Case No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

DELMART E.J.M. VREELAND, II,

Petitioner,

v.

DAVID ZUPAN; and
THE ATTORNEY GENERAL OF THE STATE OF COLORADO,

Respondents.

ON PETITION FOR WRIT OF *CERTIORARI* TO
THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

APPENDIX VOLUME I – COURT OPINIONS AND ORDERS
(APPENDICES A-C)

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APPENDIX A

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Tenth Circuit

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PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

DELMART E.J.M. VREELAND II,

Petitioner - Appellant,

v.

DAVID ZUPAN; THE ATTORNEY GENERAL OF THE STATE OF COLORADO,

Respondents - Appellees.

No. 16-1503

Appeal from the United States District Court
for the District of Colorado
(D.C. No. 1:14-CV-02175-PAB)

Lynn C. Hartfield, Law Office of Lynn C. Hartfield, LLC, Denver, Colorado, for Petitioner-Appellant.

Ryan A. Crane, Senior Assistant Attorney General (Cynthia H. Coffman, Attorney General, with him on the brief), Denver, Colorado, for Respondents-Appellees.

Before **BACHARACH**, **KELLY**, and **MORITZ**, Circuit Judges.

MORITZ, Circuit Judge.

Delmart Vreeland II sought relief in federal district court under 28 U.S.C. § 2254, alleging in relevant part that the state trial court violated his Sixth Amendment right to counsel and his Fourteenth Amendment right to due process.

The district court rejected both claims and declined to issue a certificate of appealability (COA).

Vreeland later obtained a COA from this court to appeal the district court's resolution of his Sixth Amendment claim. Pursuant to that COA, he now argues on appeal that the district court erred in denying him relief on that claim. He also asks us for a COA so he can appeal the district court's denial of his due-process claim.

We agree with the district court that Vreeland fails to demonstrate the state appellate court's resolution of his Sixth Amendment claim satisfies § 2254(d). That is, Vreeland fails to show that the state appellate court's decision (1) "was contrary to, or involved an unreasonable application of, clearly established [f]ederal law" or (2) "was based on an unreasonable determination of the facts." § 2254(d)(1)–(2). Thus, we affirm the district court's order to the extent it denies Vreeland relief on his Sixth Amendment claim. And because we conclude that reasonable jurists wouldn't find the district court's resolution of Vreeland's due-process claim debatable or wrong, we deny his request for a COA on that claim and dismiss that portion of Vreeland's appeal.

Background

In 2004, Colorado charged Vreeland with various offenses, including sexual exploitation of a child and sexual assault. Vreeland initially retained attorney Declan O'Donnell to represent him. But a week after O'Donnell entered his appearance, he moved to withdraw. In support, O'Donnell accused Vreeland of lying about his identity, using stolen funds to post bond, and skipping bail.

Vreeland then informed the trial court that he was in the process of retaining the services of attorney Thomas Henry. But because Vreeland asserted he had been unable to contact Henry by telephone from the jail, the trial court appointed attorney Juliet Miner to represent him instead. Miner initially accepted the appointment. But two weeks later, she asked the trial court to allow her to withdraw after Vreeland accused her of failing to do what he thought she "need[ed] to be doing." App. vol. 3, 315.

The trial court agreed to continue Vreeland's preliminary hearing while he obtained replacement counsel. Vreeland then retained attorney Harvey Steinberg, who requested a continuance after the state (1) sought to add additional charges and (2) provided Steinberg with approximately 70 pages of new discovery relating to those additional counts. In response to this request, the trial court expressed frustration with the delay and with Steinberg in particular. Nevertheless, although the court denied Steinberg's request for a continuance on the original counts, it agreed to "a second setting for" the new counts. *Id.* at 339. The trial court also agreed to another continuance after Steinberg learned that the out-of-state jail where Vreeland was initially housed had recorded some of Vreeland's "phone calls with lawyers." *Id.* at 341.

A little over three months later, Vreeland informed the trial court that Steinberg "need[ed] to withdraw." *Id.* at 344. Vreeland also informed the trial court that he had lodged a disciplinary complaint against Steinberg based on disagreements

over fees and over Steinberg's alleged refusal to turn over certain discovery. Based on this information, the trial court granted Steinberg's motion to withdraw.

Vreeland next retained attorney Thomas Henry to represent him. Henry asked the trial court to order a competency evaluation, in part because Vreeland was threatening to stop eating. The court granted Henry's request. It also vacated the pending December 6, 2005 trial date.

Approximately two months later, Henry learned that Vreeland had accused him of blackmail and extortion. According to Henry, Vreeland went so far as to report these accusations to the sheriff's department, who in turn relayed them to the Federal Bureau of Investigation at Vreeland's request. Vreeland "adamantly denie[d]" levying these allegations against Henry. *Id.* at 419. Nevertheless, Henry—like the three attorneys who came before him—moved to withdraw.

The trial court granted Henry's motion and asked if Vreeland wanted to have counsel represent him. Vreeland answered in the negative and informed the district court that he wished to represent himself instead. After engaging in a lengthy colloquy with Vreeland and providing him with an *Arguello* advisement, the court granted Vreeland's request to proceed pro se. *See People v. Arguello*, 772 P.2d 87, 95 (Colo. 1989) ("[T]he trial court [must] conduct a specific inquiry on the record to ensure that the defendant is voluntarily, knowingly[,] and intelligently waiving the right to counsel."). But just before trial was scheduled to begin, Vreeland changed his mind and informed the court that he no longer wanted to proceed pro se; instead, he wished to obtain advisory counsel.

The trial court then allowed attorney Joseph Scheideler to enter his appearance on Vreeland's behalf. But the court refused to let Scheideler serve as Vreeland's advisory counsel. Instead, it required Scheideler to enter his appearance as Vreeland's acting attorney. And it also granted Scheideler's request for a continuance. In doing so, though, the court expressed its belief that Vreeland was "very obvious[ly]" trying to "manipulat[e]" and "play[]" the court. App. vol. 3, 467. Specifically, the trial court agreed with the state that Vreeland appeared to be manufacturing conflicts with his own attorneys in "an attempt to avoid the ultimate resolution of th[e] case before a jury." *Id.* Likewise, the court didn't quarrel with the state's prediction that on the eve of trial, a conflict would "suddenly" arise between Vreeland and Scheideler and "Scheideler w[ould] have to get off the case" as a result. *Id.* at 465.

These concerns proved prescient. Eleven days before trial was set to begin, the court allowed Scheideler to withdraw based on his representation that Vreeland had filed or was about to file "both a grievance and a . . . lawsuit" against Scheideler. *Id.* at 503. Vreeland then informed the court that he was in contact with another attorney who was willing to represent him but that the new attorney needed a continuance to prepare for trial.

Before ruling on Vreeland's request for a continuance, the court detailed the procedural history of the case. In particular, it cited the following observations from Vreeland's competency evaluation: Vreeland, the court said, "appears to use the means available to him in the moment to accomplish his goals, including threatening

suicide, threatening litigation, and intimidating those around him." *Id.* at 532. The court also noted that he is "highly intelligent" and "understands the criminal justice system very well." *Id.* at 533.

The court then described Vreeland's "long history of contacts with previous counsel in this case"; his previous decision to proceed pro se; his later change of heart; and the resulting request for a continuance. *Id.* The trial court reasoned:

> [T]he pattern in this case is quite stark and is quite clear: [Vreeland], while having the ability to certainly retain counsel, retains counsel, inescapably enters into a conflict, fires that lawyer, and has to seek to retain new counsel; it[] occurred with [Steinberg], it occurred with [Henry], and it lastly occurred with [Scheideler].

Id. at 537–38. Similarly, the court stated:

> What the [c]ourt will find is that [Vreeland] is, in fact, highly intelligent. He has a very good understanding of the criminal justice system and this process. This has been reinforced by counsel having to withdraw in previous circumstances. [Vreeland] knows exactly what it takes to have counsel withdraw from a case; complain about them, intimidate them in some way, or allege that you are going to be filing a lawsuit or a grievance.

Id. at 543. Finally, the trial court concluded, "Vreeland has attempted to create the perfect storm, if you would, from the standpoint of continually obtaining counsel and then firing them on the eve of trial. This [c]ourt finds that there [are] no good grounds . . . to continue the trial in this matter." *Id.* at 544. Thus, it denied Vreeland's request for a continuance.

Four days later, and a week before trial was set to begin, attorney Scott Jurdem filed a conditional entry of appearance. Jurdem stated he was willing to represent Vreeland at trial, but only if the court was willing to grant another continuance. In

response, the court stated that although Vreeland was "entitled to have counsel represent him," he was "not entitled to abuse the process" or "the system." App. vol. 4, 563. It then informed Jurdem that he was free to enter his appearance, but that the entry of appearance would "not [be] conditional." *Id.* at 564. Rather, by entering his appearance, Jurdem would be representing to the court that he was "ready . . . to provide competent and effective representation" to Vreeland. *Id.* Jurdem declined to make such a representation, and the trial court excused him. Vreeland then represented himself at trial. The jury convicted him of various offenses, including sexual exploitation of a child, sexual assault, and contributing to the delinquency of a minor.

Vreeland appealed to the Colorado Court of Appeals (CCA). As relevant here, he argued "that his constitutional right to counsel was violated because he was forced to represent himself during trial." App. vol. 6, 1031. He also asserted that the trial court violated his due-process rights "when it instructed the jury based on the complaint and information, and not the bill of particulars." *Id.* at 1038.

The CCA rejected both arguments. In addressing Vreeland's right-to-counsel argument, the CCA first recognized that "[b]efore proceeding pro se, a defendant must knowingly, intelligently, and voluntarily waive his [or her] constitutional right to counsel." *Id.* at 1032. It then reasoned that "[a] defendant may waive assistance of counsel either expressly or impliedly through his or her conduct." *Id.* It further explained that "[a]n implied waiver occurs when the defendant is deemed to have forfeited the right to counsel, as opposed to having made a deliberate decision to

forgo the right." *Id.* But it then clarified that "[c]ourts must ascertain whether, under the totality of the circumstances, a defendant's conduct evinces a voluntary, knowing, and intelligent waiver of right to counsel." *Id.* (quoting *People v. Alengi*, 148 P.3d 154, 159 (Colo. 2006)). And it noted that "[a] defendant's pattern of obstreperous, truculent, and dilatory behavior may be deemed relevant as to whether such conduct has been undertaken with full awareness of the consequences of doing so." *Id.* (quoting *Alengi*, 148 P.3d at 159).

With this framework in mind, the CCA then held that Vreeland "impliedly waived his right to counsel" by "threatening counsel, filing meritless motions, and firing counsel as the date of trial approached." *Id.* at 1037. "Such behavior," the CCA reasoned, "support[ed] the conclusion that [Vreeland], who is 'highly intelligent,' was manipulating the legal system with full awareness of the consequences of what he was doing." *Id.* (quoting App. vol. 3, 533). Thus, the CCA concluded that the trial court didn't violate Vreeland's Sixth Amendment right to counsel.

The CCA then turned to Vreeland's due-process argument. It first noted that although the complaint alleged certain acts occurred between September 1 and October 18, 2004, the state later represented in a bill of particulars that to the best of its knowledge, those acts occurred on October 3–4, 2004. And at trial, the victims testified on direct examination that the acts indeed occurred on "the night of October 3 to 4." *Id.* at 1039. Yet one victim stated on cross-examination "that the acts may have occurred on October 6"—a date for which Vreeland presented an alibi defense. *Id.* Nevertheless, the trial court "instructed the jury that the prosecution was required

to prove that the offenses occurred during the period from September 1, 2004[,] to October 18, 2004," (as alleged in the complaint) "rather than on October 3 and 4" (as alleged in the bill of particulars). *Id.* at 1042.

After reciting this procedural history, the CCA rejected Vreeland's assertion that the trial court "failed to enforce the bill of particulars and abused its discretion" in declining to confine its instruction to the narrower date range. *Id.* In support, the CCA pointed out that "[t]he prosecution's evidence was consistent with the bill of particulars and that evidence, as well as [Vreeland's] alibi evidence, pertained to dates within the period alleged in the complaint and information." *Id.* Thus, the CCA concluded, the trial court "did not abuse its discretion when it declined to modify the instruction." *Id.*

After the CCA affirmed Vreeland's convictions, the Colorado Supreme Court denied review. Vreeland then sought relief in federal district court under § 2254. As relevant here, he challenged the CCA's resolution of both his Sixth Amendment claim and his due-process claim.

The district court denied relief. In rejecting Vreeland's Sixth Amendment claim, the district court found that "[t]he state[-]court record support[ed] the CCA's finding that" Vreeland "impliedly waived his right to counsel" by "repeatedly fail[ing] to maintain a working relationship with counsel, threaten[ing] counsel, fil[ing] meritless motions, and fir[ing] counsel as the trial date approached." App. vol. 2, 262. It likewise concluded that the "record also support[ed] the CCA's conclusion that [Vreeland] is highly intelligent and was fully aware that he was

manipulating the legal system." *Id.* Thus, the district court ruled, the CCA's resolution of Vreeland's Sixth Amendment claim wasn't "contrary to or an unreasonable application of any clearly established rule of federal law as determined by the [United States] Supreme Court or a decision that was based on an unreasonable determination of the facts." *Id.*

The district court also rejected Vreeland's due-process claim, concluding that any constitutional error in the trial court's failure to confine the jury instruction to the dates in the bill of particulars was harmless. It declined to issue a COA on either claim. Vreeland then filed a combined opening brief and application for COA with this court. *See* 28 U.S.C. § 2253(c)(1)(A) ("Unless a circuit justice or judge issues a [COA], an appeal may not be taken to the court of appeals from . . . the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a [s]tate court.").

Analysis

Under the Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996, our review of the CCA's decision is "highly deferential." *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011) (quoting *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002)). In particular, because the CCA adjudicated Vreeland's claims on the merits, he isn't entitled to relief under § 2254 unless he first demonstrates that the CCA's decision (1) "was contrary to . . . clearly established [f]ederal law, as determined by the Supreme Court of the United States"; (2) "involved an unreasonable application of[] clearly established [f]ederal law, as determined by the Supreme Court of the United

States"; or (3) "was based on an unreasonable determination of the facts in light of the evidence presented in the [state-court] proceeding." § 2254(d)(1)–(2); *see also Pinholster*, 563 U.S. at 181 (explaining that petitioner bears burden of establishing that he or she has satisfied § 2254(d)).

Before a petitioner may appeal the denial of a § 2254 petition, he or she must obtain a COA. *See* § 2253(c)(1)(A). This court has already granted Vreeland a COA on his Sixth Amendment claim. Thus, we begin by discussing whether Vreeland has demonstrated that the CCA's resolution of that claim satisfies § 2254(d)'s rigorous requirements. *See Pinholster*, 563 U.S. at 181 (explaining that § 2254(d)'s standard is "difficult to meet" and requires federal courts to give state-court decisions "the benefit of the doubt" (first quoting *Harrington v. Richter*, 562 U.S. 86, 102 (2011); then quoting *Visciotti*, 537 U.S. at 24)). We then address whether Vreeland is entitled to a COA on his due-process claim. *See* § 2253(c)(1)(A).

I. Vreeland's Sixth Amendment Claim

According to Vreeland, the district court erred in ruling that he failed to show the CCA's resolution of his Sixth Amendment claim satisfies § 2254(d). Although we owe substantial deference to the CCA's decision, "[w]e review the district court's legal analysis of the state[-]court decision de novo." *Fairchild v. Workman*, 579 F.3d 1134, 1139 (10th Cir. 2009).

A. Contrary to Clearly Established Federal Law

Vreeland first argues that the CCA's resolution of his Sixth Amendment claim "was contrary to . . . clearly established [f]ederal law, as determined by the Supreme

Court of the United States." § 2254(d)(1).

For purposes of § 2254(d)(1), the term "'clearly established [f]ederal law' . . . refers to the holdings, as opposed to the dicta, of [the Supreme] Court's decisions as of the time of the relevant state-court decision." *Williams v. Taylor*, 529 U.S. 362, 412 (2000). Thus, a state-court decision is contrary to clearly established federal law only "if the state court applies a rule that contradicts the governing law set forth in [the Court's] cases" or "if the state court confronts a set of facts that are materially indistinguishable from a decision of th[e] Court and nevertheless arrives at a result different from [its] precedent." *Id.* at 405–06.

Vreeland doesn't attempt to identify a Supreme Court case with facts that "are materially indistinguishable from" those present here. *Id.* at 406. Instead, he points to the CCA's statement that a defendant may make an "implied waiver" of the right to counsel "when the defendant is deemed to have forfeited the right to counsel, as opposed to having made a deliberate decision to forgo the right." App. vol. 6, 1032. According to Vreeland, this implied-waiver rule contradicts clearly established Supreme Court precedent holding that any waiver of the right to counsel must be made "knowingly and intelligently." Aplt. Br. 16 (quoting *Faretta v. California*, 422 U.S. 806, 835 (1975)).

Before turning to the merits of this argument, we pause to clarify the difference between waiving a right and forfeiting one. Although related, these concepts are unquestionably distinct. *See United States v. Olano*, 507 U.S. 725, 733 (1993) ("Waiver is different from forfeiture."). Unfortunately, courts have long used these two terms "interchangeably." *Freytag v. Comm'r*, 501 U.S. 868, 894 n.2 (1991) (Scalia, J.,

concurring in part and concurring in the judgment). As a result, "it may be too late to introduce precision" into the discussion. *Id.*

But such precision is necessary here; we can't resolve whether the CCA applied a rule that contradicted governing Supreme Court precedent without first determining what rule the CCA actually applied. Thus, for purposes of this opinion, we use the following terms to convey the following meanings.

First, we use the term waiver to refer to "the 'intentional relinquishment or abandonment of a known right.'" *Olano*, 507 U.S. at 733 (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)). We use the term forfeiture, on the other hand, to refer to the loss of a right when that loss is "inadvertent," *Freytag*, 501 U.S. at 894 n.2 (Scalia, J., concurring in part and concurring in the judgment), or "unintentional," *United States v. Burke*, 633 F.3d 984, 990 (10th Cir. 2011). So when we say a defendant has waived a particular right, we mean that the defendant has knowingly, voluntarily, and intentionally chosen to relinquish it. When we say a defendant has forfeited a particular right, we mean that the defendant has lost the right through some action or inaction, but has done so under circumstances that preclude characterizing the loss as knowing, voluntary, and intentional. *See United States v. Figueroa-Labrada*, 720 F.3d 1258, 1264 (10th Cir. 2013) (distinguishing between forfeiture, which can come about via "inadvertent neglect," and waiver, which is the result of "an intentional decision").

To resolve this appeal, we must also distinguish between an express waiver and an implied one. We use the term express waiver to refer to a defendant's written or oral waiver of a particular right. We use the term implied waiver to refer to a defendant's

waiver of a particular right via some other action or inaction. *Compare Express*, Black's Law Dictionary (10th ed. 2014) (defining "express" to mean "[c]learly and unmistakably communicated; stated with directness and clarity"), *with id.* at *Implied* (defining "implied" to mean "[n]ot directly or clearly expressed; communicated only vaguely or indirectly"). Finally, we further distinguish between two potential types of implied waivers: (1) scenarios in which a court has expressly informed a defendant that a certain action or inaction will result in the loss of a particular right and (2) scenarios in which a court has not expressly informed a defendant that a particular action or inaction will result in such a loss, but the circumstances nevertheless demonstrate that the defendant is aware that it will. And applying these definitions here, we conclude that the CCA clearly determined Vreeland impliedly waived—rather than forfeited—his right to counsel.

That's not to say the CCA employed these distinct terms with enviable "precision." *Freytag*, 501 U.S. at 894 n.2 (Scalia, J., concurring in part and concurring in the judgment). Indeed, the CCA confusingly opined that "[a]n implied *waiver* occurs when the defendant is deemed to have *forfeited* the right to counsel, as opposed to having made a deliberate decision to forgo the right." App. vol. 6, 1032 (emphasis added). But the CCA also expressly recognized that before a defendant can proceed pro se, he or she "must knowingly, intelligently, and voluntarily waive [the] constitutional right to counsel." *Id.* And the CCA further explained that a defendant can effect such a knowing, intelligent, and voluntary waiver either (1) "expressly" or (2) "impliedly through his or her conduct." *Id.* The CCA then carefully clarified that before a court can say a defendant impliedly waived the right to counsel through his or her conduct, the court must assure

itself that "under the totality of the circumstances, [the] defendant's conduct evince[d] a voluntary, knowing, and intelligent waiver of" that right. *Id.* (quoting *Alengi*, 148 P.3d at 159); *see also Alengi*, 148 P.3d at 159 ("Thus, the record as a whole, including the reasons given by the defendant for not having counsel, must show that the defendant knowingly and willingly undertook a course of conduct that demonstrates an unequivocal intent to relinquish or abandon his or her right to representation."). Finally, the CCA concluded that Vreeland "impliedly waived his right to counsel" by engaging—"with full awareness of the consequences of what he was doing"—in "a pattern of threatening counsel, filing meritless motions, and firing counsel as the date of trial approached." App. vol. 6, 1037. Thus, despite the CCA's single use of the term "forfeit[ure]," *id.* at 1032, it's clear from the remainder of the CCA's analysis that the CCA determined Vreeland impliedly waived his right to counsel.[1]

Armed with this understanding, we now return to Vreeland's assertion that the CCA's resolution of his Sixth Amendment claim is contrary to clearly established federal law. According to Vreeland, the Supreme Court has "never endorsed" (and has in fact "specifically rejected") the "concept of an implied waiver of counsel." Aplt. Br. 19. But for the reasons discussed below, none of the cases that Vreeland cites to support this

[1] Because we conclude that the CCA determined Vreeland waived his right to counsel, we need not address whether a finding that he instead forfeited that right would be contrary to clearly established federal law. But we note that two of our sibling circuits have answered that question in the negative. *See Higginbotham v. Louisiana,* 817 F.3d 217, 223 (5th Cir.), *cert. denied*, 137 S. Ct. 506 (2016); *Fischetti v. Johnson*, 384 F.3d 140, 150 (3d Cir. 2004). For the same reason, we likewise decline to address Vreeland's assertion that to the extent the CCA concluded he forfeited his right to counsel, that conclusion "constitutes an unreasonable extension of clearly established law surrounding forfeiture of constitutional rights." Aplt. Br. 24.

assertion actually resolve whether a defendant can relinquish the right to counsel via an implied waiver. Thus, none of them are sufficient to demonstrate that the CCA's implied-waiver holding is contrary to clearly established federal law. *See Woods v. Donald*, 135 S. Ct. 1372, 1377 (2015) ("Because none of our cases confront 'the specific question presented by this case,' the state court's decision could not be 'contrary to' any holding from this Court." (quoting *Lopez v. Smith*, 135 S. Ct. 1, 4 (2014))).

For instance, in *Faretta*, the Court held that the defendant's express statements were *sufficient* to waive the right to counsel and to invoke the right to proceed pro se. 422 U.S. at 835–36. But the Court didn't address whether such express statements were *necessary* to yield that result; indeed, in light of the defendant's "clear[] and unequivocal[] declar[ation] to the trial judge that he wanted to represent himself and did not want counsel," anything the Court might have said about the efficacy of such an implied waiver would have been dicta. *Id.* Thus, *Faretta* doesn't stand for the proposition that a defendant can only waive the right to counsel expressly, rather than impliedly. And for that reason, the CCA's statement that a defendant can impliedly waive the right to counsel through conduct "evinc[ing] a voluntary, knowing, and intelligent waiver of" that right, App. vol. 6, 1032 (quoting *Alengi*, 148 P.3d at 159), isn't contrary to clearly established federal law as set forth in *Faretta*, *see Donald*, 135 S. Ct. at 1377; *Williams*, 529 U.S. at 412.

Similarly, the issue in *Patterson v. Illinois* wasn't whether the defendant—who "executed a written waiver of his right to counsel"—could impliedly waive the right to counsel through his or her conduct. 487 U.S. 285, 292 (1988). Instead, the only question

before the Court was whether the defendant's express written waiver was "knowing and intelligent." *Id.* (quoting *Brewer v. Williams*, 430 U.S. 387, 403 (1977)). Accordingly, the CCA's implied-waiver holding isn't contrary to clearly established federal law as set forth in *Patterson*. *See Donald*, 135 S. Ct. at 1377; *Williams*, 529 U.S. at 412.

Nor did the Supreme Court resolve whether a defendant can impliedly waive the right to counsel through his or her conduct in *Carnley v. Cochran*, 369 U.S. 506 (1962). True, the *Carnley* Court opined that "an accused [must be] offered counsel but intelligently and understandingly reject[] the offer" and that "[a]nything less is not waiver." *Id.* at 516. But nothing in *Carnley* suggests that a defendant can only "reject[]" such representation via an express statement to that effect. *Id.*

In short, it appears the Supreme Court has never addressed whether a defendant can impliedly waive the right to counsel via his or her conduct, as opposed to by an express written or verbal statement. Thus, to the extent the CCA held that Vreeland "impliedly waived his right to counsel" by (1) engaging in "a pattern of threatening counsel, filing meritless motions, and firing counsel as the date of trial approached" and (2) doing so "with full awareness of the consequences of what he was doing," that decision is not contrary to clearly established federal law. App. vol. 6, 1037.

B. Unreasonable Application of Clearly Established Federal Law

Vreeland next argues that even if the CCA's decision isn't contrary to clearly established federal law, it nevertheless constitutes an unreasonable application of such law. *See* § 2254(d)(1).

"A state-court decision that correctly identifies the governing legal rule but applies it unreasonably to the facts of a particular prisoner's case" constitutes an unreasonable application of that rule. *Williams*, 529 U.S. at 407–08. So too does a decision in which a state court "unreasonably extends a legal principle from [the Court's] precedent to a new context where it should not apply." *Eizember v. Trammell*, 803 F.3d 1129, 1154 (10th Cir. 2015) (alteration in original) (quoting *Williams*, 529 U.S. at 407).

Critically, "an *unreasonable* application of federal law is different from an *incorrect* application of federal law." *Williams*, 529 U.S. at 410. Thus, it's not enough for Vreeland to show that the CCA "applied clearly established federal law erroneously or incorrectly" in resolving his Sixth Amendment claim. *Id.* at 411. Instead, to satisfy § 2254(d)(1)'s unreasonable-application prong, Vreeland must demonstrate that the CCA's resolution of his claim "was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fair[-]minded disagreement." *Virginia v. LeBlanc*, 137 S. Ct. 1726, 1728 (quoting *Donald*, 135 S. Ct. at 1376), *reh'g denied*, 138 S. Ct. 35 (2017).

In attempting to make that showing here, Vreeland asserts that even assuming the CCA correctly identified the governing legal rule when it said that a defendant can impliedly waive the right to counsel, the CCA unreasonably applied the implied-waiver rule to the facts of this case. In support, Vreeland advances two arguments. First, he argues that his initial decision to proceed pro se was irrelevant to the CCA's determination of whether he later impliedly waived the right to counsel. Thus, he concludes, the CCA unreasonably applied clearly established federal law by relying on

his initial express waiver to conclude that his subsequent implied waiver was valid. Second, he points out that the trial court never expressly warned him that his conduct might result in the loss of the right to counsel. And he asserts that the CCA unreasonably applied clearly established federal law by employing the implied-waiver rule in the absence of such a warning. We disagree on both counts.

First, Vreeland's initial decision to waive the right to counsel and proceed pro se was not, as he contends, "wholly irrelevant to the issue here." Aplt. Br. 20. Instead, his initial express waiver of the right to counsel—and the circumstances surrounding that express waiver—offer support for the CCA's conclusion that his subsequent implied waiver of that same right was valid. This is so because "in order [to] competently and intelligently . . . choose self-representation, [a defendant] should be made aware of the dangers and disadvantages of self-representation." *Faretta*, 422 U.S. at 835. And as the CCA noted here, the trial court made Vreeland aware of those dangers and disadvantages when it granted his initial request to proceed pro se.

Specifically, the CCA pointed out that the trial court gave Vreeland an "extensive *Arguello* advisement[] about the consequences of his decision" to waive the right to counsel. App. vol. 6, 1037; *see also Arguello*, 772 P.2d at 95–96 (noting trial court's duty to "conduct a specific inquiry on the record to ensure that the defendant is voluntarily, knowingly[,] and intelligently waiving the right to counsel"; holding that inquiry was insufficient based, in part, on trial court's failure to ensure that defendant was aware of "the many risks of self-representation"). And it was reasonable for the CCA to assume that, at the time of his subsequent implied waiver, Vreeland remained aware of the same

dangers and disadvantages the trial court had previously warned him about. Thus, the CCA didn't unreasonably apply clearly established federal law by relying in part on Vreeland's earlier express waiver of the right to counsel to conclude that, for purposes of his subsequent implied waiver of that same right, Vreeland acted "with full awareness of the consequences of what he was doing."[2] App. vol. 6, 1037.

Nor did the CCA unreasonably apply clearly established federal law by employing the implied-waiver rule in the absence of an express warning by the trial court that Vreeland's conduct would result in the loss of his right to counsel. In arguing otherwise, Vreeland cites various authorities for the proposition that a valid waiver of counsel must be "knowing and intelligent." Aplt. Br. 21 (citing *United States v. Hughes*, 191 F.3d 1317 (10th Cir. 1999); *United States v. Meeks*, 987 F.2d 575 (9th Cir. 1993); *United States v. McFadden*, 630 F.2d 963 (3d Cir. 1980); *United States v. Weninger*, 624 F.2d 163 (10th Cir. 1980)). But none of these cases involve a scenario in which (1) it's clear from the record that the defendant knew his or her conduct would result in the loss of counsel and yet (2) a reviewing court nevertheless declined to find an implied waiver of counsel because (3) the trial court failed to expressly advise the defendant of what the record indicates he or she already knew.

Moreover, even if we assumed that the cases Vreeland cites *did* involve such a scenario, that assumption wouldn't necessarily entitle him to relief. To demonstrate that

[2] Indeed, Vreeland appears to concede as much: he acknowledges that the circumstances surrounding his prior waiver had at least some "possible relevance" because they "demonstrate[d] that Vreeland had knowledge of the right to counsel and the consequences of waiving it." Aplt. Br. 20 n.4.

the CCA's implied-waiver decision constitutes an unreasonable application of clearly established federal law, Vreeland must do more than show that the CCA's decision was wrong. Instead, he must show that the decision "was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fair[-]minded disagreement." *LeBlanc*, 137 S. Ct. at 1728 (quoting *Donald*, 135 S. Ct. at 1376). And in light of the Supreme Court's decision in *Taylor v. United States*, 414 U.S. 17 (1973), Vreeland cannot make that showing here. In that case, the Supreme Court held that the petitioner impliedly waived his constitutional right to be present at trial by voluntarily absenting himself. *Taylor*, 414 U.S. at 20. Critically, the Court reached that conclusion despite the fact that the trial court never expressly warned the petitioner that "the trial would continue in his absence." *Id.* at 19. Instead, the Court pointed out that (1) the petitioner never suggested he was unaware of this consequence of his decision and (2) any suggestion to that effect would be "incredible." *Id.* at 20.

Reasonable jurists could conclude that, under *Taylor*, an express warning from the trial court isn't a necessary precondition for holding that a defendant impliedly waived his or her constitutional rights. Accordingly, the CCA didn't unreasonably apply clearly established federal law in concluding that Vreeland impliedly waived his right to counsel via certain conduct—even in the absence of an express warning by the trial court that such conduct would result in the loss of that right. *See LeBlanc*, 137 S. Ct. at 1728 (quoting *Donald*, 135 S. Ct. at 1376).

C. Unreasonable Determination of the Facts

Vreeland next asserts that that the CCA's adjudication of his Sixth Amendment claim "was based on an unreasonable determination of the facts in light of the evidence presented in the [state-court] proceeding." § 2254(d)(2).

In resolving this argument, we "must defer to the state court's factual determinations so long as 'reasonable minds reviewing the record might disagree about the finding in question.'" *Smith v. Duckworth*, 824 F.3d 1233, 1241 (10th Cir. 2016) (quoting *Brumfield v. Cain*, 135 S. Ct. 2269, 2277 (2015)). Critically, "a state court's factual findings are presumed correct, and the petitioner bears the burden of rebutting that presumption by 'clear and convincing evidence.'" *Id.* (quoting § 2254(e)(1)).[3] Nevertheless, "if the petitioner can show that 'the state courts plainly misapprehend[ed] or misstate[d] the record in making their findings, and the misapprehension goes to a material factual issue that is central to petitioner's claim, that misapprehension can fatally undermine the fact-finding process, rendering the resulting factual finding unreasonable.'" *Id.* (alterations in original) (quoting *Ryder ex rel. Ryder v. Warrior*, 810 F.3d 724, 739 (10th Cir.), *cert. denied*, 137 S. Ct. 498 (2016)).

Here, Vreeland asserts that the CCA relied on three unreasonable factual determinations: (1) that Vreeland previously waived his right to counsel; (2) that Vreeland failed to maintain a working relationship with counsel; and (3) that Vreeland

[3] It's not entirely clear whether § 2254(e)(1)'s presumption applies to our § 2254(d)(2) analysis. *See Sharp v. Rohling*, 793 F.3d 1216, 1228 n.10 (10th Cir. 2015) ("The interplay between § 2254(d)(2) and § 2254(e)(1) is an open question."). Nevertheless, because Vreeland appears to concede it does, we need not resolve this "open question." *Id.*

"deliberately delayed the trial by repeatedly firing counsel" and "filing meritless motions." Aplt. Br. 40. We address each of these purported factual determinations in turn.

1. Prior Waiver of Counsel

Vreeland's first argument is a legal challenge masquerading as a factual one. He doesn't suggest that the CCA "plainly misapprehend[ed] or misstate[d] the record" when it noted that, at one point in the proceedings, he indeed waived his right to counsel and decided to proceed pro se. *Smith*, 824 F.3d at 1241 (alterations in original) (quoting *Ryder*, 810 F.3d at 739). Instead, Vreeland submits that "to the extent that the [CCA] *relie*[*d*] *on* [his] earlier waiver of his right to counsel, it constitutes an unreasonable determination of the facts under § 2254(d)(2), because he successfully revoked his prior waiver." Aplt. Br. 27–28 (emphasis added).

But whether Vreeland's initial express waiver of the right to counsel was relevant in determining the validity of his subsequent implied waiver of that same right is a legal question, not a factual one. More to the point, we've already answered that legal question adversely to Vreeland. As we explain above, the circumstances surrounding his initial express waiver were relevant to determining the validity of his later implied waiver because those circumstances established that Vreeland knew he had a right to counsel, knew he could waive that right, and knew the dangers and disadvantages of doing so.

2. Vreeland's Failure to Maintain a Working Relationship with Counsel

Vreeland next argues that the CCA relied on an unreasonable factual determination in concluding that (1) he was represented by five attorneys and (2) he was

responsible for the failure to maintain a working relationship with them. But Vreeland was indeed represented by five attorneys. And although Vreeland points to evidence in the record that might allow "reasonable minds" to conclude that Vreeland's conflicts with some of those attorneys were not of his making, the fact that "reasonable minds reviewing the record might disagree" with the CCA's finding is insufficient to satisfy § 2254(d)(2). *Smith*, 824 F.3d at 1241 (quoting *Brumfield*, 135 S. Ct. at 2277). In light of the record as a whole, we therefore conclude that Vreeland's argument on this point doesn't entitle him to relief under § 2254(d)(2)'s "daunting standard." *Wood v. Carpenter*, 899 F.3d 867, 878 (10th Cir. 2018) (quoting *Byrd v. Workman*, 645 F.3d 1159, 1172 (10th Cir. 2011)).[4]

[4] Vreeland says the trial court "unreasonably" refused to listen to tape-recorded telephone conversations that, according to Vreeland, would have proved Scheideler created the conflict between the two men. Aplt. Br. 39. But Vreeland cites no authority for the proposition that the trial court's refusal to examine certain evidence—even if that refusal was unreasonable—satisfies § 2254(d)(2). Accordingly, we find any argument on this point waived and decline to consider it. *See* Fed. R. App. P. 28(a)(8)(A) (requiring argument section of appellant's opening brief to contain "appellant's contentions and the reasons for them, with citations to the authorities . . . on which the appellant relies"); *Bronson v. Swensen*, 500 F.3d 1099, 1104 (10th Cir. 2007) (explaining that we "routinely . . . decline[] to consider arguments that are . . . inadequately presented[] in an appellant's opening brief").

In a related argument, Vreeland asserts that he is entitled to an evidentiary hearing under § 2254(e)(1) to resolve who was to blame for his attorneys' decisions to withdraw. In support, he cites *Milton v. Miller*, 744 F.3d 660 (10th Cir. 2014). But in *Milton*, we remanded for an evidentiary hearing only after holding that the defendant satisfied § 2254(d)(1). *See id.* at 673. Because Vreeland hasn't made that showing here, an evidentiary hearing is unwarranted.

3. Delays

Next, Vreeland challenges the CCA's finding that he was responsible for "[m]ost, if not all, of the delay in bringing the case to trial." App. vol. 6, 1037. According to Vreeland, most of the continuances that occurred in this case were actually the "direct result of the state's failure to tender discovery until the eleventh hour." Aplt. Br. 42.

But as the state points out, Vreeland's argument on this point focuses solely on the *number* of continuances the state's conduct allegedly necessitated, without regard for their length. And even assuming the state was responsible for most of the continuances, that doesn't mean the state caused most of the delay: some continuances may have been longer than others. Because Vreeland fails to account for this possibility, he necessarily fails to demonstrate "by 'clear and convincing evidence'" that the CCA's factual finding on this point—which attributed to him most of the delay, rather than most of the continuances—was incorrect. *Smith*, 824 F.3d at 1241 (quoting § 2254(e)(1)).

In his final factual challenge, Vreeland asserts that the CCA's "determination that Vreeland's motions were frivolous and caused delay is . . . unreasonable in light of the evidence presented." Aplt. Br. 49. In support, Vreeland insists that "many" of his motions were in fact meritorious, and that in any event, his motions didn't actually delay the proceedings. *Id.* But Vreeland doesn't dispute that at least some of his motions lacked merit.[5] Thus, he necessarily fails to demonstrate that the CCA made an unreasonable

[5] For instance, Vreeland filed a pro se motion to recuse that alleged the trial judge was "one of the suspects in the possible criminal conspiracy of the possible extortion of money from [Vreeland] as well as the possible attempt to force medicate and murder [Vreeland]." Supp. App. 14. "[N]ot surprisingly," Vreeland notes, "[t]he

factual determination in concluding that he had "a pattern of . . . filing meritless motions." App. vol. 6, 1037. Further, even assuming Vreeland is correct that he didn't actually delay the proceedings by filing meritless motions, the CCA was entitled to conclude that he *attempted* to do so—a finding that would likewise support its conclusion that Vreeland was trying to "manipulat[e] the legal system." *Id.* Accordingly, Vreeland fails to satisfy § 2254(d)(2).

D. Conclusion

For the reasons discussed above, the CCA's resolution of Vreeland's Sixth Amendment claim (1) wasn't contrary to clearly established federal law; (2) didn't involve an unreasonable application of clearly established federal law; and (3) wasn't based on an unreasonable determination of the facts. *See* § 2254(d)(1)–(2). Thus, the district court correctly denied him relief on that claim.

II. Vreeland's Due Process Claim

Vreeland next requests a COA on his due-process claim, which is premised on the trial court's refusal to instruct the jury on the narrower date range in the state's bill of particulars, as opposed to the broader date range contained in the initial complaint.

Specifically, Vreeland argued in district court that (1) "his entire trial strategy was based on" the bill of particulars' representation that the alleged offenses occurred on October 3–4, 2004, and (2) the trial court's failure to instruct the jury on that narrow date range therefore violated his due-process rights. App. vol. 2, 276. The district court

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trial court . . . denied th[at] motion." Aplt. Br. 44. Vreeland also filed a motion to dismiss that invoked the Royal Canadian Mounted Police, a cache of stolen jewels, and a head injury requiring treatment in a Mexican hospital.

rejected this claim, concluding that even if the trial court erred in refusing to tailor the jury instruction to the narrow date range in the bill of particulars, that error was harmless. *See Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993) (explaining that petitioners aren't "entitled to habeas relief based on trial error unless they can establish" that "error 'had substantial and injurious effect or influence in determining the jury's verdict'" (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946))).

To obtain a COA, Vreeland must "demonstrate that reasonable jurists would find the district court's assessment" of his due-process claim "debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Vreeland can't make that showing here. As the district court pointed out, all of the victims testified on direct examination that the relevant acts occurred on October 3–4, 2004, which is the date range identified in the bill of particulars. It was only on cross-examination that a single victim expressed confusion on this point, stating that the acts "*may have* occurred on October 6." App. vol. 2, 284 (emphasis added). Under these circumstances, even assuming the jury accepted Vreeland's assertion that he had an alibi for October 6, Vreeland doesn't explain why the jury would have disregarded the victims' initial testimony that the relevant acts occurred on October 3–4. Accordingly, we conclude that Vreeland fails to "demonstrate that reasonable jurists would find the district court's assessment" of his due-process claim "debatable or

wrong." *Slack*, 529 U.S. at 484. Thus, we deny Vreeland a COA on his due-process claim and dismiss that portion of the appeal.[6]

Conclusion

The CCA's decision rejecting Vreeland's Sixth Amendment claim was neither contrary to, nor an unreasonable application of, clearly established federal law. Nor did the CCA base its decision rejecting that claim upon an unreasonable determination of the facts. Accordingly, we affirm the district court's order denying relief on Vreeland's Sixth Amendment claim. We also deny Vreeland a COA to appeal the district court's rejection of his due-process and actual-innocence claims and dismiss the remainder of the appeal.

[6] Vreeland also raised a standalone actual-innocence claim below. He references this claim on appeal, but only "to preserve his right to seek further review." Aplt. Br. 64. As Vreeland concedes, we have previously held that "an assertion of actual innocence, although operating as a potential pathway for reaching otherwise defaulted constitutional claims, does not, standing alone, support the granting of the writ of habeas corpus." *LaFevers v. Gibson*, 238 F.3d 1263, 1265 n.4 (10th Cir. 2001). Thus, we decline to issue Vreeland a COA on this basis.

APPENDIX B

FILED
United States Court of Appeals
Tenth Circuit

November 19, 2018

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

DELMART E.J.M. VREELAND, II,

Petitioner - Appellant,

v.

DAVID ZUPAN, et al.,

Respondents - Appellees.

No. 16-1503

ORDER

Before **BACHARACH**, **KELLY**, and **MORITZ**, Circuit Judges.

Appellant's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court

ELISABETH A. SHUMAKER, Clerk

APPENDIX C

08CA2468 Peo v. Vreeland 02-14-2013

COLORADO COURT OF APPEALS

Court of Appeals No. 08CA2468
Douglas County District Court No. 04CR706
Honorable Paul A. King, Judge

The People of the State of Colorado,

Plaintiff-Appellee,

v.

Delmart Michael Edward Vreeland,

Defendant-Appellant.

JUDGMENT AFFIRMED

Division V
Opinion by JUDGE CARPARELLI
Román and Terry, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(f)
Announced February 14, 2013

John W. Suthers, Attorney General, Katherine J. Gillespie, Assistant Attorney General, Denver, Colorado, for Plaintiff-Appellee

Michael J. Heher, Corvallis, Oregon, for Defendant-Appellant

Defendant, Delmart Michael Edward Vreeland, appeals the judgment of conviction entered upon jury verdicts finding him guilty of inducement of child prostitution, solicitation of child prostitution, sexual exploitation of children, sexual assault, contributing to the delinquency of a minor, and distribution of a controlled substance. We affirm.

I. Background

Defendant promised to pay two teenage boys if they allowed him to photograph them in their underwear and post the photographs on a pornographic website. After providing the teenagers with alcohol and cocaine, defendant took photographs of the boys and sexually assaulted them.

II. Right to Counsel

Defendant contends that his constitutional right to counsel was violated because he was forced to represent himself during trial. We disagree.

A. Law

The fundamental right to the assistance of counsel is constitutionally guaranteed by the Sixth Amendment. U.S. Const.

amend. 6; *see* Colo. Const. art. II, § 16; *People v. Alengi*, 148 P.3d 154, 159 (Colo. 2006). A defendant also has a correlative constitutional right to self-representation. *Alengi*, 148 P.3d at 159. That right may be asserted affirmatively or by inference when the defendant declines to be represented by counsel. *Id.*

Before proceeding pro se, a defendant must knowingly, intelligently, and voluntarily waive his constitutional right to counsel. *People v. Bergerud*, 223 P.3d 686, 693 (Colo. 2010); *People v. Krueger*, 2012 COA 80, ¶ 13. A defendant may waive assistance of counsel either expressly or impliedly through his or her conduct. *Alengi*, 148 P.3d at 159. An implied waiver occurs when the defendant is deemed to have forfeited the right to counsel, as opposed to having made a deliberate decision to forgo the right. *Id.*

"Courts must ascertain whether, under the totality of the circumstances, a defendant's conduct evinces a voluntary, knowing, and intelligent waiver of right to counsel." *Id.* "A defendant's pattern of obstreperous, truculent, and dilatory behavior may be deemed relevant as to whether such conduct has been undertaken with full awareness of the consequences of doing so." *Id.*; *see also People v. Tellez*, 890 P.2d 197, 198 (Colo. App. 1994) ("the

defendant cannot delay his [or her] trial indefinitely under the guise of seeking counsel").

Whether a defendant effectively waived his right to counsel is a mixed question of fact and law that we review de novo. *Bergerud*, 223 P.3d at 693; *Krueger*, ¶ 15.

B. Trial Court Proceedings

Five attorneys, in succession, represented defendant before trial, and each requested and was granted permission to withdraw from that representation. After the trial court granted the fourth attorney's request to withdraw, defendant said he did not want to be represented by counsel and that he wanted to proceed pro se. The court then gave defendant a thorough *Arguello* advisement regarding his decision to represent himself. *See People v. Arguello*, 772 P.2d 87, 95-96 (Colo. 1989). Defendant repeatedly said he wanted to represent himself.

Defendant reaffirmed his decision to represent himself at the next two pretrial hearings. On February 22, 2006, defendant asked for a continuance and waived his right to speedy trial so that he could hire advisory counsel to help him review discovery.

At a pretrial hearing three weeks before the new trial date,

defendant again asked for a continuance to hire advisory counsel to help him review discovery. The prosecution expressed concern that although defendant appeared pro se and said he wanted to represent himself, he was, at the same time, writing letters to the court saying he wanted to be represented by counsel. During the hearing, defendant affirmed that he wanted to represent himself and said he wanted to hire advisory counsel to help him when he testified at trial. The court denied defendant's request for a continuance.

Two weeks before trial, defendant's fifth attorney entered an appearance and asked for a continuance to prepare for trial. The court granted the request over the prosecution's objection. The court expressed concern "that there is a manipulative aspect of this that is very obvious to the Court." The court found that the "past history of this case, as articulated by [the prosecutor], speaks to the issue of there being an attempt to avoid the ultimate resolution of this case before a jury."

A few days before trial, defendant's fifth attorney filed a motion to withdraw. The court granted counsel's motion to withdraw, finding a conflict of interest had arisen. The court then considered,

and denied, defendant's motion for a continuance.

The court noted that during defendant's competency evaluation, the interviewer determined that defendant had "a working knowledge of the legal system that surpassed [that of] most individuals" and "a distinctly acute understanding of the proceedings against him." The interviewer's diagnostic impression of defendant was that he "appears to use the means available to him in the moment to accomplish his goals, including threatening suicide, threatening litigation, and intimidating those around him." The interviewer concluded that defendant's "ability to work with his attorney to develop the best defense possible is not an issue."

The court found that defendant was "highly intelligent," had a long history of conflict with his counsel, and had attempted to intimidate the court through use of profanity. The court also found that defendant "has an extremely high interest in exercising control, manipulating and dominating."

The court summarized defendant's history with counsel as follows:

> What's clear to the Court is that the pattern in this case is quite stark and is quite clear: Mr. Vreeland, while having the ability to certainly

> retain counsel, retains counsel, inescapably enters into a conflict, fires that lawyer, and has to seek to retain new counsel; it's occurred with [the former attorneys].

The court found that defendant, "when he was pro se, was adamant, adamant in his desire to represent himself" and that his "pro se pleadings reflect a persistent, adamant desire to represent himself." The court further found that defendant "has obviously manifested a desire to represent himself in the past," including after extensive *Arguello* advisements.

On the morning of trial, a sixth attorney tried to enter a "conditional entry of appearance," in which he agreed to enter an appearance if the court granted a continuance for him to prepare for trial. The court denied the "conditional" entry of appearance because no such motion exists under Colorado law. The court also denied defendant's motion to continue the trial based on his past manipulation of the process. Counsel did not enter an appearance to represent defendant; instead, he acted as defendant's advisory counsel during trial.

C. Analysis and Conclusion

The record amply supports the trial court's findings that

defendant waived his right to counsel. *See Alengi*, 148 P.3d at 159. Defendant said repeatedly that he wanted to proceed pro se, including after extensive *Arguello* advisements about the consequences of his decision to do so. In addition, defendant repeatedly said both orally and in writing that his intention was to represent himself and that counsel had been "forced upon him."

In addition, the totality of the circumstances shown in the record also demonstrates that defendant's actions impliedly waived his right to counsel. *See id.* Most, if not all, of the delay in bringing the case to trial was a result of defendant's repeated failure to maintain a working relationship with counsel. *See Tellez*, 890 P.2d at 198. In addition, the record shows that defendant had a pattern of threatening counsel, filing meritless motions, and firing counsel as the date of trial approached. Such behavior supports the conclusion that defendant, who is "highly intelligent," was manipulating the legal system with full awareness of the consequences of what he was doing. *See Alengi*, 148 P.3d at 159.

Accordingly, we conclude defendant's right to counsel was not violated.

III. Jury Instructions

Defendant contends the trial court "fail[ed] to enforce the bill of particulars" when it instructed the jury based on the complaint and information, and not the bill of particulars. Defendant also contends the trial court erred by refusing his tendered instruction regarding the limited purpose of the evidence admitted under CRE 404(b). There were no errors.

A. Law Regarding Jury Instructions

Trial courts have a duty to correctly instruct juries on matters of law. *Bedor v. Johnson*, 2013 CO 4, ¶ 9; *People v. Doubleday*, 2012 COA 141, ¶ 38. To determine whether the trial court has performed this duty, we first review de novo the jury instruction at issue to assess whether the instruction correctly states the law. *Bedor*, at ¶ 9. If it does, we then review the trial court's decision to give the jury instruction for an abuse of discretion. *Id.* A trial court abuses its discretion when its decision is manifestly arbitrary, unreasonable, or unfair. *People v. Stewart*, 55 P.3d 107, 122 (Colo. 2002).

B. Bill of Particulars

Counts 1 through 9 and count 14 alleged that between

September 1, 2004 and October 18, 2004, defendant induced and solicited the victims for child prostitution, sexually exploited them, and sexually assaulted them. In response to a motion for a bill of particulars that was granted in part by the court, the prosecution said that the acts alleged in counts 1 through 9 and count 14 happened on the same night and "[i]t is believed from the best information in discovery that the night in question is October 3-4[], 2004."

The implicit premise of defendant's argument on appeal is that the prosecution's bill of particulars amended the date of the offenses alleged in the charges and required the court to instruct the jury to determine whether the offenses occurred on the dates stated in the bill of particulars. We are not persuaded.

1. Trial Court Proceedings

The victims testified that the charged acts occurred during the night of October 3 to 4. During cross-examination, the victims described the location, time of day, and circumstances of the alleged acts, but had difficulty remembering some of the details. One victim said that the acts may have occurred on October 6. Much of defendant's case focused on the victims' credibility and the

testimony that the alleged acts may have occurred on October 6, as to which defendant presented alibi evidence showing that he was not at home on that date.

Defendant argued that the jury instructions should say that the prosecution was required to prove that the offenses occurred on October 3 and 4. The court rejected defendant's argument and instructed the jury that the charges were alleged to have occurred "between and including September 1, 2004 and October 18, 2004."

2. Law Regarding Bill of Particulars

"The right to seek a bill of particulars provides the defendant and the trial court with a procedure by which the defendant can be provided with further detail in advance of trial sufficient to facilitate trial preparation." *Thomas v. People*, 803 P.2d 144, 154 (Colo. 1990); *see* Crim. P. 7(g). For example, "where there is evidence of many acts, any one of which would constitute the offense charged, the prosecution may be compelled to select the transaction on which it relies for a conviction." *Thomas*, 803 P.2d at 152. In such circumstances, the prosecution is not required to specify the exact date the offense took place, but it must specify a particular act "to ensure unanimous jury agreement that the defendant had

committed the same act and to enable the defendant to prepare a defense to the specific act charged." *Id.*; *see People v. Estorga*, 200 Colo. 78, 81, 612 P.2d 520, 523 (1980). A bill of particulars is not the same as an amended complaint and information. *Compare* Crim. P. 7(g) (bill of particulars), *with* Crim. P. 7(e) (amending of information); *see also Erickson v. People*, 951 P.2d 919, 921 (Colo. 1998) (a bill of particulars is an informational tool for the defense that is "intended to define the charged offense more specifically").

3. Analysis and Conclusion

We reject defendant's contention that the court erred when it instructed the jury that the prosecution was required to prove that the offenses occurred between September 1, 2004, and October 18, 2004.

In the bill of particulars, the prosecution said "[i]t is believed from the best information in discovery that the night in question is October 3-4[], 2004." Consistent with those particulars, the witnesses testified that the offenses occurred on October 3 and 4. These dates are also within the period alleged in the complaint and information.

When defendant questioned the witnesses, they manifested

some uncertainty about the exact date of the events. One victim agreed that the offenses may have occurred on another date, and, perhaps, on October 6. Defendant then attempted to prove that the offenses could not have occurred on that date because he was not home. From this, defendant argued that the victims' description of the offenses should not be believed.

We reject defendant's contention that the court failed to enforce the bill of particulars and abused its discretion when it instructed the jury that the prosecution was required to prove that the offenses occurred during the period from September 1, 2004 to October 18, 2004, rather than on October 3 and 4. The prosecution's evidence was consistent with the bill of particulars and that evidence, as well as defendant's alibi evidence, pertained to dates within the period alleged in the complaint and information.

We conclude that the bill of particulars did not amend the complaint and information, the court's instruction properly advised the jury regarding the elements of the offenses and the prosecution's burden of proof, and the court did not abuse its discretion when it declined to modify the instruction. Moreover, the verdict demonstrates that the jury agreed, beyond a reasonable

doubt that the offenses occurred during the period alleged.

Accordingly, we perceive no instructional error.

C. Jury Instructions Regarding Other Acts Evidence

Defendant next contends the trial court erred by refusing his tendered instruction regarding the limited purpose of the evidence admitted under CRE 404(b). We are not persuaded.

1. Trial Court Proceedings

Before trial, the prosecution gave notice of its intent to present evidence of similar uncharged acts with three other individuals to show defendant's modus operandi; common plan, scheme, or design; intent; knowledge; motive; preparation; and grooming behavior and to refute a defense of fabrication. Defendant stipulated to the admission of the evidence for the purposes offered by the prosecution in its notice.[1]

Each party tendered a proposed jury instruction about the limited purpose for which the Rule 404(b) evidence was admitted during trial. The prosecution's proffered instruction, which was based on the stock Rule 404(b) instruction, stated:

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[1] On appeal, defendant does not contend that the trial court erred when it admitted the evidence under CRE 404(b).

> The evidence from [J.O.] about how he and the defendant met and how their relationship developed was admitted for the specific purpose of showing modus operandi, common plan scheme or design, intent, knowledge, motive, preparation, grooming behavior, and to refute a defense of fabrication.

Defendant's proffered instruction was also based on the stock jury instruction, but would have advised the jury:

> The evidence from [J.O.] about how he and the defendant met and how their relationship developed and evidence of Mr. Vreeland's sexual or other conduct involving anyone other [than the victims in this case] or involving any date other [than] 10/03 – 10/04[,] 2004 or place other [than] 8770 Wildrye Circle, Parker, Colorado, was admitted for the specific purpose of showing modus operandi, common plan scheme or design, intent, knowledge, motive, preparation, grooming behavior and to refute a defense of fabrication.

The court gave the prosecution's instruction and rejected defendant's proffered instruction.

2. Analysis and Conclusion

We perceive no error. Defendant's proffered instruction would have advised the jury that it could not consider evidence for purposes that he had stipulated were proper. Therefore, that instruction was an incorrect statement of the law. Conversely, the

instruction given to the jury correctly stated the limited purposes for which the other acts evidence could be considered. *See id.* Thus, the court did not abuse its discretion when it gave that instruction to the jury.

Accordingly, we conclude the trial court did not err when it refused defendant's tendered instruction regarding the limited purpose of the evidence admitted under CRE 404(b).

IV. Right to a Speedy Trial

Defendant contends that his statutory right to a speedy trial was violated because the trial court incorrectly attributed a request for continuance to him when it was caused by the prosecution's discovery violation. We disagree.

A. Law

A defendant has a statutory right to be brought to trial within six months from the date he or she enters a plea of not guilty. § 18-1-405(1), C.R.S. 2012; *see also* Crim. P. 48(b)(1). If the defendant is not brought to trial within that time, the pending charges must be dismissed. § 18-1-405(1); Crim. P. 48(b)(1).

If the defendant requests and is granted a continuance after a trial date has been set, the period within which the trial must begin

is extended for an additional six months from the date of the continuance. § 18-1-405(3), C.R.S. 2012. "[T]he key to interpreting subsection 405(3) is not whether the defendant caused the delay, but whether a continuance was granted at the defendant's request." *People v. Duncan*, 31 P.3d 874, 876-77 (Colo. 2001) (citation omitted).

"A good many factors may influence a defendant to make the tactical choice to request a continuance, including not only some for which [the defendant] cannot be held responsible but also many over which he [or she] has absolutely no control." *Id.* at 877. Therefore, "[t]o the extent that [a defendant] is disadvantaged by erroneous rulings of the court or violations of the law or procedural requirements by the prosecuting attorney, appropriate remedies are separately provided for those irregularities." *Id.* (citing Crim. P. 16(III)(g) (providing for the imposition of sanctions to remedy failures to comply with discovery obligations)). Thus, "in the absence of a showing of bad faith on the part of the prosecutor, such as a last minute ploy to circumvent the requirements of the speedy trial provisions, a defendant's tactical decision to seek a continuance is chargeable to him." *Id.*

We review de novo whether a defendant's statutory right to a speedy trial was violated. *Id.* at 876.

B. Analysis and Conclusion

Defendant entered a plea of not guilty on July 6, 2005 and trial was set for December 6, 2005. The parties agree that the time period for speedy trial was properly tolled for a competency evaluation. The court then reset trial for February 22, 2006.

On February 16, 2006, defendant filed a motion to dismiss alleging that the prosecution violated its discovery obligations under Crim. P. 16 by belatedly producing recorded telephone conversations between defendant and various witnesses. After conducting a hearing, the trial court found that the prosecution had violated discovery requirements and, as a sanction, dismissed four counts.

On February 22, 2006, the morning of trial, defendant asked for a continuance to review discovery with the help of advisory counsel, whom he had yet to retain. Defendant explicitly waived his right to a speedy trial and the court set new trial date. [2]

[2] On appeal, defendant does not challenge the other continuances granted in this case, except as argued in Section II.

Here, the trial court did not find that the prosecutor acted in bad faith to delay the trial. On appeal, defendant argues that the sanction of dismissing the four counts "necessarily entailed a finding of willful misconduct" and, therefore, the delay in bringing the case to trial should be chargeable to the prosecution rather than to him. Consequently, in his view, the charges against him should have been dismissed because the trial did not occur within six months of his plea. We are not persuaded.

Defendant conflates a finding of willful misconduct under the discovery rules with a finding of bad faith in delaying the start of trial. As the supreme court explains in *Duncan*, remedies for discovery violations are separately provided for and, absent a finding of bad faith, a defendant's request for a continuance is chargeable to the defendant. *Id.*

Because the record shows that defendant requested the continuance and the trial court did not find that the prosecutor acted in bad faith, the tactical decision to request a continuance is chargeable to defendant. Accordingly, we conclude that defendant's statutory right to a speedy trial was not violated.

V. Competence

Defendant contends the trial court did not make an adequate inquiry into his mental and physical competence to proceed at trial and to represent himself. He argues that the court abused its discretion when it refused his requests for breaks "due to his medical condition and its related mental effects." We are not persuaded.

A. Law

A defendant is presumed to be competent to stand trial and it is the defendant's burden to prove that he or she is not competent. *People v. Palmer*, 31 P.3d 863, 866 (Colo. 2001). However, "[p]utting an accused on trial while he [or she] is incompetent violates due process of law." *Id.* (quoting *Jones v. District Court*, 617 P.2d 803, 806 (Colo. 1980)).

At the time of defendant's trial, the applicable statutes provided that "[n]o person shall be tried, sentenced, or executed if such person is incompetent to proceed at that stage of the proceedings against him or her." Ch. 26, sec. 10, § 16-8-110(1)(b), 1995 Colo. Sess. Laws 76 (repealed by Ch. 389, sec. 8, 2008 Colo. Sess. Laws 1855, effective July 1, 2008). A defendant is "incompetent to proceed" if he or she suffers from a mental disease

or defect that renders him or her incapable of (1) understanding the nature and course of the proceedings against him or her, or (2) participating or assisting in his or her defense or cooperating with his or her counsel. Ch. 44, sec. 1, § 39-8-102(1), 1972 Colo. Sess. Laws 225 (later codified at § 16-8-102(3); repealed by Ch. 389, sec. 15, 2008 Colo. Sess. Laws 1850, effective July 1, 2008).

More specifically, to be competent, a defendant must have "a sufficient present ability to consult with his counsel with a reasonable degree of rational understanding, and a present rational and factual understanding of the proceedings against him." *People v. Mondragon*, 217 P.3d 936, 940 (Colo. App. 2009) (emphasis omitted) (quoting *People v. Morino*, 743 P.2d 49, 51 (Colo. App. 1987) (citing *Dusky v. United States,* 362 U.S. 402, 80 S.Ct. 788, 4 L.Ed.2d 824 (1960)). The *Dusky* standard applies equally to whether a defendant is generally competent and whether a defendant is competent to choose to exercise or waive his or her constitutional rights. *Mondragon*, 217 P.3d at 940 (citing *Godinez v. Moran,* 509 U.S. 389, 398-99, 113 S.Ct. 2680, 125 L.Ed.2d 321 (1993) (*Dusky* standard applies to a defendant's decision to waive the right to counsel)).

Under the *Dusky* standard, a defendant lacks the requisite rational understanding "if his mental condition precludes him from perceiving accurately, interpreting, and/or responding appropriately to the world around him." *Mondragon*, 217 P.3d at 940 (quoting *Lafferty v. Cook*, 949 F.2d 1546, 1551 (10th Cir. 1991)).

A defendant's competence to stand trial is a question of fact. We uphold a trial court's competency determination absent an abuse of discretion. *Palmer*, 31 P.3d at 865-66; *see also People v. Stephenson*, 165 P.3d 860, 866 (Colo. App. 2007) ("Because the trial court is in the best position to observe the defendant's general demeanor, its determination of competency will be upheld absent an abuse of discretion."). A trial court abuses its discretion when its decision is manifestly arbitrary, unreasonable, or unfair. *Stephenson*, 165 P.3d at 866.

B. Trial Court Proceedings

Before the second day of trial began, defendant asked that the trial be suspended because his withdrawal from a medication was interfering with his ability to concentrate and think clearly "at all times." When the trial court asked if he was asserting that he was incompetent to proceed, defendant responded that he was mentally

competent but that he was "medically" unfit to represent himself "fluidly" because he gets dry mouth and his heart races.

The court denied defendant's motion, finding that there was "absolutely no evidence" that defendant was not competent to proceed. The court allowed defendant to take water with him to the podium and to readdress the issue several hours later after consulting with advisory counsel. After consulting with counsel, defendant chose to withdraw his motion and proceed with trial. Defendant did not raise his motion again during trial.

On the third day of trial, defendant said that he was talking fast and that his heart was racing because he was overdue for his medication. However, he did not say that it was interfering with his ability to proceed with the trial. The court called a recess to allow defendant to take his medication, and an hour later defendant said he was feeling better and that his heart was no longer racing.

Before closing arguments on the tenth day of trial, defendant said that he had just taken his medication and that it had not taken effect yet. As a result, his "blood pressure [was] flying." Although defendant said that he did not think it was "a good idea" for him to address the jury because he did not want "to start talking

pretty fast," he said it was up to the court to decide whether to proceed. The court noted that the previous time defendant was delayed in taking his medication, he conducted a cross-examination of a witness that was "cogent, direct, structured, [and] had a beginning point and an ending point." The court then denied defendant's request for a recess.

C. Analysis and Conclusion

We conclude that the trial court did not abuse its discretion. The record shows that defendant voluntarily withdrew his motion after consulting with counsel and expressly stated that he was mentally competent to proceed at trial. Defendant did not raise this motion again and did not argue that withdrawal from his previous medication was adversely affecting him again during trial.

Similarly, when defendant said that his medications were affecting him, the court responded by allowing him to drink water, calling recesses to allow defendant to take his medication, and following up with him afterwards about how he felt. The record also supports the trial court's findings that defendant's medication was not interfering with his ability to proceed at trial or represent himself. Our review of the record shows that defendant was quite

effective at cross-examining witnesses, making objections, arguing his position to the court, and presenting his case to the jury. This is also evident by the number of defendant's objections the court sustained and the fact that the jury did not convict defendant on all charged counts.

We are not persuaded otherwise by defendant's argument that the trial court misapplied the correct legal standard when evaluating whether he was competent to proceed. *See Indiana v. Edwards*, 554 U.S. 164, 173-74, 128 S.Ct. 2379, 2385-86, 171 L.Ed.2d 345 (2008) (recognizing that mental illness varies in the degree and defendants' competency may fall within a "gray area" in which they are competent to stand trial but not to represent themselves). Even assuming that the *Edwards* competency standard applies not only to diagnosed mental illnesses but also to temporary side effects from medications, applying a higher standard here would not alter our conclusion. Despite his expressed frustration with the court and its rulings, defendant represented himself ably and there is no evidence in the record to indicate that he was incompetent to proceed at trial or to represent himself.

We also reject defendant's contention that the former statutes

were unconstitutional on their face and as applied by the court because those statutes were not applied to him during trial. On appeal, defendant bases his argument on the motion he withdrew after consulting with advisory counsel. Because defendant withdrew this motion, explicitly said he was not challenging whether he was mentally incompetent to proceed, and did not raise the issue again during trial, those statutes were not applied to defendant. Therefore, we need not consider defendant's constitutional challenges to those statutes on appeal.

Accordingly, we conclude that the trial court did not abuse its discretion when it found defendant competent to proceed at trial and to represent himself.

The judgment is affirmed.

JUDGE ROMÁN and JUDGE TERRY concur.