id.* at 240.) Stallworth stated that Gebreselassie had about 1500 pages of materials. He also discussed how he and the investigator would get the remainder of the discovery to him. (*Id.* at 265-266.)

On January 6, Gebreselassie asked for a continuance to get another attorney. The court said that would be allowed if prior counsel, public defenders Lew and Plumhoff, were willing and were ready. (*Id.* at 292.)

Trial began in January 2011. The defense started presenting its case three months later, in April.

Gebreselassie alleges that on the first day of trial he was still without thousands of pages of discovery, as well as audio tapes, and some CDs of crime scene photographs. (Pet., Dkt. No. 1 at 84-85.) He admits that a prior attorney (public defender Marvin Lew) had provided him with some 1200 pages of materials and seven tapes. (*Id.*)

The continuance claim was denied on appeal. Gebreselassie had had adequate time to prepare a defense. (Ans., Dkt. No. 26-24 at 372-73.) The case had been pending for four years, during which he "actively participated in preparation for his defense"; he failed to show he could not complete his review of the tape within the time frame; he and Stallworth had assured the court the defense would be ready by January 10; and his "tortuous history of changing representation" indicated he was using his self-representation rights as a way of delaying trial. (*Id.*)

To establish a constitutional violation based on the denial of a continuance motion, a petitioner must show that the trial court abused its discretion, which will be found if, after carefully evaluating all relevant factors, the denial was arbitrary or unreasonable. *See Armant v. Marquez*, 772 F.2d 552, 556 (9th Cir. 1985). The relevant factors are: (i) whether the continuance would have inconvenienced witnesses, the court, counsel, or the parties; (ii) whether other continuances had been granted; (iii) whether legitimate reasons existed for the delay; (iv) whether the delay was the defendant's fault; and (v) whether the denial prejudiced the defendant. *See United States v. Mejia*, 69 F.3d 309, 314

(9th Cir. 1995). The ultimate test remains whether the trial court abused its discretion through an "unreasoning and arbitrary insistence upon expeditiousness in the face of a justifiable request for delay." *Houston v. Schomig*, 533 F.3d 1076, 1079 (9th Cir. 2008) (quoting *Morris v. Slappy*, 461 U.S. 1, 11-12 (1983)) (internal quotation marks omitted).

Habeas relief is not warranted here. First, Gebreselassie's claims are conclusory. He does not state what materials would have made a difference at trial. Such conclusory allegations fail to "state facts that point to a real possibility of constitutional error." *Felix*, 545 U.S. at 655. Furthermore, he had until April to review the materials and prepare a defense. He makes no specific, supported allegation that the failure to have the materials at an earlier time prevented him from challenging the prosecution's case-in-chief.

Second, the state court's denial of the claim was reasonable. During the four years trial had been pending, Gebreselassie had been an active participant in his defense and his continued changing of counsel supported an inference that he was engaging in dilatory tactics. This last point is important. Gebreselassie had had attorneys willing and able to represent him, persons familiar with the case, and who were prepared to mount a defense. His insistence on dispensing with professional representation, not the court's denial of his continuances, caused problems.

Third, he has made no showing of prejudice. He admitted that he went to the Mehari house armed with

a loaded gun; harbored deep hatred toward them; and fired his gun at the family members. Also, his self-defense allegation was thoroughly undermined at trial.

It is not clear why the 911 tape was of value to his defense. It appears Gebreselassie believed the tape somehow showed that Winta murdered Abraham. Even if the tape was such evidence, how would it support his defense to Winta's killing? If anything, it would support the prosecution's theory that Gebreselassie shot for revenge, rather than in self-defense.

The state appellate court's rejection of the continuance claim was reasonable and therefore is entitled to AEDPA deference. The claim is DENIED.

IV. Prosecutorial Misconduct

Gebreselassie alleges that the prosecutor engaged in misconduct by presenting false evidence. This claim was raised only on collateral review.

Angesom Mehari testified that on the night Abraham died, he was at a hip hop club close to an immigration office on California Street in San Francisco. He claims Beal, a police investigator, testified falsely at the direction of the prosecutor in order to support Angesom's alibi. (Pet., Dkt. No. 1 at 89-90.)

Failure to set forth a factual basis for a claim that a prosecutor knowingly presented false evidence dooms such a claim. *Morales v. Woodford*, 388 F3d 1159, 1179 (9th Cir. 2004).

This claim is meritless. First, Gebreselassie has not shown any factual basis that the prosecutor knowingly presented false evidence. Second, how Beal's testimony harmed his defense is unclear. Whether Angesom was at a night club or elsewhere on the night Abraham died is immaterial. What is material is whether Gebreselassie was prejudiced.

As there was strong evidence of guilt, the answer is no.

Under an independent review of the record, the Court concludes that the state court's rejection of this claim was not objectively unreasonable. Under de novo review, the claim fails. The claim is DENIED.

V. Counsel of Choice

Gebreselassie claims that the trial court violated his Sixth Amendment right to counsel of choice when it denied his request to appoint Lefcourt as counsel. (Pet., Dkt. No. 1 at 92.) The trial court likely did so because petitioner changed (or tried to change) counsel so frequently, as the following facts demonstrate.

Gebreselassie was first represented by public defenders Ray Plumhoff and Marvin Lew. In August 2008, he unsuccessfully moved to change counsel. In September 2008, William Dubois, a private attorney, became counsel. In August 2009, Gebreselassie wrote a letter to the court in which he complained about the allegedly poor quality of Dubois's representation. Later that month, Dubois asked to be relieved as counsel,

citing a breakdown of the attorney-client relationship. The court granted the motion and reappointed Lew as counsel, over Gebreselassie's objections. Lew was relieved in October when petitioner retained William Cole as counsel. Cole's representation "was also short-lived." In December, Cole was relieved and the public defender was reappointed. (Ans., Dkt. No. 26-24 at 364-365.)

In May 2010, Gebreselassie again moved to change counsel, citing his belief that the public defenders were agents of the prosecutor. The motion was denied. (*Id.* at 365.)

In June, counsel declared a doubt as to petitioner's competency. "He has been unable to prepare to testify because of his preoccupation with matters which we believe are properly characterized as paranoid delusions." The court suspended proceedings so that petitioner could be psychologically evaluated. (*Id.* at 365-366.)

In July, the court relieved the public defenders and reappointed Dubois, with the understanding that he "had other commitments" and would need backup counsel. On August 4, petitioner stated that he would have Lefcourt, a private attorney, represent him. The court denied the motion to change counsel because it had heard that Lefcourt had not wanted to take the case, a fact Lefcourt confirmed a few days later. On August 18, Dubois declined the appointment. Gebreselassie's family then attempted to retain Lefcourt, who stated he would take the case only if he could obtain

funds from the county. The court was wary of appointing Lefcourt, who had made five special appearances but had not made a general one – he had "sort of been hovering on this case." (*Id.* at 366-368.)

The court then appointed Darryl Stallworth as counsel with the understanding that Lefcourt would step in if he could obtain county funding. In September, Gebreselassie tried to have Lefcourt appointed, but the court declined. (*Id.* at 368-369.) Stallworth remained as counsel. This is the denial of counsel petitioner bases his claim on.

This claim was rejected on appeal:

> The court's decision here to disallow a further change of counsel was a valid exercise of its discretion. The history described above shows the court carefully balanced [Gebreselassie's] request to bring Mr. Lefcourt in against his extensive history of dissatisfaction with, and termination of, a series of qualified attorneys; the resulting delays and disruption to the judicial process; and the prejudice to Tewodros [who had sought to sever his trial from petitioner's], the prosecution, and witnesses that would have resulted from allowing yet another substitution. Its ruling did not impinge on [Gebreselassie's] constitutional rights to counsel of his choice.

(*Id.* at 370.)

The Sixth Amendment right to counsel includes a qualified right of the criminal defendant to have the counsel of his choice if he can pay for it and counsel is

willing to serve. *See Wheat v. United States*, 486 U.S. 153, 159, 164 (1988). "While the right to select and be represented by one's preferred attorney is comprehended by the Sixth Amendment, the essential aim of the Amendment is to guarantee an effective advocate for each criminal defendant rather than to ensure that a defendant will inexorably be represented by the lawyer whom he prefers." *Id.* The right is qualified in that it "may be overcome by . . . 'a showing of a serious potential for conflict,'" or that the proposed choice will interfere with the integrity of the proceeding. *United States v. Stites*, 56 F.3d 1020, 1024, 1026 (9th Cir. 1995) (quoting *Wheat*, 486 U.S. at 164).

Habeas relief is not warranted here. The undisputed record of Gebreselassie's frequent attempts to change counsel, and the trial court's patience in hearing his many complaints and motions, shows that the state appellate court's ruling was reasonable.

Gebreselassie changed counsel roughly five times. His last attempt was to retain Lefcourt, an attorney who had repeatedly waffled about whether he could represent him. All this would indicate to a reasonable court that Gebreselassie was attempting to delay proceedings, rather than to ensure that he was fairly represented.

The counsel he had, Stallworth, was familiar with the case and diligent in his representation. According to the trial court, Stallworth

> more than adequately represented [Gebreselassie]. He was professional and ethical in

> spite of [Gebreselassie's] outrageous behavior and conduct. He possessed superior knowledge of the laws and procedures and evidence in this case. In fact, he asked many questions written out by [Gebreselassie] that were clearly not his own questions but from [Gebreselassie]. His overall representation of [Gebreselassie] was professional, ethical and beyond reproach.

(Ans., Dkt. No. 26-18 at 689.) On such a record, there is no doubt that "the essential aim of the Amendment" to guarantee an "effective advocate" for Gebreselassie was attained. There was no constitutional violation. The state appellate court's rejection of this claim was therefore reasonable and is entitled to AEDPA deference. This claim is DENIED.

VI. Termination of Self-Representation

Gebreselassie claims the trial court violated his right to self-representation. (Pet., Dkt. No. 1. at 96.) The fault for this lies with petitioner, not the trial judge. Gebreselassie repeatedly engaged in objectionable and disruptive behavior before and during trial. The state appellate court summarized that behavior:

> [Gebreselassie] was cautioned when he was granted pro per status that he would have to act appropriately during trial or the court could terminate his right to self-representation. 'You also understand, the other part that concerns me a little bit that you, again, tend to get a little verbose and a little worked up when you

get agitated. And when you're before the trial judge and he decides that you stepped over the line, he can terminate your pro per privileges right in the middle of trial and assign you a lawyer, and that very seldom looks good to the jury. They're going to go, wow, all of a sudden this guy's messed this up so bad and now he's got a lawyer. That generally works to the detriment of the case.' [Gebreselassie] acknowledged that he understood.

During jury selection, with the jurors outside the courtroom, [Gebreselassie] engaged in a prolonged and heated diatribe accusing the Meharis of murdering his brother and the prosecutor, the trial court and District Attorney Nancy O'Malley of being prejudiced against him. The outburst resulted in his removal, yelling and screaming, from the courtroom. When [Gebreselassie] was brought back the next day, the court warned him he would be removed again if there were further outbursts.

Angesom Mehari was the state's first important witness. During cross-examination, [Gebreselassie], acting as his own counsel, accused him, rather dramatically, of murdering Abraham: 'The question is you were there participating in Abraham's murder!!! You were there at Abraham's house killing my brother!!! Tell the truth!!!' The court warned him 'I don't want another outburst like that. If you do that again, you know what the consequences [are].'

Things deteriorated the next day. When the court instructed [Gebreselassie] to move to another line of questioning, [Gebreselassie] exclaimed, 'I have never seen this kind of justice.' The trial court admonished him to keep quiet, but he continued: 'I'm not going to keep quiet. That's my life. That's my life. The jurors has [*sic*] the right to know everything. You're arguing justice. You're prejudiced. That's my life. I have a right to defend the way I want to defend. The jury knows that he's prejudiced.' The court excused the jurors and admonished [Gebreselassie]. 'I've warned you before. You continue not to follow my instructions. You're disrespecting the Court. You're disrupting the trial. So until you can do that and keep your words to yourself, you are out of here. So he's out of here.' Before [Gebreselassie] could be removed, he responded: 'It doesn't matter. You are trying to give my case to my adversary [*sic*] counsel. No problem. You're a prejudiced person. We all know that. You are acting like a DA.'

Later that day [Gebreselassie]'s advisory counsel sought clarification about his role in light of [Gebreselassie]'s absence from the courtroom. The court explained it had not yet decided whether to revoke [Gebreselassie]'s pro per status and intended to review the case law. The next day, [Gebreselassie] accused the court of disliking and disrespecting him, offending his family, and trying to revoke his pro per status 'from the beginning.' The court terminated his self-representation. It explained: 'There's certainly a component of

emotional instability, and that's been demonstrated with his outbursts. [¶] Now, it's not sufficient for a 1368; however, I do think there are some components there . . . [¶] . . . Number one is the nature of the misconduct as stated – or as on the record. The Court had ordered him to move on. This was yesterday, to another subject matter. He refused, continued not to follow the Court's rules, regulations . . . [¶] And then as the jurors were walking out, filing out, made several comments to the Court. For example, 'You're prejudiced. You're a prejudicial person. We all know that. You're acting like a DA.' [¶] . . . It was also the outburst during the jury selection process which evidence[d] some emotional instability. On cross-examination of the first three witnesses, the Court has continuously and constantly ordered him to ask questions and not make self-serving gratuitous statements. [¶] And in terms of the impact of the misconduct on the trial proceedings, not only is it delaying the trial, but I am afraid that it has an effect on the jury and how the jury views him versus the evidence presented. [¶] I think it clearly subverts the Court's integrity of the trial and severely compromises the Court's ability to conduct a fair trial . . . [T]he impact on the trial is to the extent that the codefendant [has] filed a motion to sever. And in the preliminary reading it looks like it was preliminarily focused on the outbursts during jury selection and then what happened yesterday.'

The court also noted its futile admonitions to follow court rules and procedures throughout

> the trial, [Gebreselassie]'s apparent attempt to intimidate Angesom during cross-examination, and the lack of suitable alternative sanctions. It then terminated [Gebreselassie]'s pro per status and appointed his advisory counsel to represent him for the remainder of the trial.

(Ans., Dkt. No. 26-24 at 373-375.)

Gebreselassie's claim was rejected on appeal. "The court properly exercised its discretion here. [Gebreselassie] was argumentative, insulting and disrespectful to the court, and either unable or unwilling to control his outbursts and abide by courtroom rules and protocol despite multiple warnings that failure to do so would result in the termination of his right to represent himself." (*Id.* at 376.)

A criminal defendant has a Sixth Amendment right to self-representation. *Faretta v. California*, 422 U.S. 806, 832 (1975). This right is not absolute, however. "[A] trial judge may terminate self-representation by a defendant who deliberately engages in serious and obstructionist misconduct." *Id.* at 834 n.46 (citation omitted). "The right of self-representation is not a license to abuse the dignity of the courtroom." *Id.*

Gebreselassie's disruptive behavior gave the trial court reasonable cause to revoke his *Faretta* status. A review of the transcript reflects a pattern by him to engage in serious and obstructionist misconduct: heated rants that resulted in his removal from the courtroom; insults directed at the judge and counsel;

inappropriate questioning of witnesses; refusal to abide by the court's instructions and follow court protocol etc. The state court's decision was reasonable and is therefore entitled to AEDPA deference. Accordingly, this claim is DENIED.

VII. Admission of Winta's Diary Entries

Gebreselassie claims the trial court violated his right to due process by admitting diary entries from Winta's laptop. (Pet., Dkt. No. 1 at 98.) He contends they were inadmissible hearsay. I discussed the facts underlying this claim above, including the state appellate court's approval of the admission of the entries.

As determined above, the diary entries were properly admitted. Furthermore, Gebreselassie fails to show prejudice. The entries memorialized Winta's grief and love for Abraham and her distress over the Gebreselassie family's suspicions. They did not inculpate petitioner nor have any perceptible effect on his defense.

The state court's decision was reasonable and is therefore entitled to AEDPA deference. Accordingly, this claim is DENIED.

VIII. Exclusion of Homosexuality Evidence

Gebreselassie claims the trial court wrongly excluded evidence that Winta's brothers, twins Merhawi and Angesom, were homosexual. (Pet., Dkt. No. 1 at 99.) He believed that the Meharis killed Abraham in part because he knew of and was going to publicly

expose the brothers' homosexuality, a sexual orientation disapproved of by the family's church and by Ethiopian society. (Ans., Dkt. No. 26-24 at 380-382.)

Gebreselassie wanted to question the brothers about their sexuality and "alleged involvement with gay chat lines or web sites." (*Id.* at 380.) The trial court said it might allow such evidence to be admitted, but only after Gebreselassie testified to his beliefs about the brothers. (*Id.* at 381.) On cross-examination, he questioned the brothers about their sexual orientation. (*Id.*) When he later questioned Merhawi on direct examination about his homosexuality, the court sustained objections to such questions. (*Id.*)

Gebreselassie's claim was rejected on appeal:

> [Gebreselassie'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, [Gebreselassie] 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.

(*Id.* at 383.)

Habeas relief is not warranted here. The state appellate court reasonably determined that the trial court's decision made little difference because Gebreselassie had been allowed to present sufficient evidence of the twins' homosexuality. How any additional evidence would have strengthened his defense or how the exclusion acted to his detriment is unclear. The state court's rejection of this claim was reasonable and is entitled to AEDPA deference. This claim is DENIED.

IX. Admission of Child Custody Evidence

Winta's brother, Yehferom, testified at trial that he had been awarded custody of her son, Isaac, and that the Gebreselassies had been denied visitation rights. Gebreselassie claims the admission of such evidence violated his constitutional rights. (Pet., Dkt. No. 1 at 102.)

The state appellate court rejected this claim because the evidence was innocuous and related to collateral matters. The Court agrees. Furthermore, Gebreselassie has failed to show prejudice. The state court's rejection of this claim was reasonable and is entitled to AEDPA deference. This claim is DENIED.

X. Prosecutor's Comment

There was an allegation that Merhawi Mehari told Asmeret Gebreselassie, petitioner's sister, in front of other witnesses, that he would kill her and drink her blood. Merhawi denied this when asked by Tewodros's counsel on cross-examination. In closing argument, the prosecutor mentioned that no witnesses testified in support of the allegation. Gebreselassie claims the prosecutor's statement constituted misconduct. (Pet., Dkt. No. 1 at 103.)

The state appellate court concluded that the comment was a permissible comment on the state of the evidence and related to a tangential event. (Ans., Dkt. No. 26-24 at 387.) The Court agrees. In no plausible way can the prosecutor's comment be thought to have deprived Gebreselassie of a constitutionally fair trial. Furthermore, he has failed to show prejudice. The state court's rejection of this claim was reasonable and is entitled to AEDPA deference. This claim is DENIED.

XI. Morris's Testimony

Sergeant Morris testified that he did not believe Tewodros's version of events. Gebreselassie claims that such testimony was prejudicial to him. (Pet., Dkt. No. 1 at 108.) Habeas relief is not warranted here because Gebreselassie has not shown prejudice. His own testimony was highly inculpatory and easily outweighs any adverse effect Morris's testimony had. This claim is DENIED.

XII. Cumulative Error

Gebreselassie claims that the cumulative effect of the errors at trial violated his right to due process. (Pet., Dkt. No. 1 at 109.)

In some cases, although no single trial error is sufficiently prejudicial to warrant reversal, the cumulative effect of several errors may still prejudice a defendant so much that his conviction must be overturned. *See Alcala v. Woodford*, 334 F.3d 862, 893–95 (9th Cir. 2003). Where there is no single constitutional error existing, nothing can accumulate to the level of a constitutional violation. *See Mancuso v. Olivarez*, 292 F.3d 939, 957 (9th Cir. 2002).

Habeas relief is not warranted here. Gebreselassie has not shown that there were any constitutional errors. Therefore there can be no cumulation of errors that deprived him of a fair trial. This claim is DENIED.

CONCLUSION

Gebreselassie's ineffective assistance of counsel claims are DISMISSED as procedurally defaulted. His remaining claims are denied for want of merit.

The state court's adjudication of Gebreselassie's claims did not result in decisions that were contrary to, or involved an unreasonable application of, clearly established federal law. Further, the state court's findings did not result in decisions that were based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding.

A certificate of appealability will not issue. Reasonable jurists would not "find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Gebreselassie may seek a certificate of appealability from the Ninth Circuit.

The Clerk shall enter judgment in favor of respondent and close the file.

IT IS SO ORDERED.

Dated: October 9, 2018

/s/ William H. Orrick
WILLIAM H. ORRICK
United States District Judge

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ASMEROM GEBRESELASSIE, Petitioner-Appellant, v. SCOTT FRAUENHEIM, Warden, Respondent-Appellee.	No. 18-17161 D.C. No. 3:16-cv-06195-WHO Northern District of California, San Francisco ORDER (Filed Sep. 30, 2019)

Before: LEAVY and W. FLETCHER, Circuit Judges.

Appellant's motion for reconsideration (Docket Entry No. 14) is denied. *See* 9th Cir. R. 27-10.

No further filings will be entertained in this closed case.

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Attorney for Petitioner,
ASMEROM GEBRESELASSIE

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

(SAN FRANCISCO DIVISION)

ASMEROM GEBRESELASSIE, Petitioner and Appellant, v. SCOTT FRAUENHEIM, Warden, Respondent.	Case No.: 16-cv-06195-WHO AMENDED NOTICE OF APPEAL (Filed May 14, 2019)

Pursuant to Rule 4(a), Federal Rules Of Appellate Procedure, Petitioner in the above named case hereby appeals from the judgment and order of this court denying his motion for reconsideration of the denial of his petition for writ of habeas corpus and dismissal of the action with prejudice. Said judgment and order was entered on, April 22nd, 2019, by Honorable, William H. Orrick, United States District Court Judge.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on May 14th, 2019, at San Diego, California.

/s/ Patrick Morgan Ford
PATRICK MORGAN FORD,
Attorney for Appellant
ASMEROM GEBRESELASSIE

Certificate of Service

CASE NAME: **No.** 16-cv-06195 WHO

ASMEROM GEBRESELASSIE,

Petitioner and Appellant,

v.

SCOTT FRAUENHEIM,
Warden,

I hereby certify that on May 14th, 2019, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

Amended Notice of Appeal

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

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct

and that this declaration was executed on May 14th, 2019, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

Amended Notice of Appeal

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

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on May 14th, 2019, at San Diego, California.

/s/ Patrick Morgan Ford
PATRICK MORGAN FORD,
Attorney for Appellant
ASMEROM GEBRESELASSIE

2015 Cal. App. Unpub. LEXIS 6397

People v. Gebreselassie

Court of Appeal of California,
First Appellate District, Division Three

September 2, 2015, Opinion Filed

A133350, A134246

Judges: Siggins, J.; Pollak, Acting P. J., Jenkins, J. concurred.

Opinion by: Siggins, J.

Opinion

Asmerom and Tewodros Gebreselassie were convicted of the Thanksgiving, 2006 murders of Regbe Bahrenegasi and Winta and Yonas Mehari. It is undisputed that Asmerom[1] was the shooter, while his younger brother Tewodros was prosecuted as an accomplice. Asmerom contends the court committed constitutional error when it deprived him of his right to the retained counsel of his choice, denied requests for continuances after he was granted leave to represent himself, terminated his right of self-representation during trial, and denied his post-verdict request for a copy of the trial transcript. In addition, he alleges prosecutorial misconduct and a number of prejudicial evidentiary errors.

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[1] Because a number of the individuals involved in the case share surnames, we will in most cases use first names. We do so only for clarity, and mean no disrespect by adopting this practice.

Tewodros contends the trial court erroneously refused to sever his case or grant a mistrial due to Asmerom's misconduct before the court, admitted an investigating officer's testimony that he disbelieved a statement Tewodros gave shortly after the murders, admitted prejudicial double hearsay that suggested he lied about registering a gun he purchased not long before the murders, and refused his request to respond to that testimony. Tewodros also asserts reversal is warranted for prosecutorial misconduct. Both defendants maintain that the alleged errors, independently or cumulatively, deprived them of a fair trial.

We affirm the judgment as to Asmerom. We conclude that the combined effect of evidentiary errors affecting Tewodros deprived him of a fair trial and thus compels reversal of his conviction.

BACKGROUND

This was a very long trial, spanning some four months before the jury. The following is an admittedly non-comprehensive overview of the evidence introduced during those months, prefaced for clarity with a brief description of the identities and interrelationships of the two families most deeply involved in and affected by the murders: the Gebreselassies and the Meharis. We will supplement the following overview as we address the specific legal challenges raised in this appeal.

I. The Meharis and the Gebreselassies

Asmerom and Tewodros are two of 11 siblings. The family includes brothers Abraham, Tewodros, Tesfamariam (Tesfu) Tewolde, Dawit, Hermon and Mulugeta, and sisters Senait, Asmeret, and Betelhem. Asmerom, the second oldest, left Ethiopia as a young man in the early 1980's and settled with relatives in Oakland in 1985. He later helped older brother Abraham emigrate to the United States, followed eventually by their mother and the rest of the siblings.

Abraham met his wife, Winta Mehari, during a vacation in Ethiopia in 1998. Their son, Issac, was born in 2004. During the intervening years the Gebreselassie family helped Winta's mother Regbe and her brothers, twins Merhawi and Angesom, Yonas, and Yehferom, emigrate to the United States. With the exception of Winta, Abraham and Issac, who lived in Berkeley, the Gebreselassies and the Meharis lived in the Keller Plaza apartment complex in North Oakland.

The two families were very close, "like one family," and shared a "very good relationship." Angesom Mehari described the Gebreselassie matriarch as "almost like a mother," and her children like his own brothers and sisters. Angesom and Merhawi viewed Abraham as a father or brother. The two families frequently socialized together and shared holidays, birthdays and family dinners.

II. Abraham Gebreselassie's Death

In the early morning of March 1, 2006, Abraham, a seemingly healthy 42-year old, suddenly fell ill and died. Winta called 911, reporting that her husband was not breathing, then called her family and the Gebreselassies. An autopsy conducted by pathologist Thomas Rogers was inconclusive. A toxicology screen for prescription and street drugs was negative and there was no evidence of foul play.

Suspicious about their brother's sudden death, Asmerom and Tesfu met with Berkeley Police Sergeant Robert Rittenhouse to discuss their belief that Winta had a hand in it. Sergeant Rittenhouse reviewed the autopsy and 911 reports and interviewed Winta, Dr. Rogers, a second pathologist the Gebreselassies had retained to review Dr. Rogers' report, and a supervising investigator with the coroner's office. On August 11, Sergeant Rittenhouse told Asmerom and Tesfu that Abraham's death did not appear to be a homicide and that the police department did not intend to further investigate it.

Asmerom, nonetheless, remained suspicious. He believed the Meharis had two motives for murdering Abraham. They wanted to prevent him from disclosing that Merhawi Mehari was homosexual and to collect on Abraham's life insurance policy. Asmerom continued to urge Sergeant Rittenhouse and the insurance company to investigate his brother's death. And he repeatedly confronted the Mehari family. Twice in the late summer or fall he went to their apartment and

questioned Winta's mother and brothers about the night Abraham died. According to Angesom, Yehferom and Merhawi, Asmerom accused the Mehari family of murdering Abraham. Concerned by these confrontations, the family decided that Asmerom was no longer welcome in their home and agreed to lock the door and call the police if he returned.[2]

Yehferom testified about another encounter with Asmerom, about six weeks before Thanksgiving, when Asmerom and Tesfu came to his workplace at Central Parking in Oakland. Asmerom said he had discovered something about Merhawi. Then, according to Yehferom, Asmerom said "You guys have murdered Abraham, I'm going to murder you," and insulted Yehferom and his family. They left when Yehferom threatened to call the police. Then, about 10 days before Thanksgiving, Asmerom and Tesfu approached Merhawi at the Oakland library. Asmerom confronted Merhawi with e-mails from a gay website that he believed proved Merhawi was homosexual, and accused him of having molested their young nephew Issac. According to Asmerom, Merhawi admitted he was homosexual and that he had molested Issac, and he begged Asmerom not to tell anyone. According to Merhawi, Asmerom called Regbe a "prostitute" and said "[t]hat bitch mother of yours and you guys are the ones that killed my [brother]." After speaking with Merhawi, Asmerom went to see Yehferom to tell him about Merhawi's sexual orientation "since [Yehferom] is the older sibling." Asmerom

[2] Asmerom, in contrast, testified that he continued to visit Regbe at her apartment up until the day before Thanksgiving.

testified that Yehferom "came with an attitude" and refused to speak with him.

Tewodros was not present on these occasions, never said anything derogatory to the Meharis, and conducted himself respectfully in their presence until Thanksgiving day 2006. Merhawi testified that before the murders he saw Tewodros as a pacifist who wouldn't hurt a fly. Tewodros testified that he and the Meharis, including Winta, Issac, Angesom, Merhawi and Yonas, continued to "constantly" visit each other at their respective homes between Abraham's death and Thanksgiving. Tewodros was never told he was unwelcome at the Meharis' home.

Tewodros was aware of but did not share Asmerom's suspicion that the Meharis had killed Abraham. His concerns, rather, were that an unknown outsider, possibly someone Winta knew, might have murdered Abraham for the insurance proceeds and, if so, that Asmerom's continuing investigation could endanger the whole family. As a precaution the Gebreselassies changed the locks to each of their apartments, and Tewodros bought a gun.

III. The Murders of Winta, Regbe and Yonas

The Mehari family gathered at Regbe's apartment the afternoon of November 23, 2006 for Thanksgiving lunch. Regbe, Winta, Issac, brothers Angesom, Merhawi, Yonas and Yehferom, and Misghina Gebreselassie, a cousin of Asmerom and Tewodros, were there. Misghina had something to drink and left after a few minutes.

Tewodros arrived just before Misghina left. He greeted everyone in the apartment, asked Angesom about his school, spoke with Yonas about college, and commented to Winta that Issac was growing up. Regbe invited Tewodros to eat with them.

Tewodros got a plate of food and sat on a chair next to the television. Angesom, Yehferom and Winta were sitting on the couch across from him. Yonas was at a computer table near Winta. Merhawi was on the phone with Yosef, the eldest Mehari brother, who lived in London. Regbe sat on a stool next to the phone, using a small portable burner to prepare a traditional Ethiopian coffee ceremony. Tewodros was playing with 2-year-old Issac, letting him open and shut his cell phone.

Much of what happened next was hotly disputed at trial, as will be seen. What is undisputed is that Asmerom arrived at the Mehari apartment shortly after 3 p.m., armed with a nine-millimeter semiautomatic pistol. Shots broke out. Regbe, Yonas and Winta were killed, Yehferom was shot in the ankle, and Angesom was severely injured when he jumped from the third floor apartment to escape.

Either just before or after the shooting began, Tewodros grabbed Issac and fled to his mother's apartment. Asmerom also returned there, called 911 and reported that he had shot several people in self-defense. He begged the police to arrive quickly because people had been hurt.

Two guns were recovered from the apartment, a Lorcin 380 automatic that had been reported stolen

from its registered owner and a Luger Kahr Arms 9 millimeter registered to Mulugeta Gebreselassie. The Lorcin had six live rounds in its magazine but the chamber was empty. All of the fatal bullets and cartridge casings found at the scene of the shootings came from the Luger. Asmerom admitted bringing the Luger to the Meharis' apartment, but denied that he brought a second gun. Tewodros's cell phone was found by the chair where he had been sitting, next to Yonas's body.

IV. Prosecution Case

The prosecution theory was that Asmerom murdered Winta, Regbe and Yonas as revenge for Abraham's death and Tewodros helped him when he signaled that the Meharis had all gathered, let him into their apartment, and then spirited Issac to safety before Asmerom opened fire. Asmerom admitted the shooting but asserted he did so in self-defense. His theory was that the Meharis had killed Abraham primarily to conceal Merhawi's sexual orientation, and that they lured him to their apartment to kill him for the same reason. With respect to Tewodros, the defense was that he knew nothing of Asmerom's plans and had no part in the murders.

A. Angesom's Testimony

The state's case was supported primarily by the testimony of Angesom, Merhawi and Yehferom. Angesom testified he saw Tewodros walk toward the apartment door while speaking on his cell phone. He

paced back and forth near the door for several minutes as Issac played around and between his legs. Then, Asmerom walked in and Tewodros left the apartment with Issac. Angesom could see part of the door from where he sat, but he did not see Tewodros unlock or open it. Other than Issac, none of the Mehari family members were anywhere near the front door. Asmerom was holding a gun in his right hand and a brown paper bag in his left. First he shot Yonas, then, as Regbe cried "my child" and reached toward him, Asmerom shot her too. At that point Angesom escaped by jumping head first from the living room window to the turf three floors below, seriously injuring his back and arm.[3]

B. Merhawi's Testimony

Merhawi gave the following account. Issac was playing with Tewodros's phone, opening and shutting it. Later Merhawi saw Tewodros talking on a cell phone, although he had not heard it ring. Tewodros was saying "Hello, hello, I can't hear you" and "Hello, Mulu, Hailu, hello, I can't hear you" as he walked toward the apartment's front door. Issac was with him. Tewodros unlocked the lower lock and tried to open the door, but the top lock was still locked. As Tewodros reached to unlock it, the house phone rang and Merhawi crossed the room to answer it. The caller was his

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[3] Angesom testified that he did not go into the bedroom or see any other family members do so. He did not remember telling his doctor in December 2006 that he jumped from the third story balcony, which is off the bedroom.

brother Yosef. After the two chatted briefly, Yosef asked to speak with Regbe.

Merhawi could not see the front door or Issac and Tewodros from where he was standing. He did not see Tewodros unlock the upper lock or open the door. But Asmerom came in and started shooting. First he shot Yonas, then Regbe. Winta got up from the sofa, and Asmerom shot and killed her. Merhawi did not see what happened to Angesom once the shooting started. One minute Angesom was standing up, and the next he was gone. He did not see Angesom jump out the window or move towards the bedroom. Yehferom grabbed Asmerom's hand and they struggled over the gun. Merhawi followed and grabbed Asmerom from behind. Asmerom backed into the hallway and fled.

Merhawi had never owned a gun, had never seen any of his family with a gun, and none of them had a gun the day of the murders. He denied that his family invited Asmerom over for Thanksgiving to murder him so that he could not expose Merhawi's sexual orientation or continue to investigate Abraham's death. Merhawi confirmed that Tewodros knew Issac liked phones and had given him a phone to play with on Thanksgiving. He denied that his mother opened the door for Asmerom.

C. Yehferom's testimony

Yehferom testified that Tewodros was playing with Issac, holding his phone and playing different ring tones, when he started talking on the phone as if he

had received a call. He walked toward the front door saying "Who's this? Who's this? I can't hear you." After pacing back and forth by the door he unlocked both locks, opened the door and carried Issac out of the apartment. Asmerom came in carrying a gun in his right hand and a plastic bag in his left hand. He said "[y]ou've killed Abraham and I'm going to kill you" and shot Yonas, Regbe and Winta. Yehferom saw Angesom pass by on his right toward the living room window just after Regbe fell. Yehferom struggled with Asmerom and grabbed the gun away from him, but Asmerom pulled a second gun from his waistband. Yehferom was shot in the ankle during the struggle, but managed to get the second gun away from Asmerom and pushed him toward the hall.

D. The Initial Investigation

Questioned by police the day of the murders, Merhawi said that Tewodros fled the apartment with Issac after the first shot was fired, but Yehferom said they left before Asmerom came in. Yehferom told police that Asmerom came in saying "Everybody here killed Abraham, I'm going to kill you," but Merhawi said that Asmerom said nothing. Merhawi told police that Asmerom had one gun. Yehferom said Asmerom entered holding two silver handguns. When asked whether Asmerom fired both of the guns or just one, Yehferom said just one, and added that Asmerom was carrying a gun in his right hand and a plastic bag in his left. There were no records indicating that police looked for or found a plastic bag at the crime scene.

Asmerom and Tewodros were questioned by homicide police early the morning of November 24. Tewodros waived his Miranda rights and spoke with Sergeant James Morris for about three hours, of which only 21 minutes were taped. He explained that he had suspected foul play was involved in Abraham's death, but "kept everything inside." Regbe had invited him to Thanksgiving when he ran into her and Winta the day before. On Thanksgiving he was playing with Issac when he heard Yehferom yelling at Asmerom. He did not know that Asmerom was coming over or who opened the door to let him in. Yehferom pulled out a gun and Asmerom started shooting in the air. Tewodros heard one shot, grabbed Issac and ran.

Asmerom was questioned for just over an hour, about half of which he spent talking about his belief that the Meharis killed Abraham. Concerning the shootings, he initially told Sergeant Morris that Regbe opened the door for him and then stood there, but he later said that she sat down after letting him in. He admitted the shootings. He said that Winta was "evil," that the events of November 23 happened because Merhawi was a homosexual, and that the Meharis "maybe" murdered Abraham to conceal Merhawi's homosexuality. He knew the Meharis planned to kill him to prevent him from revealing Merhawi's lifestyle and that Winta invited him to Thanksgiving to "set him up."

Oakland Police Officer Jason Sena interviewed Yehferom around 5:00 p.m. that evening. Yehferom said Tewodros had been in the apartment for a short

period of time and then made a call, opened the door for Asmerom, and left with Issac as Asmerom entered. Asmerom came in holding two guns and started shooting.

E. Hailu Legsse and Mulu Reda

Hailu Legsse and Mulu Reda, a married couple, also lived in the Keller Plaza complex and were acquainted with the Mehari and Gebreselassie families. Both testified that Tewodros did not call them on November 23, 2006.

F. Cell Phone Records

The prosecution theorized that Tewodros signaled Asmerom to come over to Regbe's apartment by calling another brother, Dawit Gebreselassie, who was with Asmerom in their mother's apartment. There were no calls between Tewodros and Asmerom on the day of the shooting. Records for Tewodros's phone showed two calls were placed to Dawit's number on November 23, one at 2:57 p.m. and the second at 3:04 p.m. The first call connected for 3 seconds but could have gone to voice mail or was unanswered. The second call went through, but the connection time was zero seconds.

Michael Dikovitsky from Metro PCS cell phone services testified that Tewodros's phone would call the last number dialed if someone flipped it open and twice hit the "send" button. Dikovitsky testified that to speed dial a call required first pressing the assigned speed

dial number, followed by the "send" key, then "end call." He did not know whether opening and closing the phone would activate or deactivate the speed dial. But Raymond MacDonald, a manager with T-Mobile's law enforcement relations group, also testified about one-touch dialing with Tewodros's phone. According to MacDonald, one simply needs to hit and hold down a single key to speed dial a call; it was not necessary to press send as well. MacDonald also testified that closing the phone would end the call.

IV. Defense Cases

A. Asmerom's Testimony

Asmerom testified in his own defense. He said that on November 10, 2006 he told Merhawi he had proof Abraham was murdered, and that he would not expose Merhawi's homosexuality if he confessed he was present when Winta killed Abraham. Merhawi admitted to Asmerom that Winta poisoned Abraham to keep him from exposing Merhawi's homosexuality and for the insurance money. He, Yonas, and Angesom were there when Abraham died. Three days later Asmerom told Merhawi he had changed his mind and intended to expose Merhawi's homosexuality to his family and church.

On November 20 Asmerom sent Winta a letter with "proof" that her brother was homosexual, and proposed they hold a family discussion about it. The next day he saw Winta at Keller Plaza. She admitted Merhawi was homosexual and, further, that he had

molested Issac. At Asmerom's urging, Winta invited him to meet with the Meharis to discuss the families' problems at Regbe's apartment when they gathered for Thanksgiving.

But Asmerom grew suspicious about Winta's invitation that he come alone. He believed that she and her family might be planning to kill him to keep him from exposing Merhawi's homosexuality and the truth about Abraham's death, so he brought his gun to the meeting to defend himself.

Asmerom knocked at the apartment door. Regbe, not Tewodros, opened it for him. Tewodros was sitting in the living room next to Issac; Asmerom had not known Tewodros would be there. Yehferom and Merhawi almost immediately started cursing at him and Merhawi threatened to "knock [him] down." Asmerom started to back out of the apartment, but Merhawi drew a gun from his waistband. Asmerom pulled out his own gun, told Merhawi to put his weapon down, and fired a warning shot toward the window.

Everybody ducked, including Merhawi. At that point Asmerom saw that Yehferom also had a gun, on the sofa. Scared, he said "If anybody moves, I'm going to kill you." Tewodros grabbed Issac and left. Yehferom picked up his gun. Asmerom fired in his direction. Everything became chaotic. Merhawi ran towards Asmerom with his gun drawn. Asmerom shot toward Merhawi, then shot Regbe as she tried to grab him. Regbe wanted to kill Asmerom for the same reason the Meharis killed Abraham: to hide Merhawi's

homosexuality. Winta then came at Asmerom, screaming and saying "it's our fault, our fault," so he shot her too. He did not want to kill her, but she was blocking his way.

Yehferom grabbed Asmerom's hand. Asmerom's gun went off. He saw that Yehferom was also holding a gun. He dropped his weapon and struggled with Yehferom, knocking the gun from his hand. The struggle continued until Asmerom distracted Yehferom by pretending he had a second gun in his waistband and managed to flee to his mother's apartment.

B. Tewodros's Testimony

Tewodros testified that he ran into Regbe and Issac on the street on Thanksgiving morning. He told Regbe he would stop by later, and she welcomed him. Tewodros neither told Asmerom he was planning to visit the Meharis nor knew his brother would be there. Asmerom did not ask him to be there and open the door for him.

When Tewodros dropped by on Thanksgiving day, the Meharis were watching football and Regbe was making and serving coffee. Everyone was friendly, but Tewodros felt they were nervous. Regbe gave him coffee and food. After he ate, Tewodros sat on a chair near the television. Issac had been playing with his cell phone most of the time since he arrived at the apartment. Tewodros was bouncing Issac in his lap when Regbe and one of the twins got up. Yehferom yelled "what the hell are you doing here?"

Tewodros looked up and saw Asmerom. When questioned after the murders he said he did not see who opened the door for Asmerom, but he guessed it was Regbe because she was close to the door. Asmerom said something like "Winta, what's going on." Yehferom pulled a gun, then Asmerom said "drop your gun" and fired toward the window. He did not see Asmerom pull the gun out. He heard a shot and then saw a gun in his brother's hands. Nor did he see Yehferom aim or fire his gun. Tewodros ducked, then fled the apartment with Issac.

Tewodros had purchased his Metro PCS flip phone about two months earlier under an assumed name to preserve his anonymity when he visited political chat rooms. His brother Dawit's phone number was programmed into the phone so that it could be speed-dialed by pressing and holding the number assigned to it for a few seconds or less. Closing the phone would end the call. It was possible that Issac inadvertently pressed Dawit's number when he was playing with the phone.

Tewodros had called Dawit earlier on November 23, but he did not call him, or anyone else, from Regbe's apartment. He did not pretend to have a phone conversation and did not say "Mula, Mula" or "Hailu, Hailu." Issac was playing with the phone most of the time. Sometime later Tewodros realized the phone had been left behind in the Meharis' apartment, but he had no idea whether he left it or Issac was playing with it and left it there. He did not throw or kick the phone back into the apartment as he fled.

A couple of months before Thanksgiving, Tewodros bought a gun and changed his family's locks for protection. He registered the gun in his name, kept it in his mother's closet and never took it outside.

Asmerom told Tewodros in November that the Mehari family had murdered Abraham to hide Merhawi's homosexuality. Tewodros believed this was true. He was worried that Merhawi would molest Issac and felt that, as a homosexual, Merhawi should not be active in the church. Nonetheless there were no problems between himself and the Meharis before November 23, and he and the Meharis frequently visited each other's homes. They did not discuss the Gebresalassies' suspicions about Abraham's death, although everyone knew that Asmerom was still investigating it. After the murders Tewodros told the district attorney that Asmerom and the Meharis did not get along, but at trial he testified that he only meant the Meharis were uncomfortable around Asmerom because of his investigation.

V. Verdicts

Asmerom and Tewodros were each charged with three counts of murder, attempted murder, kidnapping and false imprisonment by violence. After three months of trial and six days of deliberations, the jury found both defendants guilty on all counts. Both were sentenced to multiple consecutive life terms without the possibility of parole. Both filed timely appeals.

DISCUSSION

Asmerom's Appeal

I. Issues Regarding Representation

Asmerom raises three issues related to his representation at trial. First, he asserts the trial court erroneously refused to let him substitute in newly retained private counsel before the trial started. Then, he contends, after he successfully moved to represent himself, the court committed further error by denying his requests for a continuance to prepare his case. Finally, Asmerom asserts the court violated his constitutional right of self-representation when it later terminated his pro se status. Having carefully reviewed the extensive record, we are satisfied that none of these points have merit.

A. Choice of Counsel

We turn first to Asmerom's assertion that the trial court violated his constitutional right to counsel of his choosing when it denied his request to substitute in new private counsel before the trial started. We disagree.

1. Background

Asmerom was initially represented by Ray Plumhoff and Marvin Lew from the Office of the Public Defender. In August 2008 he unsuccessfully moved for new counsel under *People v. Marsden* (1970) 2 Cal.3d 118, 84 Cal. Rptr. 156, 465 P.2d 44. In September 2008,

William DuBois stated his intent to substitute in as privately retained counsel. The court cautioned Mr. DuBois that "given the fact that this case is now about two years old, . . . it's going to be my intention to get this case tried by mid-2009" and that "[g]iven the amount of litigation that occurred in this case before this arraignment, I do not anticipate that it should take too long for you to be ready for trial." Mr. DuBois concurred.

After delays occasioned in part by Mr. DuBois's commitments on other trials, on June 5, 2009 the court again remarked on its prior intention to start trial in July. Nonetheless, it continued the case until August 17 due to Mr. Du Bois's "medical issues that have to be dealt with." Then, on August 4, Asmerom wrote to the court complaining that Mr. Du Bois was too busy to pay attention to his case and was only "after money." The letter also complained that former counsel Plumhoff "didn't do his best during the prelim hearing, that's why I am bound to trial." A week later Du Bois moved to withdraw as counsel on the ground of an irremediable breakdown of the attorney-client relationship. The court granted the motion, and on August 31 reappointed Mr. Lew over Asmerom's protests that he had a conflict of interest with the public defender and that Lew was not his attorney. In October Asmerom retained William Cole as his new attorney and the court relieved Mr. Lew.

Mr. Cole's representation was also short-lived. On December 1, 2009, at Asmerom's request, the court relieved Mr. Cole and again reappointed the Public

Defender to represent him. The court warned Asmerom that "I will not let another lawyer in the case. We're going to set a trial date on December 18th. I'm not going to let another lawyer in the case unless they are able to go to trial on that date. You need to understand that, I don't want you to be surprised." On December 18 the court set trial for May 3 and instructed counsel to block out their calendars through at least June.

On May 27 Asmerom brought another *Marsden* motion once again to remove Plumhoff and Lew. He told the court " 'My public [defenders] have revealed or have given defense evidence to the prosecutor. They are an agent of the District Attorney. The way my attorneys have dealt with my case is incompetence and intentional to hurt my case. They violated their duty of loyalty to me. Their primary motive is their personal interest rather than to represent their client.' " After exploring Asmerom's specific complaints, most of which seemed to concern evidence he felt his attorneys were not properly addressing, the court denied the motion.

On June 21 Asmerom's attorneys declared a doubt as to his competence. Mr. Lew explained their concerns were "specifically in regards to his ability to rationally assist counsel . . . in preparation of his defense pursuant to Penal Code section 1368, et seq. [¶] . . . [¶] Mr. Gebreselassie's potential testimony in this matter is critical to his defense of self-defense. He has been unable to prepare to testify because of his preoccupation with matters which we believe are properly characterized as paranoid delusions. These things have

prevented Mr. Gebreselassie from preparing his testimony as well as preventing him from preparing other aspects of his defense with our cooperation." Asmerom's delusional thinking was said to include beliefs that his attorneys were colluding with the District Attorney out of racist animus; that they were sabotaging his defense because (he believed) they were homosexual and therefore in league with two gay witnesses [presumably Angesom and Merhawi]; and that they possessed, but refused to present, "categorically irrefutable" evidence that the Meharis killed Abraham. Asmerom had refused to speak with counsel since June 9 because of his delusions about their allegiance with the prosecution.

The court suspended proceedings for a psychological evaluation and took the *Marsden* motion under submission. At a July 12 hearing Asmerom continued to detail his complaints about attorneys Lew, Plumhoff, Cole and Du Bois. Lew and Plumhoff felt they could continue representing Asmerom pending the competency evaluation. On July 26 the court granted the *Marsden* motion and relieved Lew and Plumhoff. The court explained that "the disagreements here signal a breakdown that is such a magnitude that I don't think that, even though you two are outstanding lawyers, I don't think [Asmerom] can get a fair trial if you guys are representing him. Because I think—whether the delusions or non-delusions, his state of mind is such as it relates to both of you that he will not cooperate, he will order his family not to cooperate. . . ."

After contacting the court-appointed counsel panel, the court provisionally assigned Mr. Du Bois to represent Asmerom on the understanding that Du Bois had other commitments, would need the court-appointed counsel panel to provide backup counsel, and would inform the court the following week whether he could take on the representation. But on August 4, 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 Du Bois as Asmerom's counsel subject to confirming that the appointed counsel panel could meet his requirements for fees and backup counsel. Du Bois anticipated he would need four months to prepare for trial. Four days later, Mr. Lefcourt confirmed that he would not represent Asmerom.

On August 18 Mr. DuBois declined the appointment because the appointed counsel program had not met his support requirements. Asmerom's family had retained Mr. Lefcourt contingent on his obtaining county funding for investigation, expert witnesses, transcripts and other defense costs. But on August 31 Lefcourt informed the court he would be out of the country from September 2 until September 20 and would apply for funding for defense costs only after his return. Lefcourt estimated trial preparation would take six months after that due to his heavy client load and trial schedule.

On September 2 the court stated its intention to obtain a court-appointed lawyer for Asmerom. It explained: "[I]n light of the fact that Mr. Lefcourt has

made at least five special appearances, has not—is not yet prepared to make a general appearance; in light of the fact that at least three to four boxes of discovery [have] been sitting untouched in my courtroom since sometime in—since the latter part of July, 1st part of August, and it is now September 2nd; in light of the fact that there have been continuing motions by Tewodros to sever this matter. And as I indicated yesterday, I believe that both defendants have an agenda here to try to [game] the system to get separate trials; in light of the fact that this trial is most definitely one that is anticipated or perceived by the people who wrote the law on joinder that this basically would be the same case tried twice if it was tried separately, we're going to get this case moving with or without Mr. Lefcourt. If he can meet the schedule that we're going to put together, then he most definitely can continue to represent Mr. Asmerom Gebreselassie.

"But based upon the fact that he has made the special appearances, has not ascertained whether or not he can get public funds for ancillary services; based on the fact that yesterday he gave us a six month—his associate, because he was too busy to show up, gave us a six month estimate for trial without having looked at any of the materials that we have here in this courtroom for discovery; and also, the fact that he's going to be preparing a declaration for ancillary fees without having looked at the information that are in these files to ascertain what ancillary services, investigation, so forth, has already been done, the totality of that leads

this court to believe that it would be the best interest of all parties to have court appointed send us a lawyer."

The court appointed Darryl Stallworth to represent Asmerom, over Asmerom's objection, after Stallworth confirmed he could be ready for trial by January. Mr. Lefcourt had "sort of been hovering on this case," the court noted, but had not committed to take it, had not made a general appearance, had not reviewed the court files, and had not made a request for ancillary funds. "So I don't know what Mr. Lefcourt is going to do. [¶] I now have a more than able and competent attorney from court-appointed who indicates he can be ready to go with jury selection starting December 1st and then trial starting January 3rd. [¶] I also would indicate that Mr. Lefcourt's associate, having looked at the file, threw out the number that Mr. Lefcourt would need six months to prepare for this case. I don't know how they came to that number since nobody's looked at anything. [¶] I would also note that Mr. Lefcourt indicated his associate indicated, he had two no-time waiver trials in San Francisco, one starting on October 8th and then one trailing after that date. So I don't know if that puts him into April, May or June." The court appointed Mr. Stallworth with the proviso that Mr. Lefcourt could take over if he could obtain county funding for Asmerom's defense costs and comply with the trial schedule.

On September 27 Asmerom moved to substitute Mr. Lefcourt in as counsel, subject to obtaining public funding for defense costs and "the setting of a reasonable trial schedule." Lefcourt acknowledged the

December trial date was incompatible with his request for six months to prepare, but argued the court could either sever Tewodros's case or find good cause to continue the trial for approximately three more months.[4] The court was unpersuaded. It noted that Mr. Lefcourt had been "dabbling" in the case for almost two months "and you still can't tell me exactly when you are going to be ready. . . . [Y]ou are now asking me to postpone this case until May to allow you to come into the case, try several other cases in the meantime, which means you won't be working on this case. You haven't read the preliminary hearing transcript, you haven't picked up the discovery. You haven't read enough of this case to know even what you are asking for in terms of ancillary costs." The court noted the "great amount of difficulty with Asmerom in terms of his unhappiness with prior counsel" and predicted that, if it allowed yet another substitution, Asmerom would attempt to dismiss Mr. Lefcourt as well when trial approached. The court found that "continu[ing] the case for another 7 or 8 months at this point does an injustice to the orderly administration of justice to the co-defendant, as well as to the prosecution and their witnesses." Accordingly, it rejected Asmerom's bid to replace Mr. Stallworth with Mr. Lefcourt. This is the ruling Asmerom now challenges as constitutional error.

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[4] Tewodros revoked his time waiver in June or July, and the 70th day ran in early September 2010.

2. Analysis

"The right of a criminal defendant to counsel and to present a defense are among the most sacred and sensitive of our constitutional rights. [Citations.] While we have recognized competing values of substantial importance to trial courts, including the speedy determination of criminal charges, the state should keep to a 'necessary minimum its interference with the individual's desire to defend himself in whatever manner he deems best, using any legitimate means within his resources' [Citation]. A criminal defendant's right to decide how to defend himself should be respected unless it will result in 'significant prejudice' to the defendant or in a 'disruption of the orderly processes of justice unreasonable under the circumstances of the particular case.' [Citation.] In other words, we demand of trial courts a 'resourceful diligence directed toward the protection of [the right to counsel] to the fullest extent consistent with effective judicial administration.'" (*People v. Ortiz* (1990) 51 Cal. 3d 975, 982-983, 275 Cal. Rptr. 191, 800 P.2d 547.)

But, as explained in *People v. Keshishian* (2008) 162 Cal.App.4th 425, 428, 75 Cal. Rptr. 3d 539, the right to retained counsel of choice is not absolute. "'[T]he "fair opportunity" to secure counsel of choice provided by the Sixth Amendment "is necessarily [limited by] the countervailing state interest against which the sixth amendment right provides explicit protection: the interest in proceeding with prosecutions on an orderly and expeditious basis, taking into account the practical difficulties of 'assembling the witnesses,

lawyers, and jurors at the same place at the same time.'"' [Citation.]" (*People v. Keshishian*, *supra*, 162 Cal.App.4th at p. 428.) Thus, "'"The right to counsel cannot mean that a defendant may continually delay his day of judgment by discharging prior counsel,"' and the court is within its discretion to deny a last-minute motion for continuance to secure new counsel." (*Id*. at p. 429.) "A court faced with a request to substitute retained counsel must balance the defendant's interest in new counsel against the disruption, if any, flowing from the substitution. [Citations.]" (*People v. Lara* (2001) 86 Cal.App.4th 139, 153, 103 Cal. Rptr. 2d 201; *see also Stevens v. Superior Court* (1988) 198 Cal.App.3d 932, 244 Cal. Rptr. 94 [affirming trial court's decision to relieve retained counsel whose scheduling conflicts would have forced six-month continuance].)

The court's decision here to disallow a further change of counsel was a valid exercise of its discretion. The history described above shows the court carefully balanced Asmerom's request to bring Mr. Lefcourt in against his extensive history of dissatisfaction with, and termination of, a series of qualified attorneys; the resulting delays and disruption to the judicial process; and the prejudice to 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.

Asmerom relies heavily on *People v. Courts* (1985) 37 Cal.3d 784, 210 Cal. Rptr. 193, 693 P.2d 778, but this is a very different case. The defendant there entered a plea on July 19, 1982, and started discussing

representation with a private attorney in September. Over the ensuing month he arranged funding to hire private counsel, and on October 21, 1982, paid a retainer to attorney Swartz. He then moved for substitution of counsel and a continuance of the October 26 trial date to allow new counsel to investigate and prepare for trial. (*Id.* at pp. 787-789.) The court of appeal held the denial of those requests was an abuse of discretion. The defendant had requested only one prior continuance and engaged in a good faith, diligent effort to obtain new counsel in a timely fashion. Moreover, there was no indication that the requested continuance would significantly impinge on judicial efficiency or inconvenience the court, the parties or the jurors. (*Id.* at pp. 791-794.)

Here, in contrast, 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. Although the case was over four years old, Mr. Lefcourt seemed to be making no haste to jump in and wanted another six months after a trip abroad to prepare for trial. With this history, the court found that further delay for another substitution of counsel would unacceptably disrupt the trial process and impede Tewodros's statutory speedy trial rights. The court also surmised, not unreasonably on this record, that Asmerom was exploiting his right to counsel of choice to "try to [game] the system" in order to obtain

a severance. " 'The right to counsel cannot mean that a defendant may continually delay his day of judgment by discharging prior counsel.' " (*People v. Rhines* (1982) 131 Cal.App.3d 498, 506, 182 Cal. Rptr. 478.) The court appropriately balanced Asmerom's right to counsel of his own choosing against the interest of the People, the court and the co-defendant in an expeditious resolution of the case.

B. Asmerom's Post-*Faretta* Request for a Continuance

Asmerom contends the trial court erred when it denied requests for continuances after granting his *Faretta*[5] motion to represent himself at trial. We disagree.

1. Background

On November 29, 2010, the day the trial was set to begin, Tewodros's attorneys were unexpectedly tied up in another trial. The court found good cause to continue the trial until January 3. At that same hearing, Asmerom made another *Marsden* motion,[6] and, after it was denied, moved under *Faretta* to represent himself. The trial court granted the motion, appointed Mr. Stallworth to serve as advisory counsel, and directed

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[5] *Faretta v. California* (1975) 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562.

[6] At a hearing on December 16, the court noted Asmerom had brought at least six *Marsden* motions; Asmerom thought there had been eight or ten.

him to provide Asmerom with appropriately redacted case files. Asmerom was fully cautioned that the January 3 trial date would not be continued "whether you're ready to go or not."

On December 16 Asmerom requested an additional three months to investigate allegedly newly discovered evidence—the 911 tape from the night Abraham died—but said he was nonetheless ready to go to trial on January 3, or even "tomorrow." Advisory counsel concurred that the defense preparation could be done by January 3 or January 10. The court continued the trial to January 10 and denied Asmerom's request for three more months, noting that the defense had been on notice of the 911 tape for at least eight months and had ample time to complete its investigation before January 10.

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. The trial court found the January 10 trial date allowed sufficient time for Asmerom's needs, and, specifically, that it provided adequate time for an audio expert to analyze the 911 tape before Asmerom's defense case. Asmerom also renewed his bid to retain Mr. Lefcourt as defense counsel and asked for a five or six month continuance for Mr. Lefcourt to prepare. The court denied this request as well.

2. Analysis

"The decision to grant or deny a continuance normally rests within the sound discretion of the trial court. [Citation.] While it is true that a defendant who chooses to conduct his defense in pro. per. does so subject to the disabilities normally attendant upon the status as a prisoner [citation], a pro se defendant must be given a reasonable opportunity to prepare a defense. [Citations.] The denial of a proper request for a continuance to prepare a defense constitutes an abuse of discretion and a denial of due process." (*People v. Cruz* (1978) 83 Cal.App.3d 308, 324-325, 147 Cal. Rptr. 740.) The erroneous denial of a defendant's request for a continuance after being granted in propria persona status is "usually treated as prejudicial per se." (*People v. Hill* (1983) 148 Cal.App.3d 744, 758, 196 Cal. Rptr. 382.)

There was no abuse of discretion here, because Asmerom was not denied a reasonable opportunity to prepare his defense. (*See* § 1050, subd. (e) [continuances granted only for good cause]; Cal. Rules of Court, rule 4.113 [motions to continue criminal trials are disfavored and denied unless movant proves the "ends of justice" require continuance].) The case had been pending for over four years, during which time Asmerom actively participated in preparation for his defense. He did not show he could not complete his investigations of the 911 tape by January 10. 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. Moreover, Asmerom's tortuous history of changing

representation supported a reasonable inference that Asmerom was attempting to exploit the *Faretta* mandate as yet another means of delaying the trial. The court manifestly did not abuse its discretion in denying the continuance.

C. Revocation of Asmerom's Right to Self-Representation

On February 16, 2011, 25 days into the trial, the court terminated Asmerom's right to represent himself due to his repeated inappropriate outbursts and other misconduct in court. Asmerom contends this was error, and that the error was prejudicial per se. To the contrary, the trial court properly revoked Asmerom's right to self-representation.

1. Background

Asmerom was cautioned when he was granted pro per status that he would have to act appropriately during trial or the court could terminate his right to self-representation. "You also understand, the other part that concerns me a little bit that you, again, tend to get a little verbose and a little worked up when you get agitated. And when you're before the trial judge and he decides that you stepped over the line, he can terminate your pro per privileges right in the middle of trial and assign you a lawyer, and that very seldom looks good to the jury. They're going to go, wow, all of a sudden this guy's messed this up so bad and now he's got

a lawyer. That generally works to the detriment of the case." Asmerom acknowledged that he understood.

During jury selection, with the jurors outside the courtroom, Asmerom engaged in a prolonged and heated diatribe accusing the Meharis of murdering his brother and the prosecutor, the trial court and District Attorney Nancy O'Malley of being prejudiced against him. The outburst resulted in his removal, yelling and screaming, from the courtroom. When Asmerom was brought back the next day, the court warned him he would be removed again if there were further outbursts.

Angesom Mehari was the state's first important witness. During cross-examination, Asmerom, acting as his own counsel, accused him, rather dramatically, of murdering Abraham: "The question is you were there participating in Abraham's murder!!! You were there at Abraham's house killing my brother!!! Tell the truth!!!" The court warned him "I don't want another outburst like that. If you do that again, you know what the consequences [are]."

Things deteriorated the next day. When the court instructed Asmerom to move to another line of questioning, Asmerom exclaimed, "I have never seen this kind of justice." The trial court admonished him to keep quiet, but he continued: "I'm not going to keep quiet. That's my life. That's my life. The jurors has the right to know everything. You're arguing justice. You're prejudiced. That's my life. I have a right to defend the way I want to defend. The jury knows that he's

prejudiced." The court excused the jurors and admonished Asmerom. "I've warned you before. You continue not to follow my instructions. You're disrespecting the Court. You're disrupting the trial. So until you can do that and keep your words to yourself, you are out of here. So he's out of here." Before Asmerom could be removed, he responded: "It doesn't matter. You are trying to give my case to my adversary [sic] counsel. No problem. You're a prejudiced person. We all know that. You are acting like a DA."[7]

Later that day Asmerom's advisory counsel sought clarification about his role in light of Asmerom's absence from the courtroom. The court explained it had not yet decided whether to revoke Asmerom's pro per status and intended to review the case law. The next day, Asmerom accused the court of disliking and disrespecting him, offending his family, and trying to revoke his pro per status "from the beginning." The court terminated his self-representation. It explained: "There's certainly a component of emotional instability, and that's been demonstrated with his outbursts. [¶] Now, it's not sufficient for a 1368; however, I do think there are some components there. . . . [¶] . . . Number one is the nature of the misconduct as stated—or as on the record. The Court had ordered him to move on. This was yesterday, to another subject matter. He refused, continued not to follow the Court's rules, regulations. . . . [¶] And then as the jurors were walking out, filing out, made several comments to the Court. For

[7] The prosecutor heard this last statement as "You're acting like a dick."

example, 'You're prejudiced. You're a prejudicial person. We all know that. You're acting like a DA.' [¶] . . . It was also the outburst during the jury selection process which evidence[d] some emotional instability. On cross-examination of the first three witnesses, the Court has continuously and constantly ordered him to ask questions and not make self-serving gratuitous statements. [¶] And in terms of the impact of the misconduct on the trial proceedings, not only is it delaying the trial, but I am afraid that it has an effect on the jury and how the jury views him versus the evidence presented. [¶] I think it clearly subverts the Court's integrity of the trial and severely compromises the Court's ability to conduct a fair trial. . . . [T]he impact on the trial is to the extent that the codefendant [has] filed a motion to sever. And in the preliminary reading it looks like it was preliminarily focused on the outbursts during jury selection and then what happened yesterday."

The court also noted its futile admonitions to follow court rules and procedures throughout the trial, Asmerom's apparent attempt to intimidate Angesom during cross-examination, and the lack of suitable alternative sanctions. It then terminated Asmerom's pro per status and appointed his advisory counsel to represent him for the remainder of the trial.

2. Analysis

The right of self-representation, rather than absolute, is subject to forfeiture whenever "'deliberate

dilatory or obstructive behavior' threatens to subvert 'the core concept of a trial [citation] or to compromise the court's ability to conduct a fair trial." (*People v. Carson* (2005) 35 Cal.4th 1, 10, 23 Cal. Rptr. 3d 482, 104 P.3d 837, citing *United States v. Dougherty* (D.C. Cir. 1972) 473 F.2d 1113, 1125-1126, 154 U.S. App. D.C. 76 and *Illinois v. Allen* (1970) 397 U.S. 337, 90 S. Ct. 1057, 25 L. Ed. 2d 353.) As observed in *Faretta*, "the trial judge may terminate self-representation by a defendant who deliberately engages in serious and obstructionist misconduct. [Citation.] Of course, a State may—even over objection by the accused—appoint a 'standby counsel' to aid the accused if and when the accused requests help, and to be available to represent the accused in the event that termination of the defendant's self-representation is necessary." [Citation.] [¶] 'The right of self-representation is not a license to abuse the dignity of the courtroom. Neither is it a license not to comply with relevant rules of procedural and substantive law.' " (*Faretta*, *supra*, 422 U.S. at p. 834, fn. 46; *see also People v. Carson*, *supra*, 35 Cal.4th at p. 8.)

When circumstances warrant, the trial court must thus decide "whether a defendant is and will remain so disruptive, obstreperous, disobedient, disrespectful or obstructionist in his or her actions or words as to preclude the exercise of the right to self-representation." (*People v. Welch* (1999) 20 Cal.4th 701, 735, 85 Cal. Rptr. 2d 203, 976 P.2d 754.) While each case must be evaluated in its own context and on its own facts, relevant factors may include the nature of the misconduct and its impact on the trial proceedings, the availability

and suitability of alternative sanctions, whether the defendant has been warned that particular misconduct will result in termination of in propria persona status, and whether the defendant has intentionally sought to disrupt and delay the trial. (*People v. Carson*, *supra*, 35 Cal.4th at p. 10.) "The trial court possesses much discretion when it comes to terminating a defendant's right to self-representation and the exercise of that discretion 'will not be disturbed in the absence of a strong showing of clear abuse.'" (*Ibid.*)

The court properly exercised its discretion here. Asmerom was argumentative, insulting and disrespectful to the court, and either unable or unwilling to control his outbursts and abide by courtroom rules and protocol despite multiple warnings that failure to do so would result in the termination of his right to represent himself. "'[T]rial judges confronted with disruptive, contumacious, stubbornly defiant defendants must be given sufficient discretion to meet the circumstances of each case.' . . . [W]hen a defendant's obstreperous behavior is so disruptive that the trial cannot move forward, it is within the trial judge's discretion to require the defendant to be represented by counsel." (*United States v. Brock* (7th Cir. 1998) 159 F.3d 1077, 1079.) This is such a case.

II. Admission of Entries From Winta's Laptop

A. Background

In May 2010, Asmerom's public defender moved in limine to exclude a one-page document containing

what appeared to be two diary entries recovered from Winta's laptop computer, the first expressing love for her deceased husband and the second concern about her poor treatment by the Gebreselassie family. Defense counsel sought to exclude both entries on the ground, among others, that they were impermissible hearsay. When the trial began, Asmerom incorporated this and other in limine motions filed by his former counsel in his response to the prosecutor's motions in limine.

When the motions were argued on January 10, 2011, no one could locate a copy of the printed-out diary entry. Asmerom confessed he "had no clue about this one. I didn't see it or read it. I have to wait." The prosecutor said the People did not intend to introduce the document during their case in chief, but "if the defense opens the door suggesting . . . Winta murdered Abraham, then I would be asked to be allowed to bring it in." The court postponed ruling on admissibility "until we find out what it is."

At trial, Asmerom continued to espouse his view that Winta and her family had murdered Abraham. The following exchange took place on April 13, during the prosecutor's cross-examination of Asmerom: "Q. After March 1st, 2006, you believed that Winta did not love Abraham; isn't that true? [¶] A. Miss Leventis, if a person, a lady, kills her husband, how do you assume she loves him?" The prosecutor then asked Asmerom about the "diary entry that [Winta] put in her computer for her love for Abraham." Asmerom described it as a "fake." Slightly paraphrasing passages from the

note, the prosecutor asked: "Isn't it true that she said, 'I'm angry and sorry that I didn't tell my husband often enough how much I truly love him. Sorry because I didn't spend enough time with him, help him, enjoyed every minute with him. I was too busy going to school as if I was guaranteed to have tomorrow with him. I'm angry because I didn't have a brother or a sister for Issac. So now I'm trying very hard not to put off, hold back or save anything that would add laughter to my son and my family lives. And every morning when I open my eyes I tell myself that every day, every minute, every breath truly is God's gift.' You know she said that after Abraham died, don't you?" Asmerom again responded the note was "garbage" and "a fake."

Soon after that, the prosecutor asked Asmerom if he knew Winta's relationship with the Gebreselassie family became strained after Abraham died. When Asmerom responded that it had not, the prosecutor was permitted to bring in the second diary entry to prove Asmerom was lying when he said there were no problems between Winta and the Gebreselassies. The prosecutor read the entry, dated September 8, 2006, in which Winta described her frustration that Tesfu Gebreselassie was withholding papers she needed for her taxes and, more generally, that the Gebreselassie family was treating her unfairly.[8]

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[8] " 'Friday, can't sleep much in the very early mornings like after 5:00 o'clock a.m. thinking about paper work for the garage such as tax papers. Had a good morning and afternoon since mother came and made coffee. It is file day today. I had called Tesfu yesterday, but he called me this morning and I asked him

Asmerom testified that he did not learn of the diary entries until his attorney received them in discovery, and that they did not change his view that Winta did not love Abraham. The prosecutor subsequently referred to and quoted both entries in arguing to the jury that Asmerom lied when he testified there were no problems between the two families and that Winta did not love Abraham.

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to give me some papers to prepare 2005 tax paper. Called me in the evening when I was about to enter church. Met Haniellum. So I had to call Yoni to get the paper from him. [¶] 'Got home around 8:00 p.m. and the only paper he gave him was some four months of paper work and none of the bank papers. Called him back and didn't pick up his phone. After awhile called me back and I asked him to give me all the paper that was in the box or give me the box if he doesn't need anything from it so that I might be able to find some papers that would help me for the tax preparation. He tells me that the only other paper in there is Abraham's telephone book and he would like to keep it. And I know that is not the only thing in there!!!' Multiple exclamation points. [¶] 'I mean it is not his paper!!!' Multiple exclamation points in all capitals. 'He has no right to it. He is purposely not giving me the papers and there is no way for me to get any copies of the paper because that is the bank returned the original check. It is not fair what the whole family is doing to me. I never did anything to them!!!' Multiple exclamation points. [¶]. . . . 'I got really mad and I called Yehfer on the way home still really pissed, but Yehfer told me the worse thing that could happen from this is paying more money and we will be able to do it together even if it takes time. I'm a little calm now. I'll read my Bible and sleep. I have my son, my lovely charming son scratching his hands from the allergies he has. He likes it when I scratch it for him.' "

2. Analysis

Asmerom contends the entries were hearsay and were not made admissible by the state of mind hearsay exception (Evid. Code, § 1250). He all but concedes, however, that the first entry regarding Winta's feelings about Abraham were admissible to prove her state of mind, and we agree. "Subject to Section 1252,[9] evidence of a statement of the declarant's then existing state of mind, emotion, or physical sensation (including a statement of intent, plan, motive, design, mental feeling, pain, or bodily health) is not made inadmissible by the hearsay rule when: (1) The evidence is offered to prove the declarant's state of mind, emotion, or physical sensation at that time or at any other time when it is itself an issue in the action. . . ." (Evid. Code, § 1250, subd. (a)(1), footnote added.) It was thus within the court's discretion to admit this first entry. (*See People v. Escobar* (2000) 82 Cal.App.4th 1085, 1103, 98 Cal. Rptr. 2d 696; *People v. Ortiz* (1995) 38 Cal.App.4th 377, 386, 44 Cal. Rptr. 2d 914 [the trial court is vested with broad discretion in determining admissibility of evidence pursuant to the state of mind exception to the hearsay rule].)

The second entry, about Winta's subsequent difficulties with the Gebreselassie family, does not fall so neatly within the state of mind exception. Evidence Code section 1250, subdivision (b) specifies that this

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[9] Under Evidence Code section 1252, a statement of the declarant's mental condition is admissible unless the statement was made "under circumstances such as to indicate lack of trustworthiness."

exception "does not make admissible evidence of a statement of memory or belief to prove the fact remembered or believed." As the second entry consisted of "historical memories and beliefs" about Winta's problems with the Gebreselassies, it thus was not admissible to prove the truth of those memories and beliefs. (*See People v. Deeney* (1983) 145 Cal.App.3d 647, 652, 193 Cal. Rptr. 608 [descriptions of conduct of a third person that may have caused the declarant's state of mind are inadmissible under section 1250].)

Nonetheless, it was admissible for another reason. The fact that Winta felt the Gebreselassies were treating her unfairly had some tendency to prove that she and her family would not have welcomed Asmerom's company or invited him to Regbe's apartment, and thereby to undermine his contrary testimony. Used thus as circumstantial evidence of Winta's state of mind, the statement was nonhearsay circumstantial evidence not made inadmissible by the hearsay rule. (*See generally People v. Ortiz*, *supra*, 38 Cal.App.4th at pp. 377, 389-392.) Asmerom complains that no limiting instruction was given as required when out of court statements are used as circumstantial evidence of the declarant's mental state, but he did not request such an instruction and has therefore forfeited the claim for appeal. Finally, and in any event, these diary entries were of little independent significance in light of the substantial testimony confirming the strains between Asmerom and the Meharis in the months leading up to the murders. Assuming arguendo it was error to admit the entry concerning Winta's treatment by the

Gebreselassies, the error could not conceivably have been prejudicial.

III. Exclusion of Evidence of Victims' Alleged Homosexuality

Asmerom contends the trial court committed reversible error when it excluded certain evidence concerning Angesom and Merhawi's sexual orientation. Not so.

A. Background

1. The Ruling

Asmerom argued that the Mehari siblings killed Abraham in the belief that only he knew of their sexual orientation, and that they tried to kill Asmerom for the same reason. The prosecution moved to exclude evidence of Merhawi and Angesom's alleged homosexuality unless Asmerom placed it in issue in his defense case. Until that time, the prosecution asked the court to preclude defense questions about the twins' sexual orientation and alleged involvement with gay chat lines or web sites and to exclude related telephone and email records and testimony about the Eritrean Orthodox Church's disapproval of homosexuality.[10] Asmerom countered that evidence the twins were in fact homosexual "will put to rest any claim that they were not

[10] The prosecutor acknowledged that evidence of Asmerom's threats to go public with the twins' alleged homosexuality was relevant and admissible.

gay and therefore did not really care that defendant would be making these revelations."

The court ruled the twins' sexual orientation was not to be mentioned until after Asmerom had testified to his belief in that regard. "The relevant part is not whether they're homosexuals or not. It's [Asmerom's] belief that they are." The court explained that Asmerom would be allowed to introduce evidence supporting that belief in his case in chief, "and we'll see how far you get with that if you want."[11]

Asmerom sought in his case-in-chief to recall Merhawi to testify about his "homosexuality issues" and alleged confession during their November 10, 2006 encounter at the library, and to recall Angesom "for questions about the homosexuality that we were unable to address in the prosecutor's case in chief." The prosecutor reiterated her position that the twins' actual sexual orientation was irrelevant. Moreover, she observed that Asmerom had already questioned Angesom and Merhawi about their sexual orientation on cross-examination, merely shifting to the term "lifestyle" when the court barred his questions about homosexuality. The court permitted Asmerom to recall only Merhawi, and only for questioning about the encounter at the library. It later sustained objections when Asmerom asked Merhawi whether he was "fooling and deceiving the church" about his homosexuality,

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[11] Later, during the prosecution case, the court reaffirmed that ruling in the face of renewed defense attempts to question the twins about their actual sexual orientation.

whether anyone in his church or community knew he was homosexual before November 10, 2006, and whether the twins were engaging in homosexual activities when they arrived in this country.

2. The Evidence

In his opening statement, Asmerom presented his view that the Meharis murdered Abraham, and later attempted to murder him, to prevent the Gebreselassies from disclosing Merhawi's homosexuality. The defense continued on that theme during the state's case-in-chief, and Merhawi was extensively cross-examined about the confrontation at the library, Asmerom's threats to expose his "lifestyle," the Eritrean Orthodox Church's views on homosexuality, Winta's and Yehferom's reactions to Asmerom's disclosure, whether the Meharis decided to kill Asmerom to "make sure [he] would not be able to expose your lifestyle and further investigate you and your family having murdered Abraham," and whether they killed Abraham for that same reason. Asmerom also cross-examined Angesom about whether he was angry because Asmerom "was wanting to meet with your family about your social relationships and Merhawi's relationship with Issac, correct?"

In his defense case, Asmerom testified about Merhawi's sexual orientation and their church's disapprobation of homosexuality. He testified that "[t]he topic of homosexuality in our culture is something people kill for. It's not something to be taken lightly and just

blame the people about that." Asmerom also testified about the investigation he had conducted after Abraham told him his suspicions about Merhawi. Asmerom testified he had proven through phone records that Merhawi was contacting an interactive gay website; and then, using a false identity, Asmerom exchanged emails with Merhawi to confirm he was homosexual. When Asmerom and Tesfu confronted Merhawi with this "evidence" at the library on November 10, according to Asmerom, Merhawi admitted he was gay and that he had molested Issac. Asmerom threatened to expose Merhawi unless he confessed to his family.

Asmerom also described how he had visited Yehferom that day to discuss Merhawi's homosexuality. He testified that he told Yehferom "Since you're an active member of the Ethiopian orthodox church, and since this homosexual behavior brings disgrace to your family, it's unacceptable and disgusting." He elaborated on cross-examination that "[i]n our culture homosexuality could drive to kill each other. That's something that could have you get killed. It's a pride, a family pride. If I am a homosexual person, my mother would not be approached by anybody. My family would be shot. They would be considered like garbage. The first thing the family would do, they would stay away from me, or I would have to kill myself, or my mother or my family members would have to commit suicide." Asmerom elicited similar testimony from church administrative leader Tekle Germle that "within the orthodox church, within our religion, homosexuality is not allowed or acceptable. . . ." and that Germle

personally believed homosexuals should be banned from the church.

Asmerom also testified that on November 4, 2006, he went to the Mehari family with his "proof" of Merhawi's sexual orientation. He told them "that Merhawi had a problem, that he is a homosexual, and they were shocked. You know why they were shocked? Because he is part of our family. He's our brother. It's unacceptable behavior because that's how it is. They were all shocked. And because he also serves at the church, we were shocked. . . . Because they know homosexual behavior and because it's acceptable in this country, we decided we have to inform the church now."

When Merhawi was recalled in Asmerom's case in chief, Merhawi was asked "Isn't it true that you confessed to my client that Winta poisoned Abraham because he promised to you he wouldn't reveal your secret homosexual lifestyle to the community and church?" Merhawi denied it. He also denied that Asmerom promised not to reveal his homosexuality if he confessed the Meharis poisoned Abraham or that he molested Issac.

3. Analysis

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. (Evid. Code, § 352; *see People v. Geier* (2007) 41 Cal.4th 555, 581, 61 Cal. Rptr. 3d 580, 161 P.3d 104, overruled on other grounds in *Melendez-Diaz v. Massachusetts* (2009) 557 U.S. 305, 129 S. Ct. 2527, 174 L. Ed. 2d 314.)

IV. Admission of Yehferom's Testimony About Issac's Custody

Asmerom contends the court committed prejudicial error when it admitted Yehferom's testimony that after Winta's death the family court awarded him custody of his orphaned nephew and denied the Gebreselassies' bid for visitation. The People argued the testimony was relevant because it tended to undermine Asmerom's accusation that Yehferom participated in Abraham's murder. There was no error. While the family court's decision was at best marginally relevant to the issues at trial, the trial court reasonably found it had adequate bearing on Yehferom's credibility to warrant admission. "A collateral matter has been defined as 'one that has no relevancy to prove or disprove any issue in the action.' [Citation.] A matter collateral to an issue in the action may nevertheless be

relevant to the credibility of a witness who presents evidence on an issue." (*People v. Rodriguez* (1999) 20 Cal.4th 1, 9, 82 Cal. Rptr. 2d 413, 971 P.2d 618.) In any event, the testimony was relatively innocuous. Asmerom's contention that the jurors would infer from it that the family court had determined the Gebreselassies were "bad people" and Yehferom was "a good guy" and defer to that inference rather than make their own assessments is nothing but speculation. Accordingly, assuming the court erred, there is no reasonable possibility the error affected the verdict.

V. Prosecutorial Misconduct

Both defendants contend the prosecutor committed misconduct in closing argument when she appeared to comment on the absence of evidence the court had precluded the defense from presenting at trial. There was no prejudicial error.

A. Background

During cross-examination, Tewodros's counsel asked Merhawi about a May 2009 incident at a rest stop near Los Angeles, when Merhawi accidentally encountered defendants' sister Asmeret with a friend. Counsel asked Merhawi: "Isn't it a fact that you told both of them words to the following effect, 'I'm going to kill you. I'm going to kill you.' And then to her, 'I'm going to kill you,' meaning her, 'and drink your blood?" Merhawi acknowledged the encounter occurred but denied making the threat. He elaborated that Asmeret

was insulting and that one of her companions said he would "brew you like coffee beans."

At the start of Asmerom's defense case he proffered testimony from Degefu Bagaro that Bagaro was at the encounter and observed Merhawi's threat. The defense argued the testimony was relevant both to impeach Merhawi and to support Asmerom's asserted need to defend himself against the Meharis. The court found the testimony was of only marginal relevancy and excluded it under Evidence Code section 352.

In her rebuttal argument, the prosecutor repeatedly touched on the theme that the defense had tried to smear the Meharis to distract the jurors from the evidence. As one example, she argued: "The questions about Merhawi allegedly threatening to kill Asmeret and drink her blood while they're at a rest stop on Interstate 5 where there are other witnesses, he told you he never said that, and that is the state of the evidence because Asmeret didn't get up and testify about that, did she? No witnesses got up and testified about that. That's about distracting you from the evidence in this case because the state of the evidence is that never happened."

After closing arguments finished and the jury was excused for the day, Asmerom asserted the prosecutor committed misconduct in "suggest[ing] to the jury that we didn't produce a witness that we weren't able to do because of the court's ruling." Asmerom requested an admonition "letting [the jurors] know that production of all evidence is not required, and that the prosecutor

mentioned that there [was] certain evidence by the defense that was not required that should not be taken into consideration because not all evidence is required. Or preferably, if the court would consider that the prosecutor made a mistake." In response, the prosecutor asserted that her comment merely referred to the defense's failure to call Asmeret to testify about the alleged threats. The court denied the request for an admonition.

B. Analysis

"'The applicable federal and state standards regarding prosecutorial misconduct are well established. "'A prosecutor's . . . intemperate behavior violates the federal Constitution when it comprises a pattern of conduct "so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process."'" [Citations.] Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves "'"the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury."'"'" (*People v. Ochoa* (1998) 19 Cal.4th 353, 427, 79 Cal. Rptr. 2d 408, 966 P.2d 442.) "'The focus of the inquiry is on the effect of the prosecutor's action on the defendant, not on the intent or bad faith of the prosecutor.'" (*People v. Sanchez* (2014) 228 Cal.App.4th 1517, 1528, 176 Cal. Rptr. 3d 517.)

Preliminarily, we reject the People's contention that defendants failed to preserve this claim for appeal

by waiting too long to object and request an admonition. "'To preserve for appeal a claim of prosecutorial misconduct, the defense must make a timely objection at trial and request an admonition; otherwise, the point is reviewable only if an admonition would not have cured the harm caused by the misconduct.'" (*People v. Bradford* (1997) 15 Cal. 4th 1229, 1333, 65 Cal. Rptr. 2d 145, 939 P.2d 259.) Asmerom's counsel refrained from interrupting the prosecutor's argument, but he objected and requested an admonition promptly after her argument and in time for the court to have included an admonition in its jury instructions. We see no reason to suspect that, as the People assert, the timing of such an admonition would have confused or distracted the jury.[12] (*See People v. Lewis* (2009) 46 Cal.4th 1255, 1303, fn. 34, 96 Cal. Rptr. 3d 512, 210 P.3d 1119 [objection and request for rereading of jury instruction not forfeited by waiting until end of prosecutor's argument].)

Defendants fare less well in asserting prejudicial misconduct. The prosecutor's reference to their failure to call Asmeret to testify about Merhawi's alleged

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[12] The cases the People cite to argue the admonition was untimely merely observe that defense counsel sometimes refrain from objecting to a prosecutor's comments to avoid drawing the jurors' attention to them. (*See People v. Harris* (2008) 43 Cal.4th 1269,1290, 78 Cal. Rptr. 3d 295, 185 P.3d 727 [failure to request an admonition not ineffective assistance of counsel where counsel could have decided objection would highlight prosecutor's remarks]; *People v. Huggins* (2006) 38 Cal.4th 175, 206, 41 Cal. Rptr. 3d 593, 131 P.3d 995 [same].) That point has no bearing on whether the objection and request for an admonition here was timely.

threat was a permissible comment on the state of the evidence. (*See People v. Vargas* (1973) 9 Cal.3d 470, 475, 108 Cal. Rptr. 15, 509 P.2d 959 [comment on defense failure to call logical witnesses not misconduct].) But assuming arguendo that the prosecutor's remark was deceptive,[13] defendants exaggerate its potential effect. "To prevail on a claim of prosecutorial misconduct based on remarks to the jury, the defendant must show a reasonable likelihood the jury understood or applied the complained-of comments in an improper or erroneous manner. [Citations.] In conducting this inquiry, we 'do not lightly infer' that the jury drew the most damaging rather than the least damaging meaning from the prosecutor's statements." (*People v. Frye* (1998) 18 Cal.4th 894, 970, 77 Cal. Rptr. 2d 25, 959 P.2d 183, overruled on another point in *People v. Doolin* (2009) 45 Cal.4th 390, 421 fn. 22, 87 Cal. Rptr. 3d 209, 198 P.3d 11; *People v. Berryman* (1993) 6 Cal.4th 1048, 1072, 25 Cal. Rptr. 2d 867, 864 P.2d 40, overruled on another point in *People v. Hill*, *supra*, 17 Cal.4th at p. 823, fn.1.)

Here, the prosecutor's brief and isolated remark at worst merely drew attention to the lack of evidentiary support for one of many defense attacks on Merhawi's character and credibility. It concerned a tangential event that occurred more than two years after the

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[13] We do not mean to suggest that any deception was intentional. As the Supreme Court has observed, "the term prosecutorial 'misconduct' is somewhat of a misnomer to the extent that it suggests a prosecutor must act with a culpable state of mind. A more apt description of the transgression is prosecutorial error." (*People v. Hill* (1998) 17 Cal.4th 800, 842, 72 Cal. Rptr. 2d 656, 952 P.2d 673.)

murders, and the longstanding and intense ill-will between the Mehari and Gebreselassie families was exhaustively demonstrated at trial regardless of what did or did not happen at the rest stop. Furthermore, the court instructed the jurors that neither side was required to call all available witnesses, and that statements of counsel are not evidence. We presume the jury understood and followed those instructions. (*People v. Letner and Tobin* (2010) 50 Cal.4th 99, 173, 112 Cal. Rptr. 3d 746, 235 P.3d 62.) On this record, it is not reasonably possible that a different result would have obtained absent the challenged comment. (*See People v. Cunningham* (2001) 25 Cal.4th 926, 1019, 108 Cal. Rptr. 2d 291, 25 P.3d 519; *People v. Sanchez* (1995) 12 Cal.4th 1, 47 Cal. Rptr. 2d 843, 906 P.2d 1129, disapproved on another point in *People v. Doolin*, *supra*, 45 Cal.4th at p. 421, fn. 22.)

VI. Post-Verdict Request For Trial Transcript

1. Background

After the verdicts were returned, Asmerom retained new private counsel to move for a new trial and requested a copy of the trial transcript, which the court denied. Asmerom renewed the request when he moved for a new trial on grounds including ineffective assistance of counsel, the exclusion of evidence of the twins' homosexuality and Abraham's murder, and the denial of adequate opportunity to consult with counsel before

testifying.[14] His new attorney acknowledged he did "not know whether the trial transcript would reflect any of the information asserted by the defendant," but argued a transcript was necessary to properly raise the issues in a new trial motion.

The trial court found the defense had not shown a particularized need for the transcript and denied the request. Noting that it had presided over the trial, the court further ruled that Asmerom's claims of jury misconduct, inadequate consultation with counsel before testifying and improper exclusion of evidence were meritless.

2. Analysis

Asmerom contends the denial of his request for a trial transcript violated his due process rights and requires remand to allow him to seek a new trial based on the reporter's transcript prepared for this appeal. He is wrong. The trial court may properly deny a request for free transcripts to prepare a new trial motion where an indigent defendant fails to show a particularized need for them, and it is the defendant's burden

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[14] Asmerom's new counsel explained at the hearing that "actually, he's alleging misconduct from most of the main principals in the case, other than the court reporter and the clerk, and it's impossible for me to properly raise these issues without having a transcript. All I know about the trial is what he's told me and a few things that Mr. Stallworth has told me about the trial." Asmerom also wanted an evidentiary hearing at which he would call Sergeant Morris, Inspector Beal and several of the jurors as witnesses.

to establish that necessity. (*People v. Bizieff* (1991) 226 Cal.App.3d 1689,1702, 277 Cal. Rptr. 678; *People v. Lopez* (1969) 1 Cal.App.3d 78, 83, 81 Cal. Rptr. 386.) "There are no mechanical tests for deciding when the denial of transcripts for a motion for new trial is so arbitrary as to violate due process or to constitute a denial of effective representation. Each case must be considered on its own peculiar facts and circumstances." (*People v. Bizieff*, *supra*, 226 Cal.App.3d at p. 1700; *People v. Markley* (2006) 138 Cal.App.4th 230, 242, 41 Cal. Rptr. 3d 257).

Here, the judge who heard the new trial motion had presided over the trial and was intimately acquainted with the issues raised. Both defendants' trial attorneys were deeply knowledgeable about the case, and there was no showing that either was unable or unwilling to consult with Asmerom's newly retained counsel. (*Cf. People v. Lopez*, *supra*, 1 Cal.App.3d at p. 82 [new trial motion ordinarily does not require a full trial transcript because it is usually brought by the lawyer who tried the case before the judge who presided at trial]; *see also United States v. Banks* (M.D. Pa. 1974) 369 F.Supp. 951, 955, fn. 7 [need for transcript obviated by trial judge's familiarity with the case].) The trial court could also legitimately consider the delay involved in preparing a voluminous (in the neighborhood of 30 volumes, as it turned out) transcript. (*People v. Bizieff*, *supra*, 226 Cal.App.3d at p. 1704.) Moreover, even with the benefit of the full trial transcript prepared for this appeal, Asmerom has not shown with any specificity how the transcript would

have enabled his new counsel to effectively seek a new trial. The court reasonably denied his request.

TEWODROS'S APPEAL

I. Sergeant Morris's Testimony

A. Lay Opinion Testimony On Credibility

Tewodros asserts the court erred when it admitted Sergeant Morris's testimony that he did not believe the statement Tewodros gave to police after the murders.[15]

1. Background

Questioned at the police station after the shootings, Tewodros repeatedly told Sergeant Morris he did not know Asmerom would be at the Meharis' apartment that day, did not summon Asmerom or open the apartment door for him, and that he left with Issac after, not before, Asmerom fired the first shot. His testimony at trial was consistent with his statement to police.

In rebuttal, the prosecutor called Sergeant Morris. Over objection Sergeant Morris testified that, with respect to Tewodros's police statement, he "did not believe [T]ewodros's account of events. So I, again, was asking him what occurred at 5301 Telegraph. And during the course of the investigation, his answers were not adding up." After the court overruled a defense objection and motion to strike, Sergeant Morris repeated

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[15] Asmerom joins this claim.

that Tewodros's "answers were not adding up to what occurred that day. I just didn't believe what he was telling me." Later, on cross-examination by Asmerom, Sergeant Morris repeated that he "didn't believe what [Tewodros] was telling me that day." The court again overruled the objection and motion to strike.

2. Analysis

It is settled that a lay witness's opinion about the truthfulness of another witness's statements is irrelevant and inadmissible. "Lay opinion about the veracity of particular statements by another is inadmissible on that issue. As the Court of Appeal recently explained . . . , the reasons are several. With limited exceptions, the fact finder, not the witnesses, must draw the ultimate inferences from the evidence. Qualified experts may express opinions on issues beyond common understanding [citations], but lay views on veracity do not meet the standards for admission of expert testimony. A lay witness is occasionally permitted to express an ultimate opinion based on his perception, but only where 'helpful to a clear understanding of his testimony' [citation], i.e., where the concrete observations on which the opinion is based cannot otherwise be conveyed. [Citations.] Finally, a lay opinion about the veracity of particular statements does not constitute properly founded character or reputation evidence [citation], nor does it bear on any of the other matters listed by statute as most commonly affecting credibility [citation]. Thus, such an opinion has no 'tendency in reason' to disprove the veracity of the statements."

(*People v. Melton* (1988) 44 Cal. 3d 713, 744, 244 Cal. Rptr. 867, 750 P.2d 741 (*Melton*); *see also People v. Sergill* (1982) 138 Cal.App.3d 34, 39-40, 187 Cal. Rptr. 497 [where credibility was critical, admission of police officer's opinion of child victim's truthfulness was prejudicial error]; *but see People v. Padilla* (1995) 11 Cal.4th 891, 946-947, 47 Cal. Rptr. 2d 426, 906 P.2d 388 [declining to decide whether this aspect of *Melton* survived Proposition 8].)

Here, Sergeant Morris's testimony that he disbelieved Tewodros's statements and that his version of the shootings didn't "add[] up" cannot rationally be distinguished from the statements held inadmissible in *Melton* and *Sergill*. The People nonetheless argue it was admissible to explain why Morris questioned Tewodros for so long and mostly with the tape recorder off, not for his opinion on veracity, but we disagree. Despite Tewodros's objection that the testimony was "opinion and conclusion," the prosecutor never suggested it was relevant for the different purpose the People now propose; nor was the jury given a limiting instruction to that effect. The record, accordingly, gives no basis to believe the jury would have considered Sergeant Morris's testimony for anything but its plain meaning—i.e., that Tewodros lied to the police and, by clear inference, also lied to the jury. It should not have been admitted.

B. Hearsay About Tewodros's Gun

Tewodros and Asmerom contend the trial court committed further error when it allowed Sergeant Morris to testify that there was no record Tewodros registered the gun he bought before the murders. Tewodros also contends that, once that testimony came in, the court erred when it refused to let him reopen his case to rebut it. Here, too, their contentions have merit.

Tewodros testified in his case in chief that he purchased a gun several months before the shooting because he was concerned about protecting himself and his family from the unknown person he thought was responsible for Abraham's death. After his arrest he told police about the gun and told them where to find it in his mother's closet. There was nothing to suggest the gun was used in the murders.

On cross-examination, the prosecutor asked Tewodros whether he had registered the gun in his name. He testified that he had and explained that when he purchased the gun he filled out the registration paperwork, took an exam on gun safety, and waited the 30-day period to receive the firearm. On rebuttal, the prosecutor presented testimony from Sergeant Morris that two service dispatchers ran inquiries and told him no guns were registered to Tewodros. Tewodros objected and moved to strike the testimony as hearsay, but the objection was overruled. The prosecution rested its case that afternoon.

The next morning Tewodros moved to reopen his case to show he had done all he could to register the gun in his name. He proffered new gun registration paperwork in his name, a receipt for a $30 payment for gun registration made out to the store where he bought it, and a handgun safety certificate from the California Department of Justice. He also offered to testify that he had paid for the registration and believed the gun shop would handle the paperwork. Defense counsel argued the evidence was necessary to rebut an anticipated prosecution argument that Tewodros's ownership of an unregistered gun indicated a secretive or even illegal intent. The prosecutor responded that she would not make that argument and objected that the proffered records were unauthenticated and should have been offered during Tewodros's testimony. The court found the issue was only marginally relevant and denied the request to reopen.

C. The Errors Were Prejudicial

The state, correctly, does not dispute that Morris's testimony about the firearm registration was inadmissible double hearsay. (*See*, *e.g.*, *People v. Wimberly* (1992) 5 Cal.App.4th 439, 445-446, 6 Cal. Rptr. 2d 800; *People v. Scalzi* (1981) 126 Cal.App.3d 901, 906, 179 Cal. Rptr. 61.) Whether or not the court's subsequent refusal to allow Tewodros to reopen his case was an abuse of discretion (*see People v. Funes* (1994) 23 Cal.App.4th 1506, 1520, 28 Cal. Rptr. 2d 758), it prevented Tewodros from refuting the plain implication that he lied to the jury when he testified he had

registered the gun purchased just months before the murders. We consider, then, whether the cumulative impact of this error and the erroneous admission of Morris's testimony that he disbelieved Tewodros's statement to police requires reversal. We are persuaded that it does.

"Lengthy criminal trials are rarely perfect, and this court will not reverse a judgment absent a clear showing of a miscarriage of justice. [Citations.] Nevertheless, a series of trial errors, though independently harmless, may in some circumstances rise by accretion to the level of reversible and prejudicial error. (*People v. Purvis*, *supra*, 60 Cal.2d at pp. 348, 353 [combination of "relatively unimportant misstatement[s] of fact or law," when considered on the "total record" and in "connection with the other errors," required reversal]; *People v. Herring*, *supra*, 20 Cal.App.4th at pp. 1075-1077 [cumulative prejudicial effect of prosecutor's improper statements in closing argument required reversal]; *see In re Jones* (1996) 13 Cal.4th 552, 583, 587, 54 Cal. Rptr. 2d 52, 917 P.2d 1175 [cumulative prejudice from defense counsel's errors requires reversal on habeas corpus]; *People v. Ledesma* (1987) 43 Cal.3d 171, 214-227, 233 Cal. Rptr. 404, 729 P.2d 839 [same]. . . .)" (*People v. Hill*, *supra*, 17 Cal.4th at pp. 844-845, parallel citations omitted.)

Tewodros's credibility went to the heart of his defense case. No physical evidence connected him to the shooting, nor were there any confessions or admissions. The phone records showing calls made from Tewodros's cell phone to his brother Dawit's were open to

innocent as well as culpable interpretations. Indeed, whether Tewodros was a knowing participant in the murders depended almost completely on his word against that of the three Mehari brothers, whose own depictions of the critical events displayed troubling inconsistencies. The jurors were properly instructed that they could reject the entire testimony of a witness who testified falsely as to any material point, and the prosecutor's closing argument hammered on the theme that the case came down to witness credibility.

In this context, where Tewodros's veracity weighed so crucially in the balance, the jury was allowed to hear testimony from a highly experienced police investigator with intimate knowledge of the case that he believed Tewodros lied when he spoke to the police and denied involvement in his brother's crimes. Compounding that damaging testimony, at the very end of trial the jury heard from the same officer that, in essence, Tewodros's testimony that he had registered the gun he bought not long before the murders was untrue.

A cold written record of a trial is often an inadequate substitute for being present in the courtroom and observing the proceedings first-hand. Here, when the trial court ruled upon the motion for new trial, it observed that Tewodros did not appear to be a credible witness. Maybe so. But on this record we cannot deny the reasonable possibility that these errors, in the aggregate, tipped the scales in the jury's assessment of Tewodros's credibility and thus denied him the fair trial he was entitled to. As Tewodros' counsel expressed at oral argument, all that is necessary for reversal is

for there to be a reasonable possibility that without the errors a single juror would have voted to acquit. Reversal is required under any standard. (*See People v. Hill*, *supra*, 17 Cal.4th at p. 844; *People v. Maestas* (1993) 20 Cal.App.4th 1482, 1498, 25 Cal. Rptr. 2d 644.)[16]

DISPOSITION

The judgment as to Asmerom is affirmed. The judgment as to Tewodros is reversed. The matter is remanded to the trial court for further proceedings.

Siggins, J.

We concur:

Pollak, Acting P.J.

Jenkins, J.

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[16] In light of this conclusion, we do not address Tewodros's contention that the court erred when it denied his motions to sever and for mistrial based on Asmerom's misconduct in court. Nor do we reach his claim of sentencing error.