No. 23-5285

IN THE

SUPREME COURT OF THE UNITED STATES

ASMEROM GEBRESELASSIE, — PETITIONER
(Your Name)

vs.

GIGI MATTESON, Warden, — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

United States Court of Appeals for the Ninth Circuit
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Asmerom Gebreselassie, AI4558
(Your Name)

CSP-Solano,13-1-5L, P. O. Box 4000
(Address)

Vacaville, CA 95696
(City, State, Zip Code)

(Phone Number)

QUESTIONS PRESENTED

1. Did The Ninth Circuit Court Of Appeals Err In Failing To Grant A Certificate Of Appealability When It Denied Petitioner's Motion For Certificate Of Appealability Based On A Wrong Docket, DOCKET ENTRY No. 15, Which Was Not Petitioner's Motion For Certificate Of Appealability?

2. Did The Ninth Circuit Court Of Appeals Err In Failing To Grant A Certificate Of Appealability On Petitioner's Claim Of The Violation Of His Sixth Amendment Right To The Retained Counsel Of Choice That Was Unreasonably Rejected By The California Court Of Appeal?

LIST OF PARTIES

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

STATEMENT OF RELATED CASES

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

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

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

- In re Gebreselassie, California Supreme Court No. S2392249, petition denied on June 14, 2017.

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

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

- Gebreselassie v. Matteson, Warden, United States District Court, N.D. Cal. No. 16-cv-6195; Rule 60(b)(6) and Rule 60(d)(1) motions denied on October 13, 2021.

- Gebreselassie v. Matteson, Warden, Ninth Circuit Court of Appeals, No. 21-16843 certificate of appealability denied on April 3, 2023; motion for reconsideration and motion for reconsideration en banc denied on May 15, 2023.

TABLE OF CONTENTS

TABLE OF CONTENTS - Continued

TABLE OF AUTHORITIES

CASES PAGE

UNITED STATES CONSTITUTIONS

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

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

OPINIONS BELOW

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

The opinion of the United States court of appeals appears at Appendix p. 1a to the petition and is

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

The opinion of the United States district court appears at Appendix p. 18a to the petition and is

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

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

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

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

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

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

JURISDICTION

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

The date on which the United States Court of Appeals decided my case was April 3, 2023.

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

[x] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: May 15, 2023, and a copy of the order denying rehearing appears at Appendix p.23a.

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

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

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

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

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

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

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment VI:

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

STATEMENT OF THE CASE

Petitioner and his family are from Eritrea, a small country adjacent to Ethiopia. One of petitioner's brother Abraham was married to Winta, a member of the Mehari family. Petitioner's family helped the Meharis to come to the United States.

On Thanks giving day, 2006, petitioner and his brother Tewodros visted the Meharis' arartment. A shooting occurred in which Regbe Mehari, her daughter Winta, and her son Yonas were killed. Petitioner was arrested that day and told the police that the shooting had occurred in self-defense, and resulted from prior animosity between the two families.

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

The prosecutor and defense offered starkly divergent versions of what ensued. The prosecutor's theory was that petitioner conspired with his brother Tewodros and possibly other member of his family to murder the

Mehari family and take custody of young Isaac. According to the prosecutor, Tewodros visted the Meharis' apartment on Thanksgiving; played with Isaac before sending a phone signal to someone who alerted petitioner; and then let petitioner into the apartment when he arrived. Petitioner entered with two handguns and opened fire, killing three Meharis. Tewodros took Isaac to his mother's nearby apartment.

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

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

Petitioner testified that on Tuesday, November 21, 2006, he had been invited by Winta to come to Regbe's apartment on Thanksgiving to discuss Merhawi's homosexuality and his conduct with Isaac. Winta told petitioner to come alone. Fearing he might meet the same fate as Abraham, petitioner took a gun he obtained from his brother Mulugeta's apartment. When petitioner was admitted to the Meharis' apartment, he found Tewodros there, which he had not expected. As soon as petitioner entered the Meharis' apartment, he was in life threatening confrontation. Merhawi and Yehferom yelled at him, and they drew guns, and shots were fired.

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

had speed-dial. Tewodros had not let petitioner into the apartment and had not known petitioner was coming. Tewodros left in a panic with Isaac after observing an argument, guns being drawn and gunfire. When the first shot was fired, Tewodros immediately left the apartment with Isaac and took him to a place of safety.

REASONS FOR GRANTING THE PETITION

Petitioner seeks review of the order of the Ninth Circuit denying a certificate of appealability to petitioner's federal constitutional claim raised in the district court.

First and foremost, the Ninth Circuit denied petitioner's motion for certificate of appealability based on a wrong docket, DOCKET ENTRY No. 15, which was not petitioner's motion for certificate of appealability. DOCKET ENTRY No. 5 was petitioner's motion for certificate of appealability, not DOCKET ENTRY No. 15. Secondly, the Ninth Circuit failed to correctly apply this Court's standard for issuing a certificate of appealability (hereafter "COA"), and erred in denying the request for a certificate of appealability.

The Clerk of the Ninth Circuit Court's erroneously filed DOCKET ENTRY No. 15 as motion for certificate of appealability, and the panel of the court made a mistake and denied petitioner's motion for certificate of appealability based on a wrong a docket, DOCKET ENTRY No. 15, stating that, "the request for a certificate of appealability (DOCKET ENTRY No. 15) is denied because Appellant has not shown that (1) jurists of reason would fine it debatable whether the district court abused its discretion in denying the motions and, (2) jurists of reason would find it debatable whether the underlying motions state a valid claim of the denial of a constitutional right." But, had the panel of the Ninth Circuit Court

made its decision based on petitioner's motion for certificate of appealability, DOCKET ENTRY No. 5, it would have known that petitioner has shown that (1) jurists of reason would find it debatable whether the district court abused its discretion in denying the motions and, (2) jurists of reason would find it debatable whether the underlying motions state a valid claim of the denial of a constitutional right.

The evidence petitioner presented in his motion for certificate of appealability, DOCKET ENTRY No. 5, clearly shows that the district court abused its discretion in denying petitioner's motions, 60(b)(6) and 60(d)(1), because it based its decision on a clearly erroneous finding of fact. Its initial decision, in denying petitioner's habeas petition, was clearly erroneous and its enforcement would work a manifest injustice. (See, App. pp. 2a-17a.)

The Panel's of the Ninth Circuit Court mistake is a major error of fact. The Panel's decision is based on findings that are clearly erroneous when it denied petitioner's motion for certificate of appealability based on a wrong docket, DOCKET ENTRY No. 15, which was not petitioner's motion for certificate of appealability. (See, App. p.1a.) The Panel's decision also conflicts with decisions of this Court in Slack v. McDaniel, 529 U.S. 473 (2000), as well as in Miller-El v. Cockrell, 537 U.S. 322 (2003), and consideration by this Court is therefore necessary to secure or maintain uniformity of the Court's decision.

Had the Panel of the Ninth Circuit Court not treated petitioner's case (a pro se case) in a careless or perfunctory way, and had it made its decision based on petitioner's motion for certificate of appealability, Docket Entry No. 5, (1) it would have known that the state trial court committed structural error when it denied petitioner's Sixth Amendment right to be represented by the retained counsel of his choice.

When the trial record is accurately and correctly reviewed, it is abundantly clear that: Petitioner was not dilatory. Nothing in the record indicates that petitioner was attempting to delay the proceedings (See, App. pp. 4a-14a); a continuance to permit retained counsel to substitute in would not cause any inconvenience to any party or witnesses, much less prejudice; and the prosecutor supported a continuance to permit counsel to prepare, and made no claim of prejudice at all. Therefore, there was no other legitimate reason for denying petitioner's request to be represented by the retained counsel of his choice.

(2) it would have known that the state appellate court rejected petitioner's claim of a violation of his constitutional right to the retained counsel of his choice based on an untenable and unreasonable characterization of the factual record. The state appellate court based its ruling on a clearly erroneous assessment of the evidence. (See, App. pp. 6a-14a.) The evidence petitioner presented in his motion for certificate of appealability, Docket Entry No. 5 (App. pp. 2a-17a), clearly shows that the reasons provided by the state appellate court for affirming the denial of petitioner's constitutional right to the retained counsel of his choice are rife with unreasonable determination of the facts.

(3) it would have known that Respondent's Answer was entirely based on the state appellate court's opinion that was contrary to the record evidence.

(4) it would have known that based on the trial record, petitioner filed a Traverse disputing the factual allegations of the Respondent's Answer, but the district court completely neglected petitioner's Traverse and denied petitioner's claim of a violation of his constitutional right to the retained counsel of his choice based on the Respondent's Answer

that was contrary to the record evidence. The districr court's ruling was one sided ruling. It ruled in Respondent's favor by completely neglecting the evidence and argument, presented by petitioner, that would have shown that petitioner was denied his Sixth Amendment right to be represented by the retained counsel of his choice.

(5) it would have known that petitioner has made a substantial showing of the denial of a constitutional right, which's that the denial of his constitutional right to the retained counsel of his choice, and also it would have known that petitioner has shown reasonable jurists would disagree with the district court's assessement of the constitutional claim that the state appellate court's determination of the issue was reasonable because the reasons provided by the state appellate court for affirming the denial of petitioner's constitutional right to the retained counsel of his choice are rife with unreasonable determination of the facts. (See, App. pp. 6a-14a.) Reasonable jurists would find the district court's assessment of the constitutional claim debatable or wrong. (See, 28 U.S.C. §2253(c)(2), and Miller-El v. Cockrell, supra; see also, petitioner's Traverse, dkt. No. 31-9 at 5-10, that was filed in the district court, where petitioner had shown "clearly and convincingly" that the state appellate court's decision was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding.)

Petitioner was entiltled to a COA because he had shown that jurists of reason would find it debatable whether the district court abused its discretion in denying petitioner's motions, 60(b)(6) and 60(d)(1), and he had also shown that jurists of reason would find it debatable whether the underlying motions state a valid claim of the denial of constitutional right. (See, App. pp. 14a-17a.)

Petitioner's motions, 60(b)(6) and 60(d)(1), state a valid claim of the denial of a constitutional right, which's that the denial of petitioner's constitutional right to the retained counsel of his choice. Petitioner was entitled to a COA on his claim of the violation of his constitutional right to the retained counsel of his choice because reasonable jurists would disagree with the district court's assessment of this constitutional claim. Reasonable jurists would disagree with the district court's ruling that the state appellate court's determination of the issue was reasonable, because the reason provided by the state appellate court for affirming the denial of petitioner's constitutional right to the retained counsel of his choice are rife with unreasonable determination of the facts. (See, Slack v. McDaniel, supra, 529 U.S. at p. 484; and App. pp. 6a-14a. See also, Buck v. Davis, 137 S.Ct. 759, 777-78, 197 L.Ed. 2d 1 (2017), where this Court stated that it was error to deny a prisoner a COA to pursue his Sixth Amendment right claims on appeal where he demonstrated IAC, and that error entitled him to relief under Fed. R. Civ. P. 60(b)(6).)

Since the Panel of the Ninth Circuit Court made an error when it denied petitioner's motion for certificate of appealability based on a wrong docket, DOCKET ENTRY No.15, which was not petitioner's motion for certificate of appealability, petitioner filed motion for reconsideration and reconsideration en banc in order the Ninth Circuit Court to correct the panel's erroneous decision.

It is obvious that the panel of the Ninth Circuit Court based its decision on a clearly erroneous finding of fact when it denied petitioner's motion for certificate of appealability based on a wrong docket, DOCKET ENTRY No. 15. The panel's decision is based on findings that are clearly erroneous. Therefore, reconsideration should have been granted in order to correct the panel's erroneous decision, but since the Ninth Circuit Court

was treating petitioner's case (a pro se case) in a careless or perfunctory way. it denied petitioner's motion for reconsideration and reconsideration en banc, stating that, "The motion for reconsideration is denied and the motion for reconsideration en banc is denied on behalf of the court." (See, App. p. 23.)

It's a known fact that most of the courts are biased against pro se litigants. They don't even bother to read the pro se litigants' motions and evidence. That's what exactly happened in petitioner's case so far.

The Panel of the Ninth Circuit Court did not read petitioner's motions and evidence when it denied petitioner's motion for certificate of appealability. Since the Panel did not read petitioner's motion for certificate of appealability, Docket Entry No. 5, and petitioner's supplemental motion for certificate of appealability, Docket Entry No. 8, that's why it denied petitioner's motion for certificate of appealability based on a wrong docket, Docket Entry No. 15. Had the Panel read petitioner's motion for certificate of appealability, Docket Entry No. 5, it would have known that DOCKET ENTRY No. 15 was not petitioner's motion for certificate of appealability.

The sad and ugly truth is that even pro se litigants who can apply the law to their cases must still overcome judicial bias. That's not just me (petitioner) saying so - a former federal judge was saying so. Judge Richard posener had served on the 7th Circuit Court of Appeal since Ronald Regan appointed him. He's authored more than 3,000 opinions. He retired back in 2017, years earlier than planned. His reason? The court's refusal to address entrenched judicial bias against people representing themselves. As he told the Chicago Daily Bulletin, "I was not getting along with the other judges because I was very concerned about how the court treats pro se litigants, who I believe deserve a better shake."

In New York Times interview on his sudden retirment, Judge Posner accused the court of funneling pro se appeals to staff lawyers, to be summarily dismissed over trivial technical issues. He said, staff lawyers rather than judges assessed appeals from pro se litigants, and the court generally rubber-stamped the lawyers' recommendations. And he also said that his colleagues refused to let him work with staff lawyers on their recommendations, which caused some tensions on the court.

What Judge Posner said exactly happened in petitioner's case, so far. The district court and the Ninth Circuit Court have been treating petitioner's case (a pro se case) in a careless or perfunctory way, so far. Let the record speaks for itself. (See, App. pp. 1a-17a.)

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

To obtain a COA, a petitioner "must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong". (Slack v. McDaniel, supra.) The showing required for a COA is "relatively low." (Williams v. Woodford, 384 F.3d 567, 583 (9th Cir. 2004).) The applicant need not prove that jurists would necessarily or even probably grant the habeas petition. (Miller-El v. Cockrell, supra.) The court should resolve any doubts about issuing a COA in favor of the petitioner. (Rhoades v. Henry, 598 F.3d 511, 518 (9th Cir. 2010).)

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

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

Petitioner made good faith efforts to retain and proceed to trial with retained counsel of choice, which was his Sixth Amendment right. (United States v. Gonzalez-Lopez, 548 U.S. 140, 144 (2006). "It is the right of a

defendant who does not require appointed counsel to choose who represent him.") The Alameda County Superior Court violated that right by refusing to permit counsel of choice to represent petitioner; the California Court of Appeal rejected petitioner's claim of a violation of his Sixth Amendment right to the retained counsel of his choice based on numerous unreasonable and erroneous determinations of fact that were contradicted by the record evidence; and the federal courts erred in denying petitioner's request for a certificate of appealability.

1. The procedurial history

The homicide in this case occurred on November 23, 2006. Petitioner was arrested shortly afterward and was initially represented by the Alameda County Public Defenders. After the preliminary hearing, petitioner sought to relieve the Public Defenders and filed two Marsden motions.

Following the denial of Marsden motion, petitioner retained attorney William Dubois, and a July 2009 trial date was set, which afforded Mr. Dubois 10 months to prepare for trial. However, Mr. Dubois had a jam-packed trial calendar, and when July 2009 arrived, he moved for a continuance based on lack of preparation time and medical problems. The court granted a month continuance during which Mr. Dubois moved to withdraw based on an irreconcilable conflict and breakdown in the attorney-client relationship. (7CT 1976.) The trial court granted the motion to withdraw, and reappointed the original Public Defenders over petitioner's objection. (See, App. pp. 24a-65a which's petitioner's declaration that shows the procedural history of issues regarding representation.)

Since there was a complete breakdown in communication between the public defenders and the petitioner, and since petitioner did not want the public defenders to represent him, petitioner and his family managed

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

The court knew there was a complete breakdown in communication between the public defenders and the petitioner. (See RT(8/31/09)1-5.) Petitioner even wrote a letter to the court, dated August 4, 2009, and in that letter petitioner explained to the court the conflict he had with the public defenders. But, regardless, the court kept bringing back the public defenders to petitioner' case. (App. pp. 26a-28a.)

The public defenders did not bring the case to trial within the time frame that Mr. Cole had requested. Rather, on June 21, 2010, the public defenders declared a doubt as to petitioner's competency, claiming that there was a complete breakdown in communication between them and petitioner. Petitioner denied the claim of incompetence, and sought to proceed to trial with the retained counsel of his choice. No finding of incompetency was made. The court subsequently granted petitioner's Marsden motion and relieved the public defenders on July 26, 2010, citing a total breakdown in the attorney-client relationship. And on that same day, on July 26, 2010, petitioner had a private attorney, Mr. Lefcourt, who made a special appearance for petitioner. (See, App. pp. 28a-32a.)

After the court granted petitioner's Marsden motion, Mr. Lefcourt, codefendant's attorneys, the prosecutor and the the court went to the court's chamber. After few minutes, Mr. Lefcourt came out from the court's chamber and told petitioner that the court wanted this case to go to trial in one month, and Mr. Lefcourt told the court that it's impossible for any new attorney to be ready for trial in one month in this complex case. (See, App. pp. 31a-32a, and see also, 1RT 192.)

After thirty or forty minutes, petitioner's former attorney, Mr. Dubois, who had earlier been found to have an "irreconcilable conflict", came to the courtroom, and the court provisionally reassigned him on the understanding that Mr. Dubois would need court appointed backup counsel and would inform the court the following week whether he could take on the case. (See, App. pp. 32a-34a.)

On August 4, the court re-appointed Mr. Dubois over petitioner's objection. Petitioner told the court that he wanted to be represented by the retained counsel of his choice, Mr. Lefcourt.

On August 18, Mr. Dubois relinquished his appointment because the court appointed program had refused his support requests. Counsel from Lefcourt's office appeared to discuss trial timing and logistics.

On August 24, Mr. Lefcourt appeared in court, and he told the court that petitioner's family had retained him contingent on his obtaining county funding for investigation, experts and other costs. The case was continued to September 28 to permit Mr. Lefcourt to file the written request for ancillary service funds. However, on September 7, the court appointed a court appointed attorney, Mr. Stallworth, on the condiction that he answered he would be ready for trial on January 3, 2011. Petitioner objected and specifically informed the court that he wanted to be represented by the retained counsel of his choice, Mr. Lefcourt, to no avail. (See, App. pp. 35a-38a, and see also 1RT 242.)

On September 28, Mr. Lefcourt appeared in court, and moved to substitute in, as had previously been contemplated. He addressed the court, saying that, "I don't believe the time period that we're asking for such a serious case is unreasonable. In fact, it's extremely reasonable. This case is a complicated case that will take six months to prepare, and if the substitution is allowed, I will not request further continuance." (2RT 263-

-264.) Petitioner also addressed the court, saying that, "I don't want Mr. Stallworth [the court appointed attorney] to represent me because I don't trust him. Besides, he doesn't have enough experience as defense attorney. He was working as a prosecutor for the Alameda County District Office at the time I was arrested. I want to be represented by well experienced defense attorney, Mr. Lefcourt, who could give me an effective defense." (See, App. pp. 39a-42a, see also 2RT 264-275.)

The court denied Mr. Lefcourt's request for six months to prepare for trial based solely on the fact that petitioner's codefendant had withdrawn his time waiver and requested to go to trial. The court expressly acknowledged that Mr. Lefcourt's request for six months to prepare was reasonable. The court stated that: "If that were a single defendant case with time waived, I believe that I would agree with Mr. Lefcourt that he should come into the case and the case should go to trial in a six-month period." (See, 2RT 289.) But, the court concerned that petitioner's codefendant had withdrawn his time waiver. However, California law is clear that the good cause to continue one defendant's trial beyond the statutory period justifies continuance of the trial of an objecting codefendant. (People v. Sutton, 48 Cal. 4th 553, 558 (2010).)

Petitioner's codefendant had no cognizable speedy trial claim to override petitioner's request for the retained counsel of his choice. The prosecutor supported a continuance to permit counsel to prepare, and made no claim of prejudice at all. There was no showing in the record by any party or witness that a continuance to permit retained counsel to substitute in would cause any inconvenience, much less prejudice. There was no other legitimate reason for denying the request to let retained counsel, Lefcourt, in. Therefore, the court should have allowed petitioner to be represented by the retained counsel of his choice, Mr. Lefcourt. The record clearly

shows that the court committed structural error when it denied petitioner's Sixth Amendment right to the retained counsel of his choice.

Having been denied counsel of his choice, petitioner requested to represent himself, which was granted, and Stallworth was appointed to be advisory counsel. The case was called for trial on January 3, 2011, and jury selection began shortly after that. Opening statements were given on February 8, 2011. On February 15, there was a testy exchange between petitioner and the court relating to petitioner's cross-examination. On February 16, the court terminated petitioner's pro per representation, and gave the case back to Stallworth over petitioner's objection. At the end of the day, petitioner was forced to proceed to trial with the court appointed attorney, Stallworth, whose relationship with petitioner was completely brokedown prior to the start of petitioner's trial. (See, App. pp. 43a-62a.)

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

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

> Asmerom's dissatisfaction with a series of prior attorney 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.

Petitioner had indeed filed motions to discharge the originally appointed public defenders. However, petitioner never fired any retained (private) attorney, contrary to the California Court of appeal characterization. The first retained attorney, Mr. Dubois, moved to withdraw, citing

an "irreconcilable conflict" which resulted in an "irremediable breakdown" in the attorney-client relationship, and the court granted Mr. Dubois's motion to withdraw. (7Ct 1976.) The second retained attorney, William Cole, made an initial appearance but then unilaterally moved to withdraw when the court could not afford him seven months to prepare. The third retained attorney, Mr. Lefcourt, was not permitted to substitute in because the court would not afford him six months to prepare. The record clearly shows that the court, not petitioner, was the one caused delays when it twice reappointed conflicted counsels (the public defenders) over petitioner's objection, and failed to give sufficient time to the retained counsel of petitioner's choice, first Mr. Cole and second Mr. Lefcourt. The record also clearly shows that both of private attorneys, Mr. Dubois and Mr. Cole, withdrew from the case. Petitioner did not fire them. Therefore, the California Court of Appeal made factual findings that are contradicted by "clear and convincing" evidence in the record. The California Court of Appeal's determination that petitioner's dissatisfaction with a series of prior attorneys had already caused delay by the time he moved to retain Mr. Lefcourt is not supported by the record. It is roundly repudiated by the record. (See, App. pp. 7a-13a.)

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

the California Court of Appeal's discussion of the procedural history in the case is there an acknowledgement that petitioner opposed the competency proceedings.

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

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

> 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 Dubois as Asmerom's counsel subject to confirming that the appointed counsel panel could meet his requirments for fees and backup counsel. Dubois anticipated he would need four months to prepare for trial. Four days later, Mr. Lefcourt confirmed that he would not represent Asmerom.

There is nothing in the record that supports the statement that Lefcourt informed the court that he would not represent Asmerom on August 4, or on August 8, or at any other time. The California Court of Appeal erroneously found that on August 8, Lefcourt confirmed he would not represent Asmerom. This was not just an unreasonable determination of the facts, it simply wasn't true. It's not supported by the record. In fact, the record shows the opposite. The record shows that on August 17, petitioner's family had retained Mr. Lefcourt to represent petitioner. And on September 28, Mr. Lefcourt addressed the court that he wanted to represent petitiioner. Therefore, the record clearly shows that the California Court of Appeal made factual findings that are contradicted

by "clear and convincing" evidence in the record.

The California Court of Appeal also contended that petitioner "attempted to rehire" Dubois, as further evidence of petitioner's strategy of delay. To the contrary, the trial court unilaterally appointed Dubois in August 2010 over petitioner's objection, and petitioner responded to that appointment by retaining Lefcourt. The record clearly shows that the trial court was the one who brought Dubois back to petitioner's case knowing that there was an irremediable breakdown in the relationship between Dubois and petitioner. The record also clearly shows that petitioner did not want Dubois to represent him. There is nothing in the record shows that petitionr attempted to rehire Dubois, Again, the California Court of Appeal made factual findings that are contradicted by "clear and convincing" evidence in the record. (See, App. pp. 32a-34a.)

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

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

When the trial record is viewed accurately and correctly, a reasonable jurists would be compelled to conclude that petitioner was not dilatory; a continuance to permit retained counsel to substitute in would not cause any inconvenience to any party or witness, much less prejudice; the prosecutor supported a continuance to permit counsel to prepare, and made no claim of prejudice at all. There was no other legitimate reason for denying the request to let retained counsel, Lefcourt, in.

Lefcourt was the retained counsel of petitioner's choice. Denying

Lefcourt's request for six month to prepare for trial was a violation of petitioner's Sixth Amendment right, and the violation is structural error. (See, United States v. Gonzalez-Lopez, 548 U.S. 140 (2006), and see also, People v. Williams, 61 Cal. App. 5th 627 (2021). This case involves the California Court of Appeal denied petitioner's direct appeal while granted Williams's direct appeal on the same claim based on the same error. The California Court of Appeal stated that the trial court's error in denying Williams's request to be represented by retained counsel of his choice violated Williams's constitutional rights and requires automatic reversal. The court held that the trial court erred in permitting expedience to take precedence over defendant's right to be represented by counsel of his choice. The length of continuance that new counsel requested did not constitute a sufficient basis on which the trial court could properly deny the motion to substitute. New counsel provided a simple and reasoned explanation for the length of the proposed continuance. While a continuance would cause some amount of inconvenience for witnesses, the court, and the victim's family, a defendant's constitutional right to chosen counsel must be respected, even by a byproduct of concrete and timely assertion of that right is some disruption in the process. Here, in petitioner's case, the prosecutor supported a continuance to permit counsel to prepare, and made no claim of prejudice at all. There was no showing in the record by any party or witness that a continuance to permit retained counsel to substitute in would cause any inconvenience, much less prejudice. There was no other legitimate reason for denying the request to let retained counsel in. Therefore, the Alameda County Superior Court committed structural error when it denied petitioner's Sixth Amendment right to be represented by the retained counsel of his choice, and forced him to proceed to trial with the court appointed attorney whose

relationship with petitioner was completely brokedown prior to the start of petitioner's trial.)

There was a complete breakdown in communication between the court appointed attorney, Mr. Stallworth, and petitioner prior to the start of petitioner's trial. This is what petitioner addressed the trial court when the trial started on January 3, 2011: "Since Mr. Stallworth came to my case until today, we never even for one minute discussed about the case. I don't even think he knows my name very well. ... What I am trying to build here is we don't have any communication." (See, 5RT 503.)

Since the communication between Stallworth and petitioner was completely brokedown prior to the start of petitioner's trial, Stallworth never consulted with petitioner at all prior to the start of petitioner's trial. He did not do pre-trial investigation; he did not examine the physical evidence that would have supported a defense; and he did not interview the defense and prosecution witnesses prior to the start of trial.

Petitioner's trial counsel did not consult with petitioner prior to the start of trial constituted a complete denial of counsel at the critical stage of the proceedings. (See, Mitchell v. Mason, 325 F.3d 732, 744-749 (6th Cir. 2003), where the court held that Mitchell's trial counsel did not consult with him prior to the start of trial constituted a complete denial of counsel at the critical stage of the proceedings. The court stated that pre-trial period is a critical stage of the proceedings becasue it encompasses counsel's constitutionally imposed duty to investigate the case. The court also stated that, "The United States Supreme Court recognized there is a duty to investigate before trial and that, wihtout pre-trial consultation with the defendant, trial counsel cannot fulfill his duty to investigate." See also, U.S. v. Tucker, 716 F.2d 576 (9th Cir. 1983), where the court stated that trial counsel's consultation with petitioner was

totally inadequate. Trial counsel did not do any pre-trial investigation. Since trial counsel did not adequately interview his own client or any prosspective witnesses, corroboration for petitioner's defense was never developed. ... Petitioner was incompetently represented by his attorney, and that as result he was denied a fair trial.)

Here, in petitioner's case, the record clearly shows that there was no consulation between petitioner's trial counsel and petitioner prior to the start of petitioner's trial. Since petitioner's trial counsel never consulted with petitioner prior to the start of petitioner's trial, he did not do any pre-trial investigation, and he did not interview defense and prosecution witnesses. He was totally unprepared when the trial started.

The record clearly shows that petitioner was completely deprived of the assistance of counsel during his trial. He was constructively denied counsel. The record also clearly shows that petitioner's conviction was imposed in violation of his constitutional right to the retained counsel of his choice.

The California Court of Appeal articulated certain unsupportable justification for the trial court's refusal of counsel of choice, stating that, "The prejudice to [codefendant] Tewodros, the prosecution, and witnesses that would have resulted from allowing yet another substitution, its ruling did not impinge on Asmerom's constitutional rights to couunsel of his choice."

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

Tewodros's objection to permit petitioner's counsel sufficient time to prepare:

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

1RT 240

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

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

CONCLUSION

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

Dated: July 12, 2023

Respectfully submitted,

Asmerom T. Gebreselassie