APPENDIX A

Filed 11/4/16 P. v. Forte CA2/3

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. RAMONTA FORTE, Defendant and Appellant.	B256109 (Los Angeles County Super. Ct. No. LA068401)

APPEAL from a judgment of the Superior Court of Los Angeles County,
Gregory A. Dohi, Judge. Affirmed with directions.

Janyce Keiko Imata Blair, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General,

Paul M. Roadarmel and William N. Frank, Deputy Attorneys General, for Plaintiff and Respondent.

A jury found appellant Ramonta Forte guilty of first degree murder for shooting Tommy Valdez to death. The jury also found appellant personally used a firearm, personally and intentionally discharged a firearm, and personally and intentionally discharged a firearm causing great bodily injury and death in committing the offense. The jury also convicted appellant of possession of a firearm by a felon. (Pen. Code, §§ 187, subd. (a), 12022.5, subd. (a), 12022.53, subds. (b), (c), & (d); former Pen. Code, § 12021, subd. (a)(1).)

Appellant raises four issues on appeal: (1) the court erred when it declined to appoint counsel to assist him with his motion for a new trial and sentencing; (2) the evidence was insufficient to support the premeditation and deliberation required to convict for first degree murder; (3) the court should have instructed the jury that it had to agree unanimously on which of two bullets actually killed Valdez; and (4) the abstract of judgment and sentencing minute order misstate the sentence on the possession of a firearm by a felon count. We affirm, with directions to the trial court to correct the abstract of judgment and sentencing minute order.

FACTUAL SUMMARY

On the evening of July 15, 2011, victim Tommy Valdez and two other men entered the VIP Showgirls Club (Club) and fanned out around appellant, who was seated at a table near the door. Valdez went directly up to appellant and sucker punched him. Appellant pulled out a gun and shot Valdez in the chin. Valdez fell to the floor, face down and motionless.

Appellant paced, then cursed at, hit, kicked, and pistol-whipped Valdez. Appellant fired a second shot into the back of Valdez's head. The entire incident lasted three to four seconds. Amazingly, it was precipitated, as set out below, by a party gone awry and a subsequent month of hundreds of taunting, derogatory, and threatening text messages exchanged by appellant, Ana Baez (appellant's girlfriend), Valdez, and Ani Abramyan (Valdez's wife).

Appellant represented himself at trial.

1. A Month of Escalating Tension.

In June 2011, Abramyan and Valdez lived in Santa Clarita with their children. Abramyan worked as a dancer at the Club in North Hollywood under the stage name "Miracle"; Valdez had just lost his job as a medical biller. Valdez was an ex-gang member who had covered his gang tattoos when he married Abramyan. They were experiencing "normal" marital problems.

In June 2011, Ana Baez and appellant lived in North Hollywood. Baez worked with Abramyan as a dancer at the Club under the stage name "Baby." According to Baez, appellant was bipolar and "always trip[ping]."

That month, Baez and appellant invited Abramyan and Valdez over for dinner. A few weeks later, Abramyan and Valdez returned the favor; they invited Baez and appellant to their townhome for a barbeque. During the party, Valdez's African-American neighbor, Scoop, dropped by. Appellant became angry when he saw Valdez welcome Scoop into the residence. In front of Scoop, appellant asked what "this fucking mayate" (a disrespectful term for an African-American) was doing here. Abramyan

and Valdez explained that Scoop was their friend, indeed "like a brother" to Valdez. Scoop left. The encounter was awkward. The party ended early.

Two weeks later, Baez asked Abramyan for a ride to work. They met at a park near Baez's residence. Baez was with appellant at the park. Baez asked Abramyan to get out of the car so appellant could see she was leaving with another woman. Appellant offered Abramyan a beer, which she declined. Appellant started to disparage Abramyan's husband, Valdez, saying, "Fuck your hoe-ass husband. He's a bitch. He's not about shit." Baez tried, unsuccessfully, to intervene. Abramyan told Baez she would have to find another way to work. As Abramyan was leaving, appellant yelled, "Hoe, I'm going to get you. I'm going to catch you slipping at the club. Bitch, watch out. I'll get you at VIP." After this incident, Baez and Abramyan exchanged text messages. Baez stated she hoped the two of them could remain friends despite appellant's outburst, which Baez attributed to appellant being bipolar. Later that day, Abramyan texted Valdez about appellant's remarks at the park. Valdez texted back, "I'm so mad I can't stop shaking. I want to kill that fool. . . . I'm just so pissed off. I never disrespected that fool."

Baez asked Abramyan for Valdez's telephone number. Abramyan provided it. Valdez and appellant then embarked on an escalating flurry of voice and text messages to each other, Abramyan, and Baez. A few days before the night of the shooting, Abramyan listened by speaker phone while appellant told Valdez he was going to kill her and their children in front of Valdez and then "smoke" Valdez. Valdez also showed Abramyan text messages that appellant had sent him using both his phone and Baez's phone. Appellant also texted Abramyan directly, threatening to come to the

house and get them. Baez texted Abramyan as well, saying Valdez should "come now or [appellant was] going to catch him later," which Abramyan interpreted as a threat. Abramyan got her digs in as well, texting that appellant was a "pussy ass fool." All in all, hundreds of text messages were exchanged among the two men and two women in a span of six weeks.

On July 13, 2011, two days before the fatal shooting, Valdez showed up at the Club in response to appellant's challenge to fight. Appellant, however, was not there. By text, Valdez boasted that appellant had failed to appear because he was scared of Valdez. Valdez and appellant continued to exchange derogatory insults and aggressive threats and challenges to fight.

2. The Shooting.

On July 15, 2011, the date of the shooting, both men exchanged insulting, provocative, and threatening text messages. That night, Abramyan was working at the VIP Club. With his wife working that night, Valdez, with his cousin Paulina, were hosting a barbeque at his home when appellant texted him to come to the VIP Club or else appellant would kill Abramyan when he saw her on stage. Valdez also received a text and a separate telephone call from a security guard at the Club who told him appellant was at the Club. Valdez immediately *dropped* everything, texted his friends to meet him at the Club, told his guests he would be back soon, and drove off. Valdez texted Abramyan to tell her he was coming to the Club because appellant had told him he was going to harm *her*. Abramyan told Club security not to let Valdez inside. When Valdez arrived, she went out to the entrance, gave him gas money so he would not come inside, and went back inside alone.

When Valdez arrived at the Club, appellant was inside the building. Texting ensued between the two men. Valdez asked a security guard he knew, Misael Carrera, to tell appellant to come outside because he wanted to see him. Carrera told appellant that someone outside wanted to see him outside the Club. Appellant refused to leave the Club, responding, "I'm not stupid." Valdez then tried to enter the building, but the security guard at the main entrance would not admit him. One of the bouncers told Valdez that if he wanted to get appellant, he should go through the other entrance. Valdez and his two friends immediately ran around the building to the other entrance. They burst into the Club. Appellant was seated near the secondary entrance with his jacket on his lap.

Valdez ran up to appellant and sucker punched him in the mouth. Appellant shot Valdez in the chin. Valdez fell on his stomach and did not attempt to get up. Appellant stood over Valdez and paced. Appellant cursed at Valdez, hit or kicked him a few times, and pistol-whipped him. While standing over the motionless, prone Valdez, appellant shot him in the back of the head.[2] Three to four seconds elapsed between the shots.

3. The Aftermath.

Baez was at the Club during the shooting. After the shooting, appellant found her and they left the Club together. As he exited, appellant told one of the security guards, "I just shot that mother-fucker. I think I just killed that mother-fucker." Appellant and Baez ran to a nearby park.

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[2] The Club's video equipment recorded from several different angles the altercation between Valdez and appellant, and the shooting. The videos were shown at trial.

Police saw the two sitting under bushes. Appellant and Baez conversed as police approached. Baez fled. Police arrested appellant under the bushes. They found Baez hiding a short distance away. She had a duffle bag containing a loaded .40-caliber Glock pistol and a backpack containing a loaded .38-caliber revolver. Police recovered spent .40-caliber cartridges from around Valdez's body. The cartridges were fired from the Glock pistol.

4. The Coroners' Reports.

Los Angeles County Deputy Medical Examiner Solomon L. Riley, Jr., M.D., autopsied Valdez's body. Valdez sustained two close range gunshot entry wounds to the head. One was to the left chin and the other was to the back of the head. Dr. Riley testified the cause of death was the gunshot to the back of the head. He also stated Valdez died as a result of "these two gunshot wounds."

According to Dr. Riley, the chin wound came from a gun fired less than a foot from the chin. The wound would not be expected to be rapidly fatal in and of itself and a person receiving medical treatment for the wound would have had a good chance of surviving the injury. Any wound involving the head and mouth "could" be fatal. Dr. Riley opined the chin wound "would not be fatal as rapidly as the one to the back of the head would be." Dr. Riley also testified "the possibility for fatality from this single wound exists."

The gunshot entry wound to the back of the head was very close to the middle of the back of the head. The exit wound was behind the left temple. The distance between the gun and the head wound was a little more than the distance between the gun and the chin wound. According to

Dr. Riley, it was "highly unlikely" Valdez could have survived the wound to the back of his head.

A second coroner appeared as a witness on behalf of appellant. Frank Sheridan, M.D., the Chief Medical Examiner for San Bernardino County, testified both shots were fired when the firearm was about a foot or a foot-and-a-half from Valdez's head. The first shot to the chin rendered Valdez immediately unconscious and "clearly dropped him." The first shot "could" have been fatal on its own. Dr. Sheridan testified "we'll never know for sure whether that bullet would have been fatal on its own because there was a second [bullet]." Valdez was alive at the time of the second shot. The second shot entered the left rear portion of Valdez's head and [was] "definitely a fatal shot."

5. Firearms Analysis.

Amy Antaya, a criminalist employed by the Los Angeles Police Department, testified at least seven pounds of force were required to pull the trigger on the Glock pistol. By contrast, Dr. Bruce Krell, a firearms expert for the defense, testified four and one-half pounds of force were required to pull the trigger on the Glock pistol. This was a relatively lighter pull. Dr. Krell's measurements of trigger pull were consistently different from those of the Los Angeles Police Department because of the inherent inaccuracy of the weights. He suggested measurements were inaccurate below three-quarters of a pound and he acknowledged there was a big difference between seven pounds and four pounds. Dr. Krell suggested that appellant may have accidentally fired the fatal second shot because of the easier trigger pull. Dr. Krell also assumed that appellant had retrieved the firearm from the ground between the first and second shots.

6. Mental State Testimony.

Dr. Jack Rothberg, a forensic psychiatrist, testified appellant suffered from post-traumatic stress disorder (PTSD). He also testified human beings experience an autonomic "[fight-or-flight]" response to life-threatening danger. The response is automatic and does not involving thinking. When either PTSD or the fight-or-flight response is operating, the individual is essentially on "autopilot." Rothenberg opined appellant suffered from PTSD and his reaction to the sucker punch in this case was consistent with the fight-or-flight response.

7. The Theory of the Prosecution.

In its opening statement, the prosecution stated it would present evidence that appellant shot Valdez once, a shot which incapacitated but did not kill him. Appellant then shot Valdez a second time, a shot which was the "kill shot."

In its closing argument, the prosecution argued, with respect to the second shot, that appellant, in a cold, calculated decision, walked up to the victim and put a round to the back of his head. The prosecution argued that when Valdez was not dead after the first shot, appellant "went back and hit him, punched him, and executed him." The prosecutor pointed out that after the second shot was fired, appellant gave no startled reaction and did not attempt to kick or punch the victim. The prosecutor commented, "[A]fter he intends to kill him, he's done."

8. The Theories of the Defense.

Appellant's experts testified that appellant's motions were consistent with him retrieving the pistol from the floor before he fired the second shot. Thus, appellant offered the jury several defense theories which he argued

were consistent with the evidence: he accidentally fired the second shot because of the easier trigger pull; he acted autonomically due to the fight-or-flight response; the punch triggered his PTSD, which caused him to shoot in response; and he acted in perfect or imperfect self-defense because Valdez, after sending threats of physical harm to him and Baez, not only provoked him verbally, but attacked him physically.

ISSUES

Appellant claims (1) the trial court erroneously denied his request for appointed counsel to prepare a new trial motion and to assist at sentencing; (2) there was insufficient evidence of premeditation and deliberation; (3) the trial court erred by failing to give a unanimity instruction on the first degree murder count; and (4) the sentencing minute order and abstract of judgment must be corrected as to the sentence imposed on the felon in possession of a firearm conviction.

DISCUSSION

1. *The Trial Court Properly Denied Appellant's Request To Rescind His Pro Per Status.*

a. Facts.

Appellant represented himself at trial, with assistance by counsel he retained to examine only the testifying experts. After trial, appellant asked the court to appoint the public defender to assist him with preparing and filing a new trial motion and to assist with sentencing. The court denied the motion.

In July 2011, when appellant was arraigned, the court appointed the public defender to represent him. In October 2011, the court granted appellant's request to represent himself. On June 29, 2012, the scheduled

date for appellant's preliminary hearing, the court granted appellant's request to be represented by retained counsel and continued the preliminary hearing. The preliminary hearing began in November 2012, with appellant represented by retained counsel. Appellant was held to answer.

On January 16, 2013, the trial court arraigned appellant on the information and granted appellant's request to represent himself. The court appointed private attorney Michael Morse as standby counsel. At a pretrial conference on September 12, 2013, appellant indicated that he wanted retained counsel, Matthew Horeczko, to represent him at trial. The trial court asked Horeczko if he could be ready for trial by the previously set trial date of October 7, 2013. Horeczko said he could not be ready for trial by that date.

The court advised appellant that Morse was familiar with the case and could try it by October 7, 2013. Appellant claimed Morse "knows absolutely nothing about this case." Appellant stated he and Morse had not once spoken with each other. The trial court denied appellant's request for a continuance so that Horeczko could represent him. The trial court stated, "If [appellant] wants counsel, there's one who can be ready shortly, and that's Mr. Morse." The court continued the case to October 2, 2013, for jury trial. On October 2, 2013, appellant told the court that notwithstanding the pitfalls of self-representation, he wanted to represent himself at trial.

November 7, 2013, was the first day of trial. At appellant's request, the court allowed Horeczko to represent appellant for the limited purpose of examining and cross-examining the expert witnesses. On November 8, 2013, during a break in the testimony of the People's second witness,[3] the

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[3] At trial, 17 witnesses testified for the People and 15 for appellant.

court granted appellant's request that Morse be relieved as standby counsel. On December 9, 2013, the jury convicted appellant.

On February 4, 2014, the court ordered appellant's new trial motion to be filed by February 21, 2014. It set March 4, 2014 as the hearing and sentencing date. When appellant objected that he could not be ready, the court indicated appellant had had ample time to bring the motion, but the court would give him additional time. The court also stated, "Just to be clear, we're going to handle everything on [March 4, 2014]."

On March 4, 2014, appellant told the court he wanted to be "represented once again by the public defender's office." A public defender, Judith Greenberg, was present. The court asked if appellant was requesting "[t]he help of the public defender's office in preparing a motion for new trial" and appellant replied yes.

The court summarized appellant's history of representation and then indicated it would not grant appellant's request for two reasons. First, if the court granted appellant's request, appellant's counsel would require preparation of the trial transcripts, resulting in months of delay, and the People had an interest in resolving the matter for the victim's family. Second, appellant had done a highly effective job of representing himself and his motions were as good as those of veteran attorneys.

Appellant argued his request was not a dilatory tactic; he himself would need the transcripts to prepare a new trial motion; he could not timely file the motion; he was "in over [his] head"; he had been forced to represent himself at trial; and a new trial motion was important. Appellant cited Ninth Circuit cases for the proposition that it was error to deny a request such as appellant's if it was not made in bad faith.

The court remarked that appellant's skill in articulating his point, his citation to authorities the court had not seen, and his familiarity with case law cited by the court, were proving the court's point about his effective self-representation. Appellant maintained his Sixth Amendment right to counsel entitled him to counsel in connection with his new trial motion and sentencing. The prosecutor commented that in the past when the court had ruled there would be no further continuances, appellant had asked for counsel, and had "used his pro per status as a tool in [effecting] delays in the prosecution of this case."

Ultimately, the trial court observed if it allowed appellant to be represented by counsel, it would appoint Morse because he had prepared the case for trial. The public defender agreed. The court indicated however that it would not appoint the public defender because another member of the office had previously created a conflict and appellant had previously "fired" the public defender's office. The court denied appellant's "motion to relinquish the pro per status" because granting it would incur delay and appellant had proven himself more than capable of making his legal arguments.

Appellant asked if the court was denying his right to counsel and if the court was refusing to let him relinquish his in propria persona status. The court replied, "Yes. Let me clarify, not denying your right to counsel. I'm honoring the choice you made repeatedly, which is to represent yourself."[4] The hearing was cut short and continued to the next day.

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[4] Later on March 4, 2014, Greenberg indicated appellant was "requesting the public defender's office because Mr. Morse has shown no interest in this case whatsoever, and I have never spoken to him," and Morse "was not here during the trial." The court indicated its ruling would

Appellant renewed his objections. The court pointedly told appellant, "I am going to make a factual finding here, which is I do not find you credible when you say you don't know what's going on here. You are the single most intelligent human being I have ever met in my life. I do not believe for a second that you do not understand these proceedings seeing as you have cited to me case law, chapter and verse, with more accuracy and more comprehensiveness than any lawyer who has ever appeared before me."

On April 23, 2014, appellant in propria persona filed a 177-page new trial motion. The trial court denied the motion with a detailed explanation of its decision.[5] The court rejected appellant's assertion that he had been denied his Sixth Amendment right to counsel, stating, "[y]ou did not avail yourself of the counsel that I would have appointed that you requested." Appellant again indicated he had been denied his right to counsel regarding his new trial motion, and said he wanted counsel for sentencing. The court stated, "You raise an issue that reminds me that I need to correct something you asserted before, which is that I denied you the right to counsel flat out. I noted that, if you wanted counsel, the one that you would get would be Mr. Morse, the standby counsel. What I denied was your right to select the actual lawyer who was going to represent you, if it was going to be a

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stand. On March 4, 2014, the court partially granted appellant's request for transcripts and ordered transcribed the trial testimony of six witnesses and the Evidence Code section 402 hearing proceedings with respect to Dr. Krell's proposed expert testimony.

[5] Appellant does not contend the trial court erred when it denied his motion for a new trial, except to the extent he argues the court denied him his right to counsel in connection with the motion.

publicly-appointed attorney." The court then found appellant had requested appointed counsel for a bad faith purpose.[6] The court sentenced appellant to prison for 50 years to life.

b. Analysis.

Appellant "claims the trial court erred in refusing to appoint counsel to represent him for sentencing and his new trial motion." We review for abuse of discretion a trial court's decision denying a defendant's request to change from self-representation to representation by court-appointed counsel. (*People v. Elliott* (1977) 70 Cal.App.3d 984, 993-994, 997 (*Elliott*).) To exercise meaningful discretion in ruling on a defendant's request to change from self-representation to counsel-representation, the court must consider relevant factors, which "should include, among others, the following:

(1) defendant's prior history in the substitution of counsel and in the desire to change from self-representation to counsel-representation, (2) the reasons set forth for the request, (3) the length and stage of the trial proceedings, (4) disruption or delay which reasonably might be expected to ensue from the granting of such motion, and (5) the likelihood of defendant's effectiveness

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6 The court stated, "I cited [*People v. Ngaue* (1991) 229 Cal.App.3d 1115], which states that generally speaking counsel should be appointed in a situation such as yours unless you're seeking representation for an improper purpose such as delay. I have the discretion to deny that request when it's made for a bad faith purpose[,] and factors such as your history . . . when it comes to substituting lawyers may bear on the determination as to whether such a purpose exists. I previously made the finding that I did." We understand the court to have indicated it denied appellant's request because he acted in bad faith, consistent with the court's previous finding on March 5, 2014, that it did not find appellant credible when he stated he did not understand the court proceedings.

in defending against the charges if required to continue to act as his own attorney." (*Id.* at pp. 993-994; *People v. Lawrence* (2009) 46 Cal.4th 186, 192 [same].) Ultimately, however, the court's discretion must be based not only on the listed relevant facts, but on the totality of the circumstances. (*People v. Gallego* (1990) 52 Cal.3d 115, 163-164.)

First, we note that appellant did not merely ask for court-appointed counsel. Having previously dismissed two court-appointed attorneys, including the public defender's office, he asked for a particular public defender to represent him in connection with his new trial motion and sentencing. Appellant has no right to a particular court-appointed attorney. (*People v. Young* (1987) 189 Cal.App.3d 891, 903.) Although appellant now disclaims on appeal that he only wanted the public defender's office or a particular attorney within that office, the record is clear that he wanted public defender Greenberg to represent him and he did not want standby counsel Morse to represent him.[7] The trial court also believed that appellant was requesting the appointment of the public defender's office only. In its May 1, 2014, written ruling denying the motion for new trial, the court stated: "At the outset, the Court again denies Defendant's request for the appointment of the Public Defender's Office to represent him on his motion for a new trial." The court did not abuse its discretion in denying appellant's request for the appointment of the public defender.

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7 " 'Standby counsel' is an attorney appointed for the benefit of the court whose responsibility is to step in and represent the defendant if that should become necessary because, for example, the defendant's in propria persona status is revoked." (*People v. Blair* (2005) 36 Cal.4th 686, 725.)

Second, even if appellant's request for court-appointed counsel can be considered a more generalized request for any appointed counsel, no abuse of discretion occurred. After appellant rejected the trial court's offer to reappoint Morse, the trial court not only considered the factors set out in *Elliott,* but concluded appellant made his request for appointed counsel in bad faith for purposes of delay. The record supports the court's conclusions. Three months after the initial arraignment on the complaint, the magistrate granted appellant's request to relieve the public defender and to represent himself. On the date scheduled for the preliminary hearing, the court granted appellant's request to change from self-representation to representation by retained counsel. The result was six months' delay before the preliminary hearing began. After being held to answer and at the arraignment on the information in January 2013, appellant again asked to represent himself, only to ask again on September 12, 2013, one month before the tentative trial date, that the court allow retained counsel Horeczko to represent him at trial. Appellant claimed, although he had never spoken to standby counsel Morse, that Morse knew nothing about the case and was unprepared for trial. Horeczko would have had to familiarize himself with the case. Appellant's unfounded complaints about his standby counsel permit the inference appellant simply wanted to delay proceedings.

On the second day of trial, appellant asked the court to relieve Morse as standby counsel so he could proceed in propria persona with limited assistance from Horeczko. The record again permits the inference that appellant asked the court to relieve Morse, thinking the court would be forced to appoint other counsel if he asked for representation in the future.

After trial, when the next big step was a motion for a new trial, appellant decided to switch again from self-representation to representation by counsel. Appellant's pattern of asking for counsel right before a major event in the case and then dismissing counsel thereafter was another reasonable basis upon which to conclude appellant was acting in bad faith for purposes of delay. Thus, the trial court reasonably could have viewed as fabricated appellant's March 4, 2014 assertion he had been forced to represent himself at trial.

Finally, the trial court remarked that it did not believe appellant's claim that he was "in over [his] head." The record completely belies appellant's statement and supports the trial court's conclusion that appellant knew what he was doing. Upon review of the record, we agree with the trial court that appellant's examination of the witnesses was succinct and focused. His motions were well-researched and well-argued. He was able to win for himself a severance of some of the original charges against him, charges which were later dismissed. In short, he showed a mastery of the facts and applicable law that belied any argument that he could not effectively represent himself post-trial and at sentencing. It was reasonable for the trial court to conclude, based on the court's consideration of the *Elliott* factors and the totality of the circumstances, that appellant's claims were not credible and he was acting in bad faith to delay the proceedings. The trial court did not abuse its discretion in denying appellant's bad faith request to relinquish his pro per status in connection with his new trial motion and sentencing.

2. *There Was Sufficient Evidence of Premeditation and Deliberation.*

Appellant claims there was insufficient evidence of premeditation and deliberation to support a conviction of first degree murder. In assessing the sufficiency of the evidence, we review the entire record in the light most favorable to the judgment to determine whether it discloses evidence that is reasonable, credible, and of solid value such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Johnson* (1980) 26 Cal.3d 557, 578.) Reversal on this ground is unwarranted unless it appears "that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction]." (*People v. Redmond* (1969) 71 Cal.2d 745, 755.)

"Deliberate" means arrived at as a result of careful thought and weighing of considerations for and against the proposed course of action, and "premeditated" means considered beforehand. (*People v. Perez* (1992) 2 Cal.4th 1117, 1123.) Deliberation and premeditation can occur in a brief period of time. The true test is not the duration of time as much as it is the extent of the reflection. (*People v. Thomas* (1945) 25 Cal.2d 880, 900.) "An intentional killing is premeditated and deliberate if it occurred as the result of preexisting thought and reflection rather than unconsidered or rash impulse." (*People v. Stitely* (2005) 35 Cal.4th 514, 543.) Thoughts can follow each other with great rapidity and cold, calculated judgment may be arrived at quickly. (*People v. Koontz* (2002) 27 Cal.4th 1041, 1080 (*Koontz*).

Our Supreme Court has identified three categories of evidence relevant to reviewing findings of first degree murder based on premeditation: (1) planning activity, that is, facts about a defendant's behavior before the killing that show prior planning of it; (2) motive, that

is, facts about the defendant's prior relationship, and/or conduct, with the victim from which the jury could infer a motive; and (3) the manner of killing, that is, facts about the manner of the killing from which the jury could infer that the defendant intentionally killed the victim according to a preconceived plan. (*People v. Hovarter* (2008) 44 Cal.4th 983, 1019; *People v. Anderson* (1968) 70 Cal.2d 15, 26-27.)

We find sufficient evidence of planning, motive, and manner of killing in support of the jury's findings of premeditation and deliberation. First, planning. Obtaining a weapon is evidence of planning consistent with a finding of premeditation and deliberation. (*Koontz, supra,* 27 Cal.4th at pp. 1081-1082.) Here, appellant brought a loaded Glock firearm into the Club and concealed it under a jacket while he sat at the table near the door.

Second, motive. Prior quarrels between a defendant and decedent and the making of threats by the former are competent to show the defendant's motive and state of mind. (*People v. Cartier* (1960) 54 Cal.2d 300, 311.) Here, there is ample evidence that the prior relationship between appellant and the victim consisted of numerous threatening and disparaging text messages they exchanged, including appellant's threats to kill the victim, his wife, and his children. The texting continued while appellant was in the Club. Indeed, appellant went so far as to make sure the victim knew he was in the Club and would not be coming outside. It is reasonable to infer appellant wanted to confront the victim on his own terms inside the Club with the weapon he had managed to get past security and concealed on his person.

Third, manner of killing. Shooting a victim in the back of the head in an execution-style murder is sufficient evidence of premeditation and deliberation. (*People v. Brady* (2010) 50 Cal.4th 547, 564.) Moreover, an assailant's use of a firearm against a defenseless person may show sufficient deliberation. (*People v. Bolin* (1998) 18 Cal.4th 297, 332-333 (*Bolin*).) Firing at vital body parts, including a person's face, can show preconceived deliberation. (Cf. *Bolin,* at p. 332.; *People v. Mayfield* (1997) 14 Cal.4th 668, 768; *People v. Thomas* (1992) 2 Cal.4th 489, 518.) Here, appellant fired the first shot directly at the unarmed victim's face; he fired the second shot from a standing position directly into the back of the victim's head while the victim lay face down, motionless, and unconscious. Appellant fired the second shot after cursing at, kicking, and pistol-whipping the victim who was prone on the floor. The manner of killing in this case supports a finding of premeditation and deliberation.

A jury may also determine whether premeditation exists by considering the assailant's immediate flight from the scene of the assault, the conduct of the assailant in neglecting to aid the victim, and efforts to conceal the weapon used. (*People v. Cook* (1940) 15 Cal.2d 507, 516; *People v. Clark* (1967) 252 Cal.App.2d 524, 529.) Here, appellant immediately fled the scene with Baez without aiding Valdez. They attempted to hide in bushes in a nearby park. Baez had the murder weapon in her purse when she was found. It is reasonable to infer that appellant gave the Glock to Baez in an attempt to conceal it.

The record is replete with sufficient evidence to convince a rational trier of fact, beyond a reasonable doubt, that appellant murdered Valdez with premeditation and deliberation and not, as he contends, as a result of

PTSD, flight-or-fight response, accident, or unconsidered or rash impulse. None of the cases cited by appellant, nor the fact there may have been evidence to the contrary, compels a different conclusion.

3. *The Court Did Not Err by Failing to Give an Additional Unanimity Instruction as to the Murder Count.*

Appellant was charged with one count of murder. The videotape of the shooting showed that appellant shot Valdez twice. Valdez was alive when appellant shot him a second time. Both expert coroners testified the second shot was definitely fatal; they were unsure about whether the first shot was in and of itself fatal, without the second shot. Prosecution expert, Dr. Riley, believed a person receiving medical treatment for the first shot would have had a good chance of surviving; however, the possibility for fatality from the first shot existed. Defense expert, Dr. Sheridan, testified that the first shot "could" have been fatal on its own, but we would never know for sure whether that bullet would have been fatal on its own because there was a second [bullet]." According to Dr. Sheridan, Valdez was alive at the time of the second shot, which was "definitely a fatal shot."

During closing argument, the People argued Valdez was alive when appellant fired the second bullet at Valdez's head and that there was no evidence that Valdez was dead after the first shot alone. The People's theory was there was no evidence the first shot killed Valdez. Appellant argued to the jury he fired the first shot to Valdez's chin in self-defense. He also argued the first shot was "pure reflex" and a product of "robotic outrage." Appellant noted the psychiatrist's testimony a person impacted by PTSD and the fight-or-flight response would "go on automatic."

Appellant urged that, after the first shot, he dropped the gun and, when he picked it up, unintentionally fired it.

The court gave a standard unanimity instruction applicable to both counts, i.e., CALCRIM No. 3500.[8] Nevertheless, appellant argues the jury could have convicted him of murder without all jurors agreeing on the same shot as the fatal shot. He argues the trial court should have given a unanimity instruction on this specific point as to the murder count. We disagree.

First, we note appellant did not object to the challenged instruction. Appellant has waived the asserted instructional ambiguity by failing to request clarifying language. (Cf. *People v. Nguyen* (2015) 61 Cal.4th 1015, 1051; *People v. Palmer* (2005) 133 Cal.App.4th 1141, 1156.)

Second, "[a] defendant challenging an instruction as being subject to erroneous interpretation by the jury must demonstrate a reasonable likelihood that the jury understood the instruction in the way asserted by the defendant." (*People v. Cross* (2008) 45 Cal.4th 58, 67-68.) The correctness of a jury instruction is to be determined from the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction. (*People v. Carrington* (2009) 47 Cal.4th 145, 192.)

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[8] CALCRIM No. 3500 stated, "The defendant is charged with *murder* in Count 1 and with *possession of a firearm by a felon* in Count 2. [¶] The People have presented evidence of more than one act to prove that the defendant committed *this offense*. You must not find the defendant *guilty* unless you all agree that the People have proved that the defendant committed at least one of these acts and you all agree on which act he committed." (Italics added.) The court also instructed on murder, first degree murder, and voluntary manslaughter based on the theories of sudden quarrel, heat of passion, imperfect self-defense, self-defense, and accident.

Here, there is no reasonable likelihood that some jurors could say the first shot alone killed Valdez and other jurors could say the second shot alone killed Valdez. The jury here reasonably would have understood the unanimity instruction that was given as referring to evidence of multiple acts presented to prove murder and evidence of multiple acts presented to prove the possession charge. As to the murder charge, Valdez was shot in the chin and was shot in the back of his head. However, there was no substantial evidence by which the jury could have concluded that the first shot alone killed Valdez. Dr. Riley and Dr. Sheridan each testified the first shot was *possibly* fatal, but each was unwilling to ascribe a higher probability of lethality to that shot alone. In other words, if the first shot contributed to Valdez's death, it did so only in combination with the second shot, which was sufficient by itself to kill Valdez.[9] Therefore, there is no reasonable likelihood that the jury disagreed on which shot actually killed Valdez. The testimony at trial does not support appellant's theory and does not compel giving a pinpoint unanimity instruction.

Nevertheless, assuming arguendo that either bullet was the fatal bullet, as a general rule when a violation of a criminal statue is charged and the evidence establishes several acts, any one of which could constitute the crime charged, either the state must select the particular act upon which it relies for the allegation of the information, or the jury must be instructed that it must agree unanimously upon which act to base a verdict of guilty. (*People v. Jennings* (2010) 50 Cal.4th 616, 679 (*Jennings*); *People v.*

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[9] If the first shot did not contribute to Valdez's death, no unanimity instruction was required because Valdez was killed by the second shot alone.

Diedrich (1982) 31 Cal.3d 263, 281.) A requirement of jury unanimity typically applies to acts that could have been charged as separate offenses. (*People v. Maury* (2003) 30 Cal.4th 342, 422 (*Maury*)).

There are several exceptions to the rule requiring a unanimity instruction. For example, no unanimity instruction is required if the case falls within the continuous-course-of-conduct exception, which arises when the acts are so closely connected in time as to form part of one transaction. (*Jennings, supra,* 50 Cal.4th at p. 679; *People v. Crandell* (1988) 46 Cal.3d 833, 875 (*Crandell*).) The exception applies here.

In *Jennings*, the defendant was charged with the torture death of his son. The coroner (coincidentally Dr. Sheridan) testified that there were several causes of death, including combined drug toxicity, and acute and chronic physical abuse and neglect. The victim had numerous physical injuries -- one a few weeks old and one six hours old; he had three drugs in his blood system, all central nervous system depressants; and he had acute pneumonia at the time of his death and hemorrhaging around the optic nerves of the back of his eyes. Dr. Sheridan gave the cause of death as "the entire problem" -- the drugs, physical injuries, malnutrition, and emaciation.

Defendant argued a unanimity instruction was required because of the evidence of so many different acts and causes of death. The court found that a unanimity instruction was not necessary because the prosecutor proceeded on a "course of conduct" theory, arguing that the cumulative effect of the torture began in November and ended with the victim's death the following February. (*Jennings, supra,* 50 Cal.4th at pp. 679-680.)

Here, the prosecution argued a similar continuous-course-of-conduct theory, to wit, appellant went to the Club with an intent to kill Valdez. The expert testimony bears out the People's theory. Appellant fired the first shot and finished seconds later with punches, kicks, pistol-whipping, and, ultimately, a second execution-style shot. Dr. Riley testified the first shot "would not be expected to be rapidly fatal in and of itself." Dr. Riley opined further there would be a good chance of survival if the victim received medical treatment. According to Dr. Riley, Valdez "died as a result of these injuries due to . . . these two gunshot wounds." Thus, the two shots were not multiple independent acts, any of which could have led to Valdez's death, but were part of a continuous course of conduct, so closely connected in time as to form part of one transaction.

Dr. Sheridan's testimony also supports the continuous-course-of-conduct theory. He testified that the first shot could have been fatal on its own, but we would never know for sure whether that bullet would have been fatal on its own because there was a second one. If there had been only one shot, Valdez could have died from that shot. Dr. Sheridan was not absolutely sure whether Valdez "would or not," but it was a definite possibility. Dr. Sheridan testified we would never know if the first shot caused a lot of bleeding because everything happened so quickly and we had a second shot. He also testified the second shot was definitely a fatal shot. Based on this testimony, the continuous-course-of-conduct exception to the unanimity instruction rule applies. No further unanimity instruction was required. (Cf. *Maury, supra,* 30 Cal.4th at p. 423.)

Given the substantial evidence in support of the continuous-course-of-conduct theory and the lack of evidence in support of appellant's theory

that each shot independently killed Valdez and must therefore be considered separately, the court had no obligation to give a pinpoint unanimity instruction sua sponte.

Finally, even if the unanimity instruction given by the trial court was erroneous, the error is harmless. Appellant's defense was the first shot was fired in self-defense or as the result of a "robotic outrage" suggestive of voluntary manslaughter, and the second shot was the product of an unintended discharge of the gun. However, the jury, by its finding of premeditation and deliberation, implicitly rejected any defense evidence consistent with self-defense (*Crandell, supra,* 46 Cal.3d at p. 874) or voluntary manslaughter (*People v. Carasi* (2008) 44 Cal.4th 1263, 1306 [heat of passion]; *People v. Manriquez* (2005) 37 Cal.4th 547, 582 [imperfect self-defense].) Any error by the trial court in failing to give a unanimity instruction as to the two shots in light of the jury's rejection of the defense state of mind evidence was harmless under any conceivable standard.

4. The Abstract of Judgment and Sentencing Minute Order Must Be Corrected.

At sentencing, the court orally imposed a two-year concurrent middle term on the conviction for felon in possession of a firearm. The April 23, 2014, sentencing minute order and the abstract of judgment erroneously reflect the court imposed a three-year concurrent upper term. We order the correction of the minute order and abstract of judgment to reflect the two-year concurrent middle term.

DISPOSITION

The judgment is affirmed. The trial court is directed to amend its April 23, 2014 minute order and the abstract of judgment to reflect the court imposed a two-year concurrent middle term on count 5, and the trial court is directed to forward the amended abstract of judgment to the Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

STRATTON, J.*

We concur:

ALDRICH, Acting P. J.

LAVIN, J.

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

APPENDIX B

JS-6

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

RAMONTA FORTE,

Petitioner,

v.

J. LIZARRAGA, Warden,

Respondent.

Case No. 2:19-cv-04166-MWF (AFM)

JUDGMENT

This matter came before the Court on the Petition of RAMONTA FORTE, for a writ of habeas corpus. Having reviewed the Petition and supporting papers, and having accepted the findings and recommendation of the United States Magistrate Judge,

IT IS ORDERED AND ADJUDGED that the Petition is denied and the action is dismissed with prejudice.

DATED: July 31, 2020

MICHAEL W. FITZGERALD
UNITED STATES DISTRICT JUDGE

APPENDIX B

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

RAMONTA FORTE,

Petitioner,

v.

J. LIZARRAGA, Warden,

Respondent.

Case No. 2:19-cv-04166-MWF (AFM)

ORDER ACCEPTING FINDINGS AND RECOMMENDATIONS OF UNITED STATES MAGISTRATE JUDGE

Pursuant to 28 U.S.C. § 636, the Court has reviewed the Petition, records on file and the Report and Recommendation ("Report") of United States Magistrate Judge. Further, the Court has engaged in a *de novo* review of those portions of the Report to which objections have been made.

Petitioner's objections are overruled. With the exception of the following non-substantive point, Petitioner's objections do not warrant discussion as they are properly addressed in the Report. Petitioner notes that in its summary of the trial court proceedings, the Report states that the trial court granted Petitioner's request for a continuance on October 2, 2013, but the trial court actually continued the matter for other reasons. (ECF No. 43 at 19.) Accordingly, the sentence beginning at line 13 of page 14 of the Report is replaced with the following:

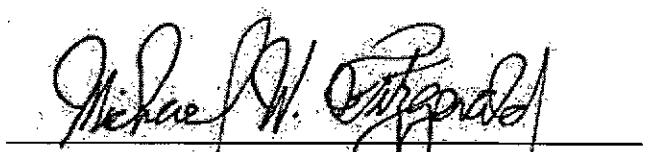
"Petitioner sought a continuance, explaining that some of his experts needed

more time to complete their reports. Although the trial court did not explicitly rule on Petitioner's request, the matter was nonetheless continued. (*See* ECF No. 377-378; ECF No. 17-29 at 32-43, 53-54.)"

With the foregoing alteration, the Court accepts the findings and recommendations of the Magistrate Judge.

IT THEREFORE IS ORDERED that (1) the Report and Recommendation of the Magistrate Judge is accepted and adopted; and (2) Judgment shall be entered denying the Petition and dismissing the action with prejudice.

DATED: July 31, 2020



MICHAEL W. FITZGERALD
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

RAMONTA FORTE,

Petitioner,

v.

J. LIZARRAGA, Warden,

Respondent.

Case No. 2:19-cv-04166-MWF (AFM)

ORDER DENYING APPLICATION FOR CERTIFICATE OF APPEALABILITY (ECF No. 52)

On July 31, 2020, judgment was entered denying Petitioner's petition for a writ of habeas corpus. (ECF No. 45.) On the same date, the Court denied a certificate of appealability. (ECF No. 46.) Petitioner subsequently filed a notice of appeal.

On September 16, 2020, Petitioner filed an Application for a Certificate of Appealability ("COA"). (ECF No. 52.) Pursuant to 28 U.S.C. § 2253(c)(2), a Certificate of Appealability ("COA") may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." The Supreme Court has held that this standard means a showing that "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *See Slack v. McDaniel*, 529 U.S. 473, 483-484 (2000) (internal

quotation marks omitted). As the Court previously determined, Petitioner has not made such a showing. Rather, after duly considering Petitioner's contentions in support of the claims alleged in the Petition, his objections to the Report and Recommendation, as well as his Application for a Certificate of Appealability, the Court finds that Petitioner has not shown that reasonable jurists would find it debatable that the petition should have been resolved in a different manner or that the issues presented deserve encouragement to proceed further. Accordingly, Petitioner's Application is denied.

It is so ordered.

DATED: September 22, 2020

MICHAEL W. FITZGERALD
UNITED STATES DISTRICT JUDGE

APPENDIX D

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

NOV 16 2021

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

RAMONTA FORTE, Petitioner-Appellant, v. JOE A. LIZARRAGA, Warden, Respondent-Appellee.	No. 20-55940 D.C. No. 2:19-cv-04166-MWF-AFM Central District of California, Los Angeles ORDER

Before: NGUYEN and FORREST, Circuit Judges.

The request for a certificate of appealability (Docket Entry No. 5) is denied because appellant has not made a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *see also Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

Any pending motions are denied as moot.

DENIED.

APPENDIX D

APPENDIX E

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

RAMONTA FORTE,

Petitioner,

v.

J. LIZARRAGA, Warden,

Respondent.

Case No. 2:19-cv-04166-MWF (AFM)

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

This Report and Recommendation is submitted to the Honorable Michael W. Fitzgerald, United States District Judge, pursuant to 28 U.S.C. § 636 and General Order 05-07 of the United States District Court for the Central District of California.

INTRODUCTION

Petitioner, a state prisoner, filed this petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Respondent filed an answer addressing the merits of the petition, and Petitioner filed a reply. For the following reasons, the petition should be denied.

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BACKGROUND

Petitioner was charged with the murder of Tommy Valdez. The following evidence was presented at trial.[1]

On the evening of July 15, 2011, victim Tommy Valdez and two other men entered the VIP Showgirls Club (Club) and fanned out around Petitioner, who was seated at a table near the door. Valdez went directly up to Petitioner and sucker punched him. Petitioner pulled out a gun and shot Valdez in the chin. Valdez fell to the floor, face down and motionless. Petitioner paced, then cursed at, hit, kicked, and pistol-whipped Valdez. Petitioner fired a second shot into the back of Valdez's head. The entire incident lasted three to four seconds. Amazingly, it was precipitated, as set out below, by a party gone awry and a subsequent month of hundreds of taunting, derogatory, and threatening text messages exchanged by Petitioner, Ana Baez (Petitioner's girlfriend), Valdez, and Ani Abramyan (Valdez's wife).

Petitioner represented himself at trial.

1. A Month of Escalating Tension.

In June 2011, Abramyan and Valdez lived in Santa Clarita with their children. Abramyan worked as a dancer at the Club in North Hollywood under the stage name "Miracle"; Valdez had just lost his job as a medical biller. Valdez was an ex-gang member who had covered his gang tattoos when he married Abramyan. They were experiencing "normal" marital problems.

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[1] The following factual summary is taken from the opinion of the California Court of Appeal. *See Brown v. Horell,* 644 F.3d 969, 972 (9th Cir. 2011) (state appellate court's factual summary is entitled to a presumption of correctness pursuant to 28 U.S.C. § 2254(e)(1)). The Court has independently reviewed the record, which confirms that the state appellate court's summary of the evidence is a fair and accurate one. The Court has substituted "Petitioner" for "Appellant" throughout.

In June 2011, Ana Baez and Petitioner lived in North Hollywood. Baez worked with Abramyan as a dancer at the Club under the stage name "Baby." According to Baez, Petitioner was bipolar and "always trip[ping]."

That month, Baez and Petitioner invited Abramyan and Valdez over for dinner. A few weeks later, Abramyan and Valdez returned the favor; they invited Baez and Petitioner to their townhome for a barbeque. During the party, Valdez's African–American neighbor, Scoop, dropped by. Petitioner became angry when he saw Valdez welcome Scoop into the residence. In front of Scoop, Petitioner asked what "this fucking mayate" (a disrespectful term for an African–American) was doing here. Abramyan and Valdez explained that Scoop was their friend, indeed "like a brother" to Valdez. Scoop left. The encounter was awkward. The party ended early.

Two weeks later, Baez asked Abramyan for a ride to work. They met at a park near Baez's residence. Baez was with Petitioner at the park. Baez asked Abramyan to get out of the car so Petitioner could see she was leaving with another woman. Petitioner offered Abramyan a beer, which she declined. Petitioner started to disparage Abramyan's husband, Valdez, saying, "Fuck your hoe-ass husband. He's a bitch. He's not about shit." Baez tried, unsuccessfully, to intervene. Abramyan told Baez she would have to find another way to work. As Abramyan was leaving, Petitioner yelled, "Hoe, I'm going to get you. I'm going to catch you slipping at the club. Bitch, watch out. I'll get you at VIP." After this incident, Baez and Abramyan exchanged text messages. Baez stated she hoped the two of them could remain friends despite Petitioner's outburst, which Baez attributed to Petitioner being bipolar. Later that day, Abramyan texted Valdez about Petitioner's remarks at

the park. Valdez texted back, "I'm so mad I can't stop shaking. I want to kill that fool.... I'm just so pissed off. I never disrespected that fool."

Baez asked Abramyan for Valdez's telephone number. Abramyan provided it. Valdez and Petitioner then embarked on an escalating flurry of voice and text messages to each other, Abramyan, and Baez. A few days before the night of the shooting, Abramyan listened by speaker phone while Petitioner told Valdez he was going to kill her and their children in front of Valdez and then "smoke" Valdez. Valdez also showed Abramyan text messages that Petitioner had sent him using both his phone and Baez's phone. Petitioner also texted Abramyan directly, threatening to come to the house and get them. Baez texted Abramyan as well, saying Valdez should "come now or [Petitioner was] going to catch him later," which Abramyan interpreted as a threat. Abramyan got her digs in as well, texting that Petitioner was a "pussy ass fool." All in all, hundreds of text messages were exchanged among the two men and two women in a span of six weeks.

On July 13, 2011, two days before the fatal shooting, Valdez showed up at the Club in response to Petitioner's challenge to fight. Petitioner, however, was not there. By text, Valdez boasted that Petitioner had failed to appear because he was scared of Valdez. Valdez and Petitioner continued to exchange derogatory insults and aggressive threats and challenges to fight.

2. The Shooting.

On July 15, 2011, the date of the shooting, both men exchanged insulting, provocative, and threatening text messages. That night, Abramyan was working at the VIP Club. With his wife working that night, Valdez, with his cousin Paulina, were hosting a barbeque at his home when Petitioner texted him to come to the VIP Club or else

Petitioner would kill Abramyan when he saw her on stage. Valdez also received a text and a separate telephone call from a security guard at the Club who told him Petitioner was at the Club. Valdez immediately dropped everything, texted his friends to meet him at the Club, told his guests he would be back soon, and drove off. Valdez texted Abramyan to tell her he was coming to the Club because Petitioner had told him he was going to harm her. Abramyan told Club security not to let Valdez inside. When Valdez arrived, she went out to the entrance, gave him gas money so he would not come inside, and went back inside alone.

When Valdez arrived at the Club, Petitioner was inside the building. Texting ensued between the two men. Valdez asked a security guard he knew, Misael Carrera, to tell Petitioner to come outside because he wanted to see him. Carrera told Petitioner that someone outside wanted to see him outside the Club. Petitioner refused to leave the Club, responding, "I'm not stupid." Valdez then tried to enter the building, but the security guard at the main entrance would not admit him. One of the bouncers told Valdez that if he wanted to get Petitioner, he should go through the other entrance. Valdez and his two friends immediately ran around the building to the other entrance. They burst into the Club. Petitioner was seated near the secondary entrance with his jacket on his lap.

Valdez ran up to Petitioner and sucker punched him in the mouth. Petitioner shot Valdez in the chin. Valdez fell on his stomach and did not attempt to get up. Petitioner stood over Valdez and paced. Petitioner cursed at Valdez, hit or kicked him a few times, and pistol-whipped him. While standing over the motionless, prone Valdez, Petitioner shot him in the back of the head.[1] Three to four seconds elapsed between the shots.

[1] The Club's video equipment recorded from several different angles the altercation between Valdez and Petitioner, and the shooting. The videos were shown at trial.

3. The Aftermath.

Baez was at the Club during the shooting. After the shooting, Petitioner found her and they left the Club together. As he exited, Petitioner told one of the security guards, "I just shot that mother-fucker. I think I just killed that mother-fucker." Petitioner and Baez ran to a nearby park. Police saw the two sitting under bushes. Petitioner and Baez conversed as police approached. Baez fled. Police arrested Petitioner under the bushes. They found Baez hiding a short distance away. She had a duffle bag containing a loaded .40–caliber Glock pistol and a backpack containing a loaded .38–caliber revolver. Police recovered spent .40–caliber cartridges from around Valdez's body. The cartridges were fired from the Glock pistol.

4. The Coroners' Reports.

Los Angeles County Deputy Medical Examiner Solomon L. Riley, Jr., M.D., autopsied Valdez's body. Valdez sustained two close range gunshot entry wounds to the head. One was to the left chin and the other was to the back of the head. Dr. Riley testified the cause of death was the gunshot to the back of the head. He also stated Valdez died as a result of "these two gunshot wounds."

According to Dr. Riley, the chin wound came from a gun fired less than a foot from the chin. The wound would not be expected to be rapidly fatal in and of itself and a person receiving medical treatment for the wound would have had a good chance of surviving the injury. Any wound involving the head and mouth "could" be fatal. Dr. Riley opined the chin wound "would not be fatal as rapidly as the one to the

back of the head would be." Dr. Riley also testified "the possibility for fatality from this single wound exists."

The gunshot entry wound to the back of the head was very close to the middle of the back of the head. The exit wound was behind the left temple. The distance between the gun and the head wound was a little more than the distance between the gun and the chin wound. According to Dr. Riley, it was "highly unlikely" Valdez could have survived the wound to the back of his head.

A second coroner appeared as a witness on behalf of Petitioner. Frank Sheridan, M.D., the Chief Medical Examiner for San Bernardino County, testified both shots were fired when the firearm was about a foot or a foot-and-a-half from Valdez's head. The first shot to the chin rendered Valdez immediately unconscious and "clearly dropped him." The first shot "could" have been fatal on its own. Dr. Sheridan testified "we'll never know for sure whether that bullet would have been fatal on its own because there was a second [bullet]." Valdez was alive at the time of the second shot. The second shot entered the left rear portion of Valdez's head and [was] "definitely a fatal shot."

5. Firearms Analysis.

Amy Antaya, a criminalist employed by the Los Angeles Police Department, testified at least seven pounds of force were required to pull the trigger on the Glock pistol. By contrast, Dr. Bruce Krell, a firearms expert for the defense, testified four and one-half pounds of force were required to pull the trigger on the Glock pistol. This was a relatively lighter pull. Dr. Krell's measurements of trigger pull were consistently different from those of the Los Angeles Police Department because of the inherent inaccuracy of the weights. He suggested measurements were inaccurate below three-quarters of a pound and he acknowledged

there was a big difference between seven pounds and four pounds. Dr. Krell suggested that Petitioner may have accidentally fired the fatal second shot because of the easier trigger pull. Dr. Krell also assumed that Petitioner had retrieved the firearm from the ground between the first and second shots.

6. Mental State Testimony.

Dr. Jack Rothberg, a forensic psychiatrist, testified Petitioner suffered from post-traumatic stress disorder (PTSD). He also testified human beings experience an autonomic "[fight-or-flight]" response to life-threatening danger. The response is automatic and does not involving thinking. When either PTSD or the fight-or-flight response is operating, the individual is essentially on "autopilot." Rothenberg opined Petitioner suffered from PTSD and his reaction to the sucker punch in this case was consistent with the fight-or-flight response.

7. The Theory of the Prosecution.

In its opening statement, the prosecution stated it would present evidence that Petitioner shot Valdez once, a shot which incapacitated but did not kill him. Petitioner then shot Valdez a second time, a shot which was the "kill shot."

In its closing argument, the prosecution argued, with respect to the second shot, that Petitioner, in a cold, calculated decision, walked up to the victim and put a round to the back of his head. The prosecution argued that when Valdez was not dead after the first shot, Petitioner "went back and hit him, punched him, and executed him." The prosecutor pointed out that after the second shot was fired, Petitioner gave no startled reaction and did not attempt to kick or punch the victim. The prosecutor commented, "[A]fter he intends to kill him, he's done."

8. The Theories of the Defense.

Petitioner's experts testified that Petitioner's motions were consistent with him retrieving the pistol from the floor before he fired the second shot. Thus, Petitioner offered the jury several defense theories which he argued were consistent with the evidence: he accidentally fired the second shot because of the easier trigger pull; he acted autonomically due to the fight-or-flight response; the punch triggered his PTSD, which caused him to shoot in response; and he acted in perfect or imperfect self-defense because Valdez, after sending threats of physical harm to him and Baez, not only provoked him verbally, but attacked him physically.

(ECF No. 18-4 at 2-8.)

The jury found Petitioner guilty of first-degree murder and possession of firearm by a felon. The jury also found true the firearm allegations. (Clerk's Transcript ("CT") 512-514.) In a separate proceeding, Petitioner admitted that he had suffered a prior serious conviction. He was sentenced to state prison for a term of 50 years to life. (ECF No. 1 at 2; CT 778-782.)

After the California Court of Appeal affirmed Petitioner's conviction (ECF No. 18-4), the California Supreme Court summarily denied review. *See* https://appellatecases.courtinfo.ca.gov (Case No. S238461.)[2] Petitioner filed a series of habeas corpus petitions in state court, all of which were denied. (ECF Nos. 18-7 through 18-15.)

PETITIONER'S CLAIMS

Petitioner alleges the following grounds for relief:

1. The trial court erred by refusing to appoint counsel for purposes of a new trial motion and for sentencing. (ECF No. 1 at 5; ECF No. 3 at 27-52.)

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[2] The document Respondent identifies as the California Supreme Court's denial – namely, Lodged Document 8 – is a second copy of the opinion of the California Court of Appeal. (ECF No. 18-6.)

2. The evidence was insufficient to support Petitioner's conviction of first-degree murder. (ECF No. 1 at 5-6; ECF No. 3 at 53-73.)

3. The trial court erroneously denied Petitioner counsel of choice. (ECF No. 1 at 6; ECF No. 3 at 74-87, ECF No. 3-1 at 1-30.)

4. The trial court erroneously denied Petitioner a continuance, thereby depriving him of his right to present a complete defense and his right to the effective assistance of counsel. (ECF No. 1 at 6; ECF No. 3-1 at 31-58.)

5. The trial court erred by failing to instruct the jury on the theory of unconsciousness. (ECF No. 1 at 6; ECF No. 3-1 at 59-69.)

6. Petitioner received ineffective assistance of counsel on appeal because counsel failed to raise the claims in Grounds Three, Four, and Five. (ECF No. 1 at 7; ECF No. 3-1 at 70-79; ECF No. 3-2 at 1-7.)

STANDARD OF REVIEW

A federal court may not grant a writ of habeas corpus on behalf of a person in state custody

> with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

As used in section 2254(d)(1), the phrase "clearly established federal law" includes only the holdings, as opposed to the dicta, of Supreme Court decisions existing at the time of the state court decision. *Howes v. Fields*, 565 U.S. 499, 505 (2012) (citing *Williams v. Taylor*, 529 U.S. 362, 412 (2000)).

Under section 2254(d)(1), a state court's determination that a claim lacks merit precludes federal habeas relief so long as "fairminded jurists could disagree" about the correctness of the state court's decision. *Harrington v. Richter*, 562 U.S. 86, 101 (2011) (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)). This is true even where a state court's decision is unaccompanied by an explanation. In such cases, the petitioner must show that "there was no reasonable basis for the state court to deny relief." *Harrington*, 562 U.S. at 98. Review of state court decisions under § 2254(d)(1) "is limited to the record that was before the state court that adjudicated the claim on the merits." *Cullen v. Pinholster*, 563 U.S. 170, 180 (2011).

Under section 2254(d)(2), relief is warranted only when a state court decision based on a factual determination is "objectively unreasonable in light of the evidence presented in the state-court proceeding." *Stanley v. Cullen*, 633 F.3d 852, 859 (9th Cir. 2011) (quoting *Davis v. Woodford*, 384 F.3d 628, 638 (9th Cir. 2004)). Further, state court findings of fact – including a state appellate court's factual summary – are presumed correct unless rebutted by clear and convincing evidence. 28 U.S.C. § 2254(e)(1); *see Vasquez v. Kirkland*, 572 F.3d 1029, 1031 n.1 (9th Cir. 2009).

Petitioner raised Grounds One and Two on direct appeal. Because the California Supreme Court summarily denied Petitioner's petition for review, the California Court of Appeal's decision constitutes the relevant state court adjudication for purposes of the AEDPA. *See Berghuis v. Thompkins*, 560 U.S. 370, 380 (2010); *Ylst v. Nunnemaker*, 501 U.S. 797, 806 (1991). Petitioner raised Grounds Three through Six in habeas corpus petitions filed in the state courts. (ECF Nos. 18-7 through 18-15.) The California Supreme Court denied the petition without explanation. (ECF No. 18-15.) Again, this Court looks through the unexplained denial by the California Supreme Court to the decision of the California Court of Appeal. That court denied Ground Six on the merits (ECF No. 18-12), so its decision is the relevant one for purposes of AEDPA review. However, it denied Grounds

Three, Four, and Five on procedural grounds. (ECF No. 18-12.)[3] Consequently, this Court reviews these claims *de novo*. *See Cone v. Bell*, 556 U.S. 449, 472 (2009). With respect to Grounds Four and Five, Respondent suggests that the relevant state court decision is the Los Angeles County Superior Court's reasoned denial. Respondent cites no authority, however, for the proposition that a federal court should look through a higher court's procedural denial to a lower court's merits denial. Because the California Court of Appeal stated its reasons – procedural reasons – for rejecting these three claims, there was no "unexplained" denial that would support application of the look-through presumption. *See Mejia v. Foulk*, 2015 WL 391688, at *8 (C.D. Cal. Jan. 28, 2015) (rejecting state's argument that federal court should look through a higher state court's procedural denial of a habeas corpus petition to a lower court's merits denial); *Gilbert v. McDonald*, 2013 WL 3941337, at *11 (E.D. Cal. July 30, 2013) (same). Accordingly, the Court reviews Claims Three, Four, and Five *de novo*.

DISCUSSION

I. Denial of Petitioner's Request for Counsel

Petitioner contends that the trial court deprived him of his Sixth Amendment right to counsel by denying his request for appointed counsel to represent him in his motion for a new trial and at sentencing. (ECF No. 1 at 5; ECF No. 3 at 27-52.)

A. Factual Background

Petitioner was arraigned in July 2011. On that date, the trial court appointed the public defender's office to represent Petitioner. (Augmented Clerk's Transcript ("ACT") 1.) In October 2011, the trial court granted Petitioner's request to represent himself. (ACT 18-19.) After the trial court granted Petitioner numerous continuances, the preliminary hearing was set for June 29, 2012. (*See* ACT 20, 27-28, 31, 36, 43,

[3] Respondent argues that federal review of Grounds Three through Five is precluded by the doctrine of procedural default. (ECF No. 16 at 22-27.) Because the Court concludes that Petitioner is not entitled to relief on the merits of these claims, it need not resolve the procedural defense. *See Lambrix v. Singletary*, 520 U.S. 518, 525 (1997) (court may address merits of claims rather than resolve procedural issues where doing so serves interest of judicial economy).

58-59.) On that date, Petitioner moved to relinquish his right to self-representation and proceed with retained counsel, William Nimmo. The trial court granted Petitioner's request and continued the preliminary hearing. (ACT 61.) The trial court granted Nimmo's motions to continue the preliminary hearing. (ACT 62, 68-69, 73-74.) Eventually, the preliminary hearing was conducted, at which Petitioner was represented by Nimmo. On January 2, 2013, Petitioner was held to answer on the charges. (ACT 78-83.)

On January 16, 2013, Petitioner informed the court that he wanted to represent himself at trial. Petitioner completed a *Faretta*[4] waiver form, and the trial court orally advised him of the dangers and disadvantages of representing himself. The trial court granted Petitioner's request to represent himself, but appointed Michael Morse as standby counsel. The court explained that Morse's "sole purpose is, at any point you change your mind, it won't cause any delays, there's a lawyer who is up to speed on the case, who's ready to step in, and in that way avoid any delay." (CT 264-265; Reporter's Transcript on Appeal ("RT") A2-A17.)

At a pretrial conference on September 12, 2013, Petitioner indicated that he wanted retained counsel, Matthew Horeczko, to represent him at trial. The trial court asked Horeczko if he could be ready for trial within the next 23 days. Horeczko said he could not be ready by then. The trial court advised Petitioner that Morse was familiar with the case and could try it by October 7, 2013. Petitioner complained that Morse "knows absolutely nothing about this case," and said that he and Morse had never spoken with each other. The trial court denied Petitioner's request for a continuance so that Horeczko could represent him. As it explained, the court could not require counsel to go to trial if he did not feel he could be ready. If Petitioner desired to be represented by counsel, Petitioner could proceed with Morse, who had been present at the proceedings and was prepared to go to trial. Thus, the trial court

[4] *Faretta v. California*, 422 U.S. 806, 807 (1975).

told Petitioner he had three options: he could represent himself, he could be represented by Morse, or he could find another attorney who would be ready in 23 days. Petitioner attempted to have Horeczko appointed as standby counsel, but the trial court told him that standby counsel needed to be able to take the case to trial at whatever point was necessary, and Horeczko already had represented that he would be unable to do so. The parties were ordered to return on October 2, 2013, with the expectation that voir dire would begin the following day. (ECF No. 17-29 at 5-31.)[5]

On October 2, 2013, Petitioner reaffirmed that notwithstanding the pitfalls of self-representation, he wanted to represent himself at trial. (ECF No. 17-29 at 32.) Petitioner requested that the court allow Horeczko to serve as advisory counsel. The court granted Petitioner's request, but clarified that it would not make any continuances based upon Horeczko's unavailability. Petitioner agreed. In addition, Petitioner sought a continuance, explaining that some of his experts needed more time to complete their reports, and the trial court granted his request. (CT 377; ECF No. 17-29 at 32-43, 53-54.)

On November 1, 2013, at what the trial court stated was a "final status check," Petitioner sought an additional two-month continuance. The trial court denied Petitioner's request. It noted that Petitioner's stand-by counsel, Morse, would not be available indefinitely. The trial court reminded Petitioner that he chose to represent himself. Furthermore, it noted that Petitioner had two and a half years to prepare for trial. (RT B1, B6-B19, B38, B44-B45, B66-B73.)

On November 4, 2013, the trial court granted Petitioner's request that Horeczko be allowed to sit with him at counsel table during voir dire. (RT 1.) On November 7, 2013 – the first day of trial – the trial court granted Petitioner's request to allow Horeczko to represent him for the limited purpose of examining and cross-examining the expert witnesses. (RT 977-978.) The following day, Petitioner asked

[5] Respondent has lodged three volumes of the Augmented Reporter's Transcript. Because at least two of the volumes utilize the same page numbers, the Court cites the ECF.

the court to relieve standby counsel because Petitioner was not going to give up representing himself and it was a waste of standby counsel's time. (RT 1343-1344.) After confirming that Petitioner understood that there was "no going back," the trial court granted Petitioner's request that Morse be relieved as standby counsel. (CT 464; RT 1344-1345.)

Petitioner was convicted on December 9, 2013. (CT 517-518.) Proceedings on the prior conviction allegations were set for February 4, 2014. (RT 5713-5714.) On February 4, 2014, Petitioner indicated that he intended to file a motion for a new trial and requested appointment of experts to assist him. He also sought juror information in order to investigate juror misconduct for purposes of the motion. (CT 569-588; RT 6003.) The trial court denied additional expert funds and deferred ruling on the release of juror information. (RT 6004-6009.) After noting that Petitioner had two months to conduct legal research, the trial court ordered that Petitioner's new trial motion was due on February 21, 2014, and set March 4, 2014 for hearing on the motion as well as sentencing. (RT 6016-6018.)

On March 4, 2014, Petitioner told the trial court he wanted to be represented by the public defender's office. Deputy public defender Judith Greenberg was present. Petitioner stated that he sought assistance of counsel specifically to prepare a motion for new trial. The trial court summarized Petitioner's history of representation. It denied Petitioner's request, explaining that appointed counsel would require preparation of the trial transcripts, resulting in months of delay, and the People had an interest in resolving the matter for the victim's family. In addition, the trial court found that Petitioner had done a highly effective job of representing himself. (CT 597; RT 6301-6305.)

Petitioner argued his request was not a dilatory tactic and pointed out that, like an attorney, he would need the transcripts to prepare a new trial motion so he could not timely file the motion. Petitioner stated that he was "in over [his] head," and stated that he had been forced to represent himself at trial. Petitioner cited Ninth

Circuit cases for the proposition that it was error to deny a request such as Petitioner's so long as it was not made in bad faith. The trial court observed that Petitioner's skill in articulating his point, his citation to authorities the court had not seen, and his familiarity with case law cited by the court, were proving the court's point about his effective self-representation. Petitioner argued that his Sixth Amendment right to counsel entitled him to counsel for purposes of a new trial motion and sentencing. The prosecutor noted that in the past when the court had ruled there would be no further continuances, Petitioner had asked for counsel, and had "used his pro per status as a tool in [effecting] delays in the prosecution of this case." (RT 6305-6311.)

The trial court stated that if it were to allow Petitioner to be represented by counsel, it would appoint Morse because he had prepared the case for trial. The deputy public defender agreed. Nevertheless, the trial court denied Petitioner's "motion to relinquish the pro per status" because granting it would result in delay and Petitioner had proven himself more than capable of making his legal arguments. (RT 6318-6321, 6333.)

Petitioner asked the court if it was denying his right to counsel. The court replied, "Yes. Let me clarify, [sic] not denying your right to counsel. I'm honoring the choice you made repeatedly, which is to represent yourself." (RT 6336; *see also* RT 6354-6357.) Petitioner renewed his request to have the public defender appointed to represent him, but the trial court declined to change its ruling. (ECF No. 17-27 at 4-5, 8-9.)

The trial court reset the due date for Petitioner's motion for a new trial to April 21, 2014. (ECF No. 17-29 at 1219.) On April 23, 2014, Petitioner filed a 177-page motion for new trial. (CT 601-778; RT 6601.) The trial court denied the motion, providing a detailed explanation of its decision. (RT 6608-6625; CT 784-789.) When Petitioner once again complained that he had been denied his right to counsel, the trial court stated that Petitioner did not avail himself of the counsel that it would have appointed. It reiterated that, "if you wanted counsel, the one that you would get would

be Mr. Morse, the standby counsel. What I denied was your right to select the actual lawyer who was going to represent you, if it was going to be a publicly-appointed attorney." (RT 6629-6630.) The trial court discussed California law which provided that while counsel generally should be appointed in situations like Petitioner's, trial courts retained discretion to deny a request for representation if it is brought for an improper purpose such as delay. It referenced its previous finding regarding Petitioner's history of substituting attorneys and denied his request, essentially concluding that it was brought for a bad faith purpose. (RT 6300; CT 784-785.)

The following day was set for trial on the prior conviction allegations. After Petitioner renewed his objections, the trial court stated:

> I am going to make a factual finding here, which is I do not find you credible when you say you don't know what's going on here. You are the single most intelligent human being I have ever met in my life. I do not believe for a second that you do not understand these proceedings seeing as you have cited to me case law, chapter and verse, with more accuracy and more comprehensiveness than any lawyer who has ever appeared before me.

(ECF No. 17-27 at 9; *see also* RT 6354-6355.)

B. State Court Determination

The California Court of Appeal rejected Petitioner's claim. As a preliminary matter, the state appellate court stated that it construed the trial court's statements as indicating that it denied Petitioner's request because it concluded that Petitioner acted in bad faith. It also noted that the trial court found Petitioner's assertion that he did not understand the proceedings to be not credible. (ECF No. 18-4 at 12 n.5.) The state appellate court then addressed Petitioner's claim as follows:

> We review for abuse of discretion a trial court's decision denying a defendant's request to change from self-representation to representation by court-appointed counsel. (*People v. Elliott* (1977) 70

Cal.App.3d 984, 993–994, 997 (*Elliott*).) To exercise meaningful discretion in ruling on a defendant's request to change from self-representation to counsel-representation, the court must consider relevant factors, which "should include, among others, the following: (1) defendant's prior history in the substitution of counsel and in the desire to change from self-representation to counsel-representation, (2) the reasons set forth for the request, (3) the length and stage of the trial proceedings, (4) disruption or delay which reasonably might be expected to ensue from the granting of such motion, and (5) the likelihood of defendant's effectiveness in defending against the charges if required to continue to act as his own attorney." (*Id.* at pp. 993–994; *People v. Lawrence* (2009) 46 Cal.4th 186, 192 [same].) Ultimately, however, the court's discretion must be based not only on the listed relevant facts, but on the totality of the circumstances. (*People v. Gallego* (1990) 52 Cal.3d 115, 163–164.)

First, we note that Petitioner did not merely ask for court-appointed counsel. Having previously dismissed two court-appointed attorneys, including the public defender's office, he asked for a particular public defender to represent him in connection with his new trial motion and sentencing. Petitioner has no right to a particular court-appointed attorney. (*People v. Young* (1987) 189 Cal.App.3d 891, 903.) Although Petitioner now disclaims on appeal that he only wanted the public defender's office or a particular attorney within that office, the record is clear that he wanted public defender Greenberg to represent him and he did not want standby counsel Morse to represent him.[6] The trial court also believed that Petitioner was requesting the appointment of the public defender's office only. In its May 1, 2014, written ruling denying the motion for new trial, the court stated: "At the outset, the

Court again denies Defendant's request for the appointment of the Public Defender's Office to represent him on his motion for a new trial." The court did not abuse its discretion in denying Petitioner's request for the appointment of the public defender.

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[6] "'Standby counsel' is an attorney appointed for the benefit of the court whose responsibility is to step in and represent the defendant if that should become necessary because, for example, the defendant's in propria persona status is revoked." (*People v. Blair* (2005) 36 Cal.4th 686, 725.)

Second, even if Petitioner's request for court-appointed counsel can be considered a more generalized request for any appointed counsel, no abuse of discretion occurred. After Petitioner rejected the trial court's offer to reappoint Morse, the trial court not only considered the factors set out in *Elliott*, but concluded Petitioner made his request for appointed counsel in bad faith for purposes of delay. The record supports the court's conclusions. Three months after the initial arraignment on the complaint, the magistrate granted Petitioner's request to relieve the public defender and to represent himself. On the date scheduled for the preliminary hearing, the court granted Petitioner's request to change from self-representation to representation by retained counsel. The result was six months' delay before the preliminary hearing began. After being held to answer and at the arraignment on the information in January 2013, Petitioner again asked to represent himself, only to ask again on September 12, 2013, one month before the tentative trial date, that the court allow retained counsel Horeczko to represent him at trial. Petitioner claimed, although he had never spoken to standby counsel Morse, that Morse knew nothing about the case and was unprepared for trial. Horeczko would have had to familiarize himself with the case. Petitioner's unfounded complaints about his

circumstances, that Petitioner's claims were not credible and he was acting in bad faith to delay the proceedings. The trial court did not abuse its discretion in denying Petitioner's bad faith request to relinquish his pro per status in connection with his new trial motion and sentencing.

(ECF No. 18-4 at 12-15.)

C. Analysis

The Sixth Amendment guarantees a criminal defendant the right to counsel at all critical stages of the criminal process. *Iowa v. Tovar*, 541 U.S. 77, 80–81 (2004); *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963). At the same time, the Constitution guarantees a criminal defendant the right to self-representation, as long as he voluntarily and intelligently waives his right to counsel. *Faretta v. California*, 422 U.S. 806, 807 (1975).

As the United States Supreme Court has observed, "[t]here can be some tension in these two principles." *Marshall v. Rodgers*, 569 U.S. 58, 62 (2013) (per curiam). In *Marshall*, the petitioner initially waived his right to counsel and elected to represent himself. By the time of his preliminary hearing, however, the petitioner changed his mind and retained counsel. Two months later, he fired his lawyer, and again waived his right to counsel. Two months after that, he changed his mind again, and the trial court granted his request for appointed counsel. The petitioner waived his right to counsel yet again prior to trial, and proceeded to trial pro se. After the jury verdict, the petitioner requested appointment of counsel to help him file a motion for new trial. The trial court denied his request. *Marshall*, 569 U.S. at 59–60. In his habeas corpus petition, the petitioner argued that he had been denied his Sixth Amendment right to counsel. In addressing that claim, the United States Supreme Court described California's legal framework granting trial courts discretion to consider post-waiver requests based upon the totality of the circumstances. *Marshall*, 569 U.S. at 62–63. It pointed out that "[t]he state appellate court applied those rules to the case at bar, concluding that the totality of the circumstances – and especially

the shifting nature of respondent's preferences, the unexplained nature of his motion, and his demonstrated capacity to handle the incidents of trial – supported the trial court's decision." *Marshall*, 569 U.S. at 63. The Supreme Court held that, "in light of the tension between the Sixth Amendment's guarantee of the right to counsel at all critical stages of the criminal process ... and its concurrent promise of a constitutional right to proceed without counsel when a criminal defendant voluntarily and intelligently elects to do so," California's approach was neither contrary to nor an unreasonable application of clearly established federal law. *Marshall*, 569 U.S. at 63 (citations, internal quotation marks and brackets omitted).

Marshall is dispositive of Petitioner's claim. Here, as in *Marshall*, the state appellate court determined that the trial court properly considered the totality of the circumstances before denying Petitioner's request for appointed counsel on the ground that it was made for an improper purpose. To the extent that this conclusion incorporates a factual finding, it is not unreasonable in light of the record before the state court. As set forth in detail above, Petitioner had a history of seeking self-representation followed by requesting appointment of different attorneys. His conduct resulted in significant delay. Furthermore, the trial court reasonably found not credible Petitioner's latest assertion that he did not understand the proceedings based upon Petitioner's demonstrated ability to effectively represent himself. (*See* RT 6305, 6321, 6333.)

Following *Marshall*, the state court's determination is neither contrary to, nor an unreasonable application of, clearly established federal law. *See Miller v. Sherman*, 2016 WL 8848871, at *35 (C.D. Cal. May 26, 2016) (following *Marshall*, rejecting challenge to trial court's denial of pro per defendant's motion for appointment of co-counsel) *report and recommendation adopted*, 2017 WL 1632862 (C.D. Cal. Apr. 28, 2017); *Gupta v. Beard*, 2015 WL 1470859, at *23 (C.D. Cal. Mar. 30, 2015) (same); *see also Rose v. Hedgpeth*, 735 F. App'x 266, 269 (9th Cir. 2018) (noting that the United States Supreme Court "has never held that a post-trial,

pre-appeal motion for a new trial is a 'critical stage' to which the Sixth Amendment right to counsel applies").

In light of the absence of a clearly established federal right, Petitioner's arguments essentially amount to a challenge to the trial court's exercise of its discretion under state law. This is not a cognizable claim. *See, e.g., Estelle v. McGuire*, 502 U.S. 62, 67–68 (1991) (reiterating that "it is not the province of a federal habeas court to reexamine state-court determinations on state-law questions").

II. Sufficiency of the Evidence

Petitioner contends that the evidence was insufficient to support his conviction of first-degree murder. (ECF No. 1 at 5-6; ECF No. 3 at 53-73.)

A. Clearly Established Federal Law

Pursuant to clearly established federal law, evidence is sufficient to support a conviction if, "after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). If the evidence supports conflicting inferences, a reviewing court "must presume - even if it does not affirmatively appear in the record – that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution." *Jackson*, 443 U.S. at 319, 326; *see also Cavazos v. Smith*, 565 U.S. 1, 2 (2011) (per curiam) (*Jackson* "makes clear that it is the responsibility of the jury – not the court – to decide what conclusions should be drawn from evidence admitted at trial"); *Bruce v. Terhune*, 376 F.3d 950, 957 (9th Cir. 2004) (a jury's credibility's determination is "entitled to near-total deference under *Jackson*).

Federal habeas corpus relief is warranted based upon insufficient evidence only if the state court decision rejecting the claim was objectively unreasonable. *See Cavazos*, 565 U.S. at 2. In considering the sufficiency of the evidence, the Court looks to state law for the substantive elements of the criminal offense. *See Coleman*

v. Johnson, 566 U.S. 650, 655 (2012) (per curiam).

B. State Court Determination

The California Court of Appeal rejected Petitioner's challenge to the sufficiency of the evidence, explaining as follows.

> We find sufficient evidence of planning, motive, and manner of killing in support of the jury's findings of premeditation and deliberation. First, planning. Obtaining a weapon is evidence of planning consistent with a finding of premeditation and deliberation. ([*People v.*] *Koontz* [(2002)] 27 Cal.4th 1041, 1081-1082.) Here, Petitioner brought a loaded Glock firearm into the Club and concealed it under a jacket while he sat at the table near the door.
>
> Second, motive. Prior quarrels between a defendant and decedent and the making of threats by the former are competent to show the defendant's motive and state of mind. (*People v. Cartier* (1960) 54 Cal.2d 300, 311.) Here, there is ample evidence that the prior relationship between Petitioner and the victim consisted of numerous threatening and disparaging text messages they exchanged, including Petitioner's threats to kill the victim, his wife, and his children. The texting continued while Petitioner was in the Club. Indeed, Petitioner went so far as to make sure the victim knew he was in the Club and would not be coming outside. It is reasonable to infer Petitioner wanted to confront the victim on his own terms inside the Club with the weapon he had managed to get past security and concealed on his person.
>
> Third, manner of killing. Shooting a victim in the back of the head in an execution-style murder is sufficient evidence of premeditation and deliberation. (*People v. Brady* (2010) 50 Cal.4th 547, 564.) Moreover, an assailant's use of a firearm against a defenseless person may show sufficient deliberation. (*People v. Bolin* (1998) 18 Cal.4th 297, 332–333

(*Bolin*).) Firing at vital body parts, including a person's face, can show preconceived deliberation. (*Cf. Bolin*, at p. 332.; *People v. Mayfield* (1997) 14 Cal.4th 668, 768; *People v. Thomas* (1992) 2 Cal.4th 489, 518.) Here, Petitioner fired the first shot directly at the unarmed victim's face; he fired the second shot from a standing position directly into the back of the victim's head while the victim lay face down, motionless, and unconscious. Petitioner fired the second shot after cursing at, kicking, and pistol-whipping the victim who was prone on the floor. The manner of killing in this case supports a finding of premeditation and deliberation.

A jury may also determine whether premeditation exists by considering the assailant's immediate flight from the scene of the assault, the conduct of the assailant in neglecting to aid the victim, and efforts to conceal the weapon used. (*People v. Cook* (1940) 15 Cal.2d 507, 516; *People v. Clark* (1967) 252 Cal.App.2d 524, 529.) Here, Petitioner immediately fled the scene with Baez without aiding Valdez. They attempted to hide in bushes in a nearby park. Baez had the murder weapon in her purse when she was found. It is reasonable to infer that Petitioner gave the Glock to Baez in an attempt to conceal it.

The record is replete with sufficient evidence to convince a rational trier of fact, beyond a reasonable doubt, that Petitioner murdered Valdez with premeditation and deliberation and not, as he contends, as a result of PTSD, flight-or-fight response, accident, or unconsidered or rash impulse. None of the cases cited by Petitioner, nor the fact there may have been evidence to the contrary, compels a different conclusion.

(ECF No. 18-4 at 15-17.)

C. Analysis

Under California law, "[p]remeditation and deliberation require more than an intent to kill." *People v. Young*, 34 Cal. 4th 1149, 1182 (2005). Instead, "premeditation and deliberation must result from careful thought and weighing of considerations." *People v. Manriquez*, 37 Cal. 4th 547, 577 (2005). The process of premeditation and deliberation "does not require any extended period of time" and can take place quickly. *People v. Perez*, 2 Cal. 4th 1117, 1127 (1992). The California Supreme Court has identified three categories of evidence relevant to reviewing findings of first degree murder based on premeditation: (1) the defendant's planning activity prior to the homicide; (2) the motive to kill, as gleaned from the defendant's prior relationship or conduct with the victim; and (3) the manner of the killing, from which it might be inferred the defendant had a preconceived design to kill. *See People v. Anderson*, 70 Cal. 2d 15, 26-27 (1968); *People v. Hovarter*, 44 Cal. 4th 983, 1019 (2008).

Applying these factors here, a jury could reasonably infer premeditation based on evidence indicating motive, planning, and the manner of the killing. Viewed in the light most favorable to the prosecution, the jury heard that Petitioner and Valdez had been quarreling, threatening each other, and that Petitioner threatened to kill Valdez in both text messages and telephone calls. (RT 997-998, 1001-1012, 1845-1848, 1860-1861, 1895.) Such evidence supported an inference that Petitioner had a motive to kill Valdez. *See Ibarra v. McEwen*, 2015 WL 366094, at *19 (C.D. Cal. Jan. 27, 2015) (evidence that petitioner threatened to kill victim was probative of motive for purposes of premeditation finding); *People v. Cartier*, 54 Cal. 2d 300, 311 (1960) (prior quarrels between defendant and victim and threats by the defendant was relevant to defendant's motive and state of mind). The jury also heard evidence that Petitioner brought a loaded gun and extra ammunition to the club on the night of the murder. (RT 1515-1516, 1526, 1540-1541, 1943-1948, 2162-2166, 2463-2468.) This evidence supports the inference that Petitioner planned to shoot Valdez. *See Jones v.*

Wood, 207 F.3d 557, 562 (9th Cir. 2000) (evidence supported premeditated murder where petitioner planned the procurement of a weapon); *Saakyan v. Santoro*, 2017 WL 5632849, at *14 (C.D. Cal. July 14, 2017) (evidence supported inferences that petitioner had motive to kill juvenile victims after he engaged in an argument with the group, then planned his act in the short time it took him to walk to his car and retrieve his gun before shooting 24 rounds directly at the group), *report and recommendation adopted*, 2017 WL 5633023 (C.D. Cal. Nov. 20, 2017); *People v. Lee*, 51 Cal. 4th 620, 636 (2011) (bringing loaded handgun and extra ammunition indicates the defendant planned for the possibility of a violent encounter). Finally, the jury received evidence – in the form of surveillance video and eyewitness testimony – that Petitioner (a) fired the first shot at Valdez immediately after Valdez rushed up and punched Petitioner, hitting Valdez in the chin, (b) Valdez fell prone on the floor and remained motionless; (c) Petitioner stood over Valdez, paced, kicked Valdez and struck him with the pistol, while Valdez continued to lay motionless and unresisting on the floor; and (d) Petitioner then fired a shot into the back of Valdez's head, killing him. (RT 1515-1521, 1526, 1540-1541, 1807-1808, 1833-1834, 2718-2722, 2733-2734, 2742.) The forgoing evidence supported the inference that Petitioner intended to kill Valdez rather than inflict some other, nonlethal injury. *See Torres v. Montgomery*, 2015 WL 9684912, at *8-9 (C.D. Cal. Oct. 9, 2015) (evidence of manner of the stabbings, namely "more than once in a vital area of each victim's body, the abdomen," sufficient to demonstrate preconceived design to kill); *Herrera v. Gipson*, 2014 WL 289386, at *13 (C.D. Cal. Jan. 23, 2014) (killing accomplished at short range without evidence of struggle supported inference of premeditation and deliberation); *People v. Romero*, 44 Cal. 4th 386, 401 (2008) (the victim "was killed by a single gunshot fired from a gun placed against his head" and "this execution-style manner of killing supports a finding of premeditation and deliberation, where there is no indication of a struggle).

Petitioner contends that the state appellate court misstated the record. (ECF

No. 3 at 54.) The Court's review of the record belies Petitioner's contention, with the following exception. Petitioner points to a sentence in the state appellate court's summary of the evidence in which the court stated that on the night of the murder, Petitioner texted Valdez "to come to the VIP Club or else Petitioner would kill Abramyan when he saw her on stage." (ECF No. 3 at 56-58.) Respondent has not addressed this particular contention, and the Court has not located evidence that Petitioner sent such a text on the date of the murder.[6] The state court may have mistakenly conflated the evidence that, two days before the murder, Petitioner challenged Valdez to come to the club (RT 1853-1855) and Petitioner's numerous threats to kill Abramyan while Valdez watched. (RT 997-998, 1009-1010; 1845-1847). Nevertheless, assuming that the state court's summary of the evidence misstated the record in this regard, it is a misstatement without consequence. In analyzing the sufficiency of the evidence, the state appellate court did not purport to rely on a text from Petitioner telling Valdez to come to the club on the night of the murder. Instead, the state appellate court's decision relied upon the undisputed evidence that Petitioner and Valdez engaged in numerous threatening text message exchanges and evidence that on the night of the murder, Petitioner "made sure that [Valdez] knew he was in the club and would not be coming outside." It was this evidence to which the state court pointed in concluding that a jury reasonably could infer that Petitioner wanted to confront Valdez in the club. Simply put, any misstatement in the summary of the evidence had no effect on the state court's analysis of the sufficiency of the evidence.

Petitioner also points to the following alleged misstatement in the state appellate court's opinion: "On July 15, 2011, the date of the shooting, both men exchanged insulting, provocative, and threatening text messages." Petitioner contends the statement is incorrect because Petitioner sent only a single text to Valdez

[6] The Court notes that the evidence regarding phone calls and texts in this case is lengthy and somewhat convoluted.

on that date, and did so in response to Valdez's phone call in which he threatened to kill Petitioner. (ECF No. 3 at 56.) At worst, what Petitioner identifies as a "misstatement" amounts to an imprecise characterization of the evidence by the state court. It does not undermine the state court's analysis, nor does it affect this Court's analysis of the sufficiency of the evidence.

Petitioner further contends that the state appellate court "overlooked" evidence. (ECF No. 3 at 54-54.) In support of this contention, Petitioner points to evidence supporting his defense and proposes alternative interpretations of the record. (*See* ECF No. 3 at 59-6.) The state court, however, was not required to reiterate every piece of evidence in analyzing the sufficiency of the evidence. Furthermore, the evidence Petitioner identifies does not alter the reasonableness of the inferences discussed above. For example, Petitioner emphasizes evidence showing that he did not know in advance that Valdez would be at the club on July 15, 2011. Contrary to Petitioner's suggestion, such evidence does not negate premeditation. The club is a location where Petitioner reasonably could expect to come across Valdez, if not on July 15, 2011, then on another night. More importantly, even if this or other evidence Petitioner relies upon would have supported an inference favorable to Petitioner's defense, the jury necessarily rejected those alternatives in reaching its contrary conclusion. As set forth above, the jury's verdict was based upon rational inferences. This Court cannot substitute its own fact-finding for that of the jury. *See De Arcos v. Ducart*, 743 F. App'x 820, 822 (9th Cir. 2018) (reviewing court "must respect the province of the jury to ascertain the credibility of the witnesses, resolve evidentiary conflicts, and draw reasonable inferences from proven facts, by assuming that the jury resolved all such matters in a manner which supports the verdict") (citation omitted).

In sum, considering this evidence and the reasonable inferences drawn from it, the state appellate court's denial of Petitioner's claim was neither contrary to, nor an unreasonable application of, *Jackson*.

III. Denial of Counsel of Choice[7]

Petitioner contends that the trial court erroneously denied him his right to counsel of choice. In support of his claim, Petitioner alleges that he "never had any intentions of trying his case himself." (ECF No. 3 at 82.) Rather, his defense strategy consisted of "representing himself in order to get the court to appoint an investigator and experts; thereby enabling him to prepare his defense as much as possible before hiring an attorney for the actual trial." (ECF No. 3 at 82.) He did not believe it was "necessary or prudent to disclose the exact nature of [his] defense strategy to the prosecution or the court." (ECF No. 2-1 (Petitioner's Declaration) at 50.) Petitioner complains that he was never advised that there was a deadline by which he was required to retain counsel. (ECF No. 1 at 6; ECF No. 3 at 74-87, ECF No. 3-1 at 1-30.)

A. Relevant Law

The right to counsel under the Sixth Amendment encompasses the qualified "right of a defendant who does not require appointed counsel to choose who will represent him." *United States v. Gonzalez–Lopez*, 548 U.S. 140, 144 (2006) (citing *Wheat v. United States*, 486 U.S. 153, 159 (1988)). The right to counsel of choice, however, is "limited." *Gonzalez–Lopez*, 548 U.S. at 154; *see also Bradley v. Henry*, 510 F.3d 1093, 1096 (9th Cir. 2007) (en banc) (the right of a defendant to secure counsel of his own choice "is not absolute"). Exercise of the right to counsel of choice "cannot unduly hinder the fair, efficient and orderly administration of justice." *United States v. Walters*, 309 F.3d 589, 592 (9th Cir. 2002).

As the Supreme Court has recognized, a trial court has "wide latitude in balancing the right to counsel of choice against the needs of fairness, and against the demands of its calendar." *Gonzalez–Lopez*, 548 U.S. at 152 (internal citations omitted). Indeed, trial courts retain the discretion to "make scheduling and other

[7] As Respondent points out, the California Court of Appeal rejected Grounds Three through Five on procedural grounds. (*See* ECF No. 18-12.)

decisions that effectively exclude a defendant's first choice of counsel." *Miller v. Blackletter*, 525 F.3d 890, 895 (9th Cir. 2008) (quoting *Gonzalez–Lopez*, 548 U.S. at 152); *see Bradley v. Henry*, 510 F.3d 1093, 1096–1098 (9th Cir. 2007) (en banc) ("[T]he trial court is entitled to manage its docket and may deny a motion to substitute retained counsel if there is a substantial risk that the substitution will result in an undue delay of the proceedings.") (Clifton, J., concurring), *amended on denial of rehearing*, 518 F.3d 657 (2008)

To prevail on his claim, Petitioner must demonstrate that the trial court abused its discretion in balancing Petitioner's right to counsel of choice against concerns of fairness and scheduling. *Miller*, 525 F.3d at 896; *Morales v. Beard*, 2016 WL 3344376, at *15 (C.D. Cal. June 7, 2016), *report and recommendation adopted*, 2016 WL 3353929 (C.D. Cal. June 8, 2016). The Ninth Circuit has identified three factors particularly relevant to a trial court's exercise of discretion in this context: (1) whether the defendant already retained new counsel; (2) whether current counsel was prepared and competent to proceed forward; and (3) the timing of defendant's request to continue. *Miller*, 525 F.3d at 896–898.

B. Analysis

As Petitioner points out, he already had retained Horeczko at the time he sought to substitute him as counsel. While this fact would weigh in favor of allowing substitute counsel, the other relevant factors do not. Perhaps most critically, Horeczko affirmatively represented that he was not ready to proceed to trial, and he could not be ready in 23 days. As the trial court repeatedly noted, the case had been continued multiple times, and Petitioner had more than two years to secure counsel and prepare for trial. In addition, the trial court found that Morse was competent and prepared to proceed. Petitioner disputes this finding and points to Morse's silence when the trial court stated that Morse was ready for trial. Petitioner's argument is unpersuasive. Morse's failure to interject during the proceedings and confirm the trial

court's statement does not support the inference that he was unprepared. (*See* ECF No. 3 at 86-87.)

Petitioner repeatedly asserts that his motion to substitute Horeczko was made two months before his trial began. (ECF No. 3 at 78, 87.) Petitioner's calculation, however, is misleading. While Petitioner's trial ultimately was delayed based upon Petitioner's subsequent request for a continuance, at the time Petitioner made his request to substitute Horeczko, the trial was scheduled to begin in 23 days.

Next, Petitioner contends that the trial court failed to conduct an adequate inquiry to learn how much time Horeczko would need to prepare and to investigate "any possible conflict of interest" with Morse. (ECF No. 3 at 86-87; ECF No. 3-1 at 2-10.) Petitioner's allegation is unsupported by the record. As set forth in detail above, the trial court consistently and repeatedly allowed Petitioner to explain the reasons for his requests. Petitioner had numerous opportunities to raise any specific concerns about Morse. Similarly, the trial court asked Horeczko several questions about what was required in order for him to adequately prepare for trial, and Horeczko provided detailed answers about the state of discovery and expert reports. (*See* ECF No. 17-29 at 5-7.) Thus, the trial court adequately inquired into the relevant factors such that it was able to make an informed exercise of its discretion. *See, e.g., United States v. Smith*, 282 F.3d 758, 764-765 (9th Cir. 2002) (trial court's failure to conduct a formal inquiry for a defendant's request for substitution of counsel was not abuse of discretion where the defendant's own description of the problem and the judge's own observations of counsel's performance throughout the trial provided a sufficient basis for reaching an informed decision).

The Court notes that Petitioner's claim does not implicate the line of cases governing a request to relieve appointed counsel based upon an alleged irreconcilable conflict of interest. In such cases, the trial court is obligated to conduct a hearing to inquire into the possibility that appointed counsel's performance has fallen below the constitutionally required by the Sixth Amendment. *See Schell v. Witek*, 218 F.3d

1017, 1021, 1026 (9th Cir. 2000). Unlike those cases, Petitioner had validly waived his right to counsel and elected to represent himself. While the trial court placed Morse on standby so that an attorney would be available if necessary, at no time was Morse ever representing Petitioner.

In addition, the complaints that Petitioner made against Morse were brief, conclusory, and in response to the trial court's refusal to permit Horeczko to represent him. Petitioner's conclusory complaints about Morse, made in the context of arguing that he was entitled to counsel of choice, were not sufficient to alert the trial court that Petitioner might allege a conflict of interest or any other irreconcilable difference. Consequently, the trial court was not required to conduct a separate, formal inquiry into a potential conflict of interest when there was no reason to believe such a conflict existed.

In his declaration, Petitioner states that he had a "serious conflict of interest with Mr. Morse as [he] did not trust him as an advocate because [he] believed [Morse] to be amoral and unethical." (ECF No. 3-1 at 52.) Petitioner's judgment about Morse's character is based upon him eavesdropping on Morse's conversations with other inmates, during which Petitioner formed the opinion that Morse was talking down to his clients, only spoke about the prosecution evidence rather than possible defense, and otherwise exhibited a "defeatist attitude" suggesting that he believed the clients were guilty. (ECF No. 3-1 at 53-55.)

Petitioner was a forceful advocate for himself and demonstrated no qualms or difficulties bringing countless issues to the court's attention. Petitioner had numerous opportunities to raise his concerns about Morse to the trial court. He provides no explanation for why he failed to do so. Moreover, the Court notes that Petitioner would be entitled to relief based upon an alleged failure to hold a hearing only if there was a conflict between Petitioner and Morse that "had become so great that it resulted in a total lack of communication or other significant impediment that resulted in turn in an attorney-client relationship that fell short of that required by the Sixth

Amendment." *Schell*, 218 F.3d at 1026. Because Morse and Petitioner did not have an attorney-client relationship and because Petitioner's allegations involve his observations of Morse's conduct in other cases, Petitioner's allegations do not come remotely close to meeting that threshold. *See Frazier v. Barnes*, 2014 WL 6946857, at *27 (C.D. Cal. Nov. 4, 2014), *report and recommendation adopted*, 2014 WL 6896032 (C.D. Cal. Dec. 4, 2014).

Petitioner also alleges that the trial court's denial of substitute counsel "forced" him to represent himself. This allegation fares no better. Petitioner made a valid waiver of counsel and affirmatively chose to represent himself. Morse was appointed standby counsel only in response to Petitioner's election. As the trial court made clear, Morse's role was to remain available to take over if Petitioner changed his mind about self-representation. Morse never actively represented Petitioner. It is unclear how Morse's "performance" could be deficient when he provided no performance on behalf of Petitioner. In any event, Petitioner's allegations do not demonstrate that Morse was constitutionally deficient. Petitioner complained that he had never spoken with Morse, but the trial court indicated that Morse could not speak with Petitioner due to his status as standby counsel. (ECF No. 17-29 at 21-22.) Petitioner's conclusory assertion that Morse knew "absolutely nothing about this case" lacks any support in the record. Petitioner's current allegations that he did not trust Morse are insufficient to demonstrate that Morse provided constitutionally deficient counsel. Accordingly, there is neither legal nor factual support for Petitioner's claim that his otherwise valid choice to represent himself was somehow rendered invalid by his distrust of standby counsel. *See Arrendondo v. Neven*, 763 F.3d 1122, 1136 (9th Cir. 2014) ("Electing self representation over unsatisfactory – but constitutionally sufficient – counsel does not make a defendant's waiver of counsel involuntary."); *Cook v. Schriro*, 538 F.3d 1000, 1016 (9th Cir. 2008) (rejecting petitioner's claim that his *Faretta* waiver was invalid because he was forced to represent himself as only alternative to counsel's alleged ineffectiveness

where petitioner had failed to provide trial court with notice of alleged ineffectiveness of counsel).

In sum, while Petitioner may disagree with the trial court's weighing of the relevant circumstances, he has not demonstrated that the trial court committed an abuse of discretion resulting in a constitutional deprivation. *See Houston v. Schomig*, 533 F.3d 1076, 1079-1080 (9th Cir. 2008) (no abuse of discretion to deny substitute counsel where trial court confirmed that appointed counsel was able to proceed to trial, evaluated the petitioner's diligence in timely retaining private counsel, and weighed the potential impact a continuance may have had on the victims and witnesses, noting that the motion was made four days before trial was scheduled to begin); *Smith*, 282 F.3d at 763-764 (no abuse of discretion to deny defendant's motion for substitute counsel where, although defendant made initial request over 30 days before scheduled trial date, new counsel would have required continuance, present counsel did not have irreconcilable dispute, and court already had granted defendant's earlier request for substitute counsel); *Jimenez v. Asuncion*, 2018 WL 3617879, at *6 (C.D. Cal. May 23, 2018) (trial court did not abuse discretion in denying petitioner's request to substitute counsel even though the petitioner had retained new counsel by the time of his substitution request, where current counsel had announced ready for trial and request was made on day of trial), *report and recommendation adopted,* 2018 WL 3615793 (C.D. Cal. July 24, 2018); *Morales*, 2016 WL 3344376, at *16 (no abuse of discretion to deny request for substitute retained counsel where record did not show substitute counsel would be prepared for trial, current counsel was competent and request was made on day set for trial); *cf. Bradley*, 510 F.3d at 1100 (relief granted where trial court denied petitioner's motion to substitute retained counsel despite the fact that the motion was filed forty-six days before trial and substitute counsel indicated on the record that there would be no delay to the start of trial).

IV. Denial of a Continuance

Petitioner alleges that the trial court erroneously denied him a continuance, depriving him of his right to present a complete defense and his right to the effective assistance of counsel. Petitioner's claim is based upon the trial court's denial of Petitioner's request for a two-month continuance made on November 1, 2013, at what the trial court stated was a "final status check." In support of his claim, Petitioner points out that the trial court appointed eight defense experts, but the trial court declared Petitioner ready for trial before Petitioner received completed reports from three of those experts – Dr. Bruce Krell (firearm/shooting reconstruction); Dr. Jack Rothberg (forensic psychiatry); and Thomas Blackburn (forensic cellular telephone). Petitioner alleges that without reports, he was unable to prepare his expert testimony. He also alleges that he needed time to allow Mr. Blackburn to recover additional text messages from Valdez's phone that would have shown Valdez made specific death threats on the night of the murder. Petitioner states that the missing messages were vital to his defense because they supported his claim that he believed it was necessary to act with deadly force. (ECF No. 1 at 6; ECF No. 3-1 at 31-58.)

A. Relevant Law

Petitioner alleges a violation of two separate constitutional rights – his right to counsel and his right to due process. As explained below, the law governing these two rights is slightly different.

Right to counsel: Trial courts retain broad discretion on matters regarding continuances, such that "only an unreasoning and arbitrary 'insistence upon expeditiousness in the face of a justifiable request for delay' violates the right to the assistance of counsel." *Morris v. Slappy*, 461 U.S. 1, 11–12 (1983) (quoting *Ungar v. Sarafite*, 376 U.S. 575, 589 (1964)). To establish a Sixth Amendment violation based on the denial of a motion to continue, [a defendant] must show that the trial court abused its discretion through an 'unreasoning and arbitrary "insistence upon expeditiousness in the face of a justifiable request for delay.'" *Houston*, 533 F.3d at

1079 (quoting *Morris*, 461 U.S. at 11-12). Where a denial of a continuance implicates a defendant's Sixth Amendment right to counsel, a court may consider whether the continuance would inconvenience witnesses, the court, counsel, or the parties; whether other continuances have been granted; whether legitimate reasons exist for the delay; whether the delay is the defendant's fault; and whether a denial would prejudice the defendant. *United States v. Thompson*, 587 F.3d 1165, 1174 (9th Cir. 2009) (quoting *United States v. Studley*, 783 F.2d 934, 938 (9th Cir. 1986)).

Due process: There are no "mechanical tests" for determining when a scheduling decision was so arbitrary that it violated due process. *Ungar*, 376 U.S. at 589; *United States v. Kloehn*, 620 F.3d 1122, 1127 (9th Cir. 2010). Instead, the court examines the circumstances in which the decision was made and the facts known to the trial court at the time. *Ungar*, 376 U.S. at 589. In particular, the court considers the petitioner's diligence in preparing for trial; the utility of the continuance; the probability that the objective of the continuance would have been achieved; and the extent to which the continuance would inconvenience the trial court and the opposing party. *See Armant v. Marquez*, 772 F.2d 552, 556–557 (9th Cir. 1985); *see also Kloehn*, 620 F.3d at 1127. To succeed on a due process claim arising out of a denial of a continuance, the petitioner must show prejudice resulting from the court's denial. *United States v. Wilkes*, 662 F.3d 524, 543 (9th Cir. 2011); *Kloehn*, 620 F.3d at 1127. "Where the denial of a continuance prevents the introduction of specific evidence, the prejudice inquiry focuses on the significance of that evidence." *Wilkes*, 662 F.3d at 543 (quoting *United States v. Rivera–Guerrero*, 426 F.3d 1130, 1142 (9th Cir. 2005)).

Although there is some variation in the law between the two issues, there is substantial overlap in the relevant factors. Further, the relevant factors overlap with the considerations already discussed in relation to Ground Three above. In order to avoid needless repetition, the Court addresses the two Constitutional claims together.

B. Analysis

First, on more than one occasion, both the prosecutor and the trial court expressed concern about the lengthy delays inconveniencing witnesses, the court and counsel. The prosecution also affirmatively asserted its right to a speedy trial. (*See, e.g.*, RT B38, B66-B68, B72-B73; ECF No. 17-29 at 10-11.)

Second, as the trial court observed, Petitioner already had been granted numerous continuances. Indeed, as a result, Petitioner had two and a half years to prepare for trial. (*See* RT B38, B44-B45, B68, B72-B73.)

Third, while at least some delay likely was legitimate, the trial court reasonably concluded that additional delay was not. The trial court had previously warned Petitioner that it was his obligation to get his experts to timely respond. Further, while Petitioner may have acted diligently, his difficulties in preparing for trial without counsel were difficulties about which the trial court had repeatedly cautioned and Petitioner expressly agreed to accept the hazards of self-representation by voluntarily electing to proceed without counsel.

Fourth, and for the same reasons already discussed, the delay was attributable to Petitioner and was fairly considered to be his fault.

Fifth, the utility of a continuance was dubious. That is, it was not evident at the time of the trial court's ruling that further delay would have yielded significant exculpatory evidence or substantially benefited Petitioner's defense.

The record confirms that the trial court's denial of Petitioner's request for a continuance was reasoned, rather than an arbitrary "insistence upon expeditiousness in the face of a justifiable request for delay." *Houston*, 533 F.3d at 1079. Thus, its decision satisfied both the Sixth Amendment and the Due Process Clause. *See Morris*, 461 U.S. at 11–12; *see also Houston*, 533 F.3d at 1079 (no constitutional deprivation where trial court denied continuance after evaluating the defendant's diligence in timely retaining private counsel and weighing the potential impact a continuance may have had on the victims and witnesses); *Wilson v. Hatton*, 2019 WL

1940611, at *11 (C.D. Cal. Apr. 4, 2019) (no violation of Sixth Amendment or Due Process Clause where record confirmed that trial court did not unreasonably or arbitrarily deny request for a continuance), *report and recommendation adopted*, 2019 WL 1936435 (C.D. Cal. Apr. 30, 2019); *Harrell v. Koenig*, 2018 WL 1142201, at *5 (E.D. Cal. Mar. 2, 2018) ("the record shows that the trial court's decision was reasoned, rather than arbitrary, this decision satisfied both the Sixth Amendment and the Due Process Clause").

Finally, Petitioner has not demonstrated that he was prejudiced by the denial of the continuance. Notably, Dr. Krell, Dr. Rothberg, and Thomas Blackburn each testified on Petitioner's behalf. (*See* RT 3610-3698 (Blackburn), 4216-4279 (Rothberg), 4305-4340 (Krell).) Further, in recognition of Petitioner's difficulties, the trial court allowed Horeczko to represent Petitioner for the purpose of examining the expert witnesses. Although Petitioner may have wished that he had more time to prepare, he did eventually receive these experts' reports prior to their testimony. (*See* ECF No. 3-1 at 38-39.) Petitioner's arguments consist of speculative assertions – for example, he alleges that if he had Dr. Krell's report sooner, he would have been able to raise an unidentified argument which may have altered the trial court's ruling excluding Dr. Krell's video reconstruction of the shooting. (*See* ECF No. 3-1 at 45). Such speculative arguments are insufficient to demonstrate that the expert testimony would have been materially different or more favorable if the trial court had granted a continuance.

Petitioner also alleges that he was prejudiced because he made representations to the jury during opening argument based upon his belief that Mr. Blackburn would recover text messages, and his "trustworthiness" was damaged by his inability to deliver that evidence. Petitioner cannot blame the trial court for his own decision to make representations to the jury without having any proof that the evidence existed.

Petitioner alleges that a continuance would have allowed him to obtain missing text messages showing death threats from Valdez. To begin with, Petitioner's claim

is speculative. Petitioner believes that a different expert could have recovered these allegedly lost text messages and presents an unsigned declaration of Richard L. Albee in support of that belief. Mr. Albee states that he "runs a business called Data Chasers." Based upon what he was told, Mr. Albee indicates that the software used to retrieve data from Valdez's phone may not have been able to retrieve all of the data possible. According to Mr. Albee, Data Chasers "would" use four different software applications to attempt to recover the entirety of the available cellphone data. (ECF No. 2-1 at 100.) At best, the declaration suggests that additional avenues were available to attempt to retrieve data from Valdez's phone. While it is possible that these methods might be successful, the mere possibility is insufficient to show prejudice. *See Cleveland v. Soto*, 2019 WL 1744862, at *26 (C.D. Cal. Jan. 24, 2019) (petitioner failed to show trial court's denial of continuance deprived him of due process where, in part, petitioner did not show that he could have secured proposed witness's presence at trial even if continuance been granted), *report and recommendation adopted*, 2019 WL 3408675 (C.D. Cal. July 29, 2019).

Even assuming that the data could have been recovered and further assuming that the text messages said what Petitioner alleges they said, the jury already received evidence that Valdez threatened Petitioner. Petitioner alleges that these missing texts include specific threats by Valdez made on the day of the murder, including a threat that he would have his gang kidnap Baez from the club and rape her. (ECF No. 2-1 at 103-137.) While the content of the alleged threats may be different than those presented to the jury, they do not significantly alter the prosecution's case. Perhaps most critically, the text messages would be relevant only to Petitioner's belief in the need to arm himself and shoot Valdez the first time. They added nothing to the defensibility of Petitioner's actions while Valdez lay on the ground defenseless.

In sum, Petitioner has not shown that a continuance would have yielded exculpatory evidence that would have had more than nominal effect on the strength of Petitioner's defense. Consequently, Petitioner cannot prevail on his claim that

denial of a continuance deprived him of due process by precluding him from presenting a complete defense. *See, e.g.*, *Wilson*, 2019 WL 1940611, at *10 (rejecting claim that denial of continuance deprived petitioner of due process, explaining that the denial did not have substantial and injurious effect or influence on the jury's verdict given the strength of the directly incriminating evidence against petitioner).

V. Failure to Instruct on Unconsciousness

Petitioner alleges that the trial court erred by failing to instruct on the defense theory of unconsciousness. (ECF No. 1 at 6; ECF No. 3-1 at 59-69.)

A. Factual Background

Dr. Jack Rothberg, a forensic psychiatrist, testified on Petitioner's behalf. Dr. Rothberg told the jury that he met with Petitioner, reviewed the arrest report, the autopsy report, transcripts of interviews, and part of the video of the shooting. (RT 4215-4120.) Dr. Rothberg also evaluated Petitioner, but did not perform any psychological tests. (RT 4221-4222.) Based upon his evaluation, Dr. Rothberg opined that Petitioner suffered from post-traumatic stress disorder ("PTSD"). In addition, Dr. Rothberg opined that Petitioner experienced fight or flight syndrome at the time of the shooting. He described this syndrome as "a physiological-emotional reaction that all human beings experience in certain situations." (RT 4222-4238.) He also testified that it was likely that Petitioner was in a "disconnected state" and acting like "a robot" at the time he fired the second shot. (RT 4258, 4279.) Dr. Rothberg conceded that his opinion regarding PTSD was not based upon any records or past treatment, but was based upon the assumption that what Petitioner told him about past experiences was true. He agreed that it was possible that Petitioner was lying. (RT 4241, 4248, 4263-4272.) Dr. Rothberg also acknowledged that there were inconsistencies between Petitioner's statements to him and his statements in reports. (RT 4242-4444, 4270-4272.)

Later, during discussion about jury instructions, Petitioner told the trial court, "just in case for appeal purposes, I want to make sure I request an unconsciousness

defense." Citing Dr. Rothberg's testimony that Petitioner "went on automatic or like a robot, that I was acting without volition," Petitioner asked the court to instruct the jury with CALCRIM No. 3425.[8] (RT 4846.) The trial court declined to do so, finding that the evidence did not support the instruction. As it explained:

> The evidence shows that you were certainly conscious at the time of the first shot. You were certainly conscious immediately after when you went to retrieve Miss Baez. There is no substantial evidence to show that you were unconscious during the interim.

(RT 4847.) The trial court later revisited the issue, reaffirming its conclusion that the instruction was not warranted. The court noted Dr. Rothberg's testimony and Petitioner's inability to remember some of the details during his interview with police. Nevertheless, the trial court referred to the language of the instruction and stated that there was no evidence that Petitioner suffered from a blackout, epileptic seizure, involuntary intoxication, or sleepwalking. It rejected Petitioner's suggestion that he might have been rendered unconscious by Valdez's punching him. Instead, the court noted that the video showed that after firing the first shot, Petitioner stomped on Valdez a number of times, struck him with his hand a number of times, shot him, and then went to retrieve Baez before fleeing. (RT 5124-5126.)

B. Relevant Law

The Supreme Court has held that the due process right to a fair trial includes the opportunity to present a complete defense. *See Crane v. Kentucky*, 476 U.S. 683, 690 (1986); *California v. Trombetta*, 467 U.S. 479, 485 (1984). Further, under the Due Process Clause, a defendant is entitled to "an instruction as to any recognized

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[8] CALCRIM No. 3425 provides:

> The [Prosecution] must prove beyond a reasonable doubt that the defendant was conscious when he acted. If there is proof beyond a reasonable doubt that the defendant acted as if he were conscious, then you should conclude that he was conscious, unless based on all the evidence, you have a reasonable doubt that he was conscious, in which case you must find him not guilty.

defense for which there exists evidence sufficient for a reasonable jury to find in his favor." *Mathews v. United States*, 485 U.S. 58, 63 (1988); *Bradley v. Duncan*, 315 F.3d 1091, 1098–1099 (9th Cir. 2002); *Hagenno v. Yarborough*, 253 F. App'x 702, 704 (9th Cir. 2007). This is so because "the right to present a defense would be empty if it did not entail the further right to an instruction that allowed the jury to consider the defense." *Bradley*, 315 F.3d at 1099 (citation omitted). The failure to instruct on a defense theory is error only if "the theory is legally sound and the evidence in the case makes [the theory] applicable." *Clark v. Brown*, 450 F.3d 898, 904–905 (9th Cir. 2006) (as amended) (citations and internal quotations omitted).

C. Analysis

Petitioner has not shown that he was entitled to an instruction on unconsciousness. Under California law, an unconscious act is defined as "one committed by a person who because of somnambulism, a blow on the head, or similar cause is not conscious of acting and whose act therefore cannot be deemed volitional." *People v. Ferguson*, 194 Cal. App. 4th 1070, 1083 (2011). As the trial court concluded, the evidence did not support a finding that Petitioner was not conscious when he shot Valdez. Petitioner's conduct before, during, and after the shooting, is not consistent with him being unconscious. In particular, between the first shot and the second shot, Petitioner stood over Valdez, stomped on him, hit him, and finally shot him in the head. Immediately thereafter, Petitioner found Baez and then fled. Dr. Rothberg's testimony that Petitioner may have acted in a "disconnected state" or like "a robot" when he fired the second shot did not constitute sufficient evidence from which a rational trier of fact could have concluded that Petitioner committed the crime while unconscious. *See People v. Halvorsen*, 42 Cal. 4th 379, 418 (2007) ("The complicated and purposive nature of [defendant's] conduct in driving from place to place, aiming at his victims, and shooting them in vital areas of the body suggests [consciousness]"; no error in refusing request for instructions on unconsciousness where defendant "testified in sharp detail regarding the shootings,"

even though earlier he had told a doctor that he did not remember them).

Furthermore, even if the trial court should have instructed the jury on the defense of unconsciousness, Petitioner is entitled to habeas corpus relief only if the error had a substantial and injurious effect on the jury's verdict. *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993). Here, any error was harmless.

As noted by the state appellate court, Petitioner offered the jury several defense theories which he argued were consistent with the evidence: "he accidentally fired the second shot because of the easier trigger pull; he acted autonomically due to the fight-or-flight response; the punch triggered his PTSD, which caused him to shoot in response; and he acted in perfect or imperfect self-defense because Valdez, after sending threats of physical harm to him and Baez, not only provoked him verbally, but attacked him physically." (ECF No. 18-4 at 2-8; *see* RT 5152-5156, 5160-5189, 5192-5193, 5200-5209, 5400-5418.) Among other defenses, the trial court instructed the jury with the law regarding self-defense, accidental killing, and imperfect self-defense. Those instructions told the jury that the prosecution had the burden of proving beyond a reasonable doubt that the killing was not justified or accidental and if the jury had a doubt, it must find Petitioner not guilty. (CT 539-541, 547-549.) At the same time, the jury was instructed that in order to be guilty of first-degree murder, the prosecution must prove beyond a reasonable doubt that Petitioner acted willfully, deliberately, and with premeditation. (CT 543-544.) Jurors are presumed to have followed the instructions given to them. *See Weeks v. Angelone*, 528 U.S. 225, 234 (2000). The jurors ultimately determined beyond a reasonable doubt that Petitioner possessed the requisite criminal intent to commit premeditated murder, a determination that necessarily rejects any notion that Petitioner might have been unconscious at the time of the offense.

VI. Ineffective Assistance of Appellate Counsel

Petitioner contends that he received ineffective assistance of counsel on appeal because counsel failed to raise the claims in Grounds Three, Four, and Five. (ECF

No. 1 at 7; ECF No. 3-1 at 70-79; ECF No. 3-2 at 1-7.) The California Court of Appeal rejected this claim on the merits, finding that Petitioner had

> failed to show that appellate counsel's exercise of professional judgment was deficient or that, but for counsel's errors, the outcome of the appeal would have been different. Appellate counsel is not required to raise every non-frivolous issue. (*Smith v. Robbins* (2000) 528 U.S. 259, 285 (2000); *Jones v. Barnes* (1983) 463 U.S. 745, 75-752.)

(ECF No. 18-12.)

Pursuant to clearly established federal law, a criminal defendant has the right to the effective assistance of counsel on his first appeal as of right. *Evitts v. Lucey*, 469 U.S. 387, 396-397 (1985). Claims of ineffective assistance of counsel on appeal are analyzed under the familiar standard set forth in *Strickland. See Smith*, 528 U.S. at 285; *Moormann v. Ryan*, 628 F.3d 1102, 1106 (9th Cir. 2010). Thus, a petitioner must show that counsel's performance was objectively unreasonable, which in the appellate context means that counsel acted unreasonably in failing to discover and brief a merit-worthy issue *Smith*, 528 U.S. at 285; *Wildman v. Johnson*, 261 F.3d 832, 841–842 (9th Cir. 2001). Second, a petitioner must show prejudice, defined as a reasonable probability that, but for appellate counsel's failure to raise an issue, the petitioner would have prevailed on his appeal. *Smith*, 528 U.S. at 285–286; *Moormann*, 628 F.3d at 1106.

Petitioner has not demonstrated that Grounds Three, Four, or Five were merit-worthy. In fact, the California Superior Court concluded that they lacked merit. Specifically, it found that the trial court properly exercised its discretion in denying Petitioner's request for counsel and his request for a continuance. It also found that there was no evidence supporting an unconsciousness instruction and that the jury's finding that the murder was willful, deliberate and with premeditation "precluded" any error in failing to give the instruction. (ECF No. 18-9 at 1-2.)

Appellate counsel did not act unreasonably by failing to raise these meritless

claims. Furthermore, Petitioner could not have been prejudiced by appellate counsel's allegedly deficient performance. *See Jones v. Ryan*, 691 F.3d 1093, 1101 (9th Cir. 2012) ("It should be obvious that the failure of an attorney to raise a meritless claim is not prejudicial"); *Wildman*, 261 F.3d at 840 ("[A]ppellate counsel's failure to raise issues on direct appeal does not constitute ineffective assistance when appeal would not have provided grounds for reversal."). It follows that the state court's rejection of this claim was neither contrary to, nor an unreasonable application of, clearly established federal law.

RECOMMENDATION

For the foregoing reasons, it is recommended that District Judge issue an Order: (1) accepting and adopting this Report and Recommendation; and (2) directing that Judgment be entered denying the petition and dismissing this action with prejudice.

DATED: 1/22/2020

ALEXANDER F. MacKINNON
UNITED STATES MAGISTRATE JUDGE