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ADVANCE SHEET HEADNOTE
April 10, 2023

2023 CO 15

No. 21SC388, *People v. Davis*, —Sixth Amendment —Right to Counsel— Prejudice in General.

The defendant in this case was represented by the public defender's office. The defendant requested a continuance so that his appointed public defender could represent him at trial. The trial court denied the request, stating that because of the simple nature of the case, it perceived no prejudice in denying the continuance, though that required substitution of counsel. The defendant appealed, arguing that the Sixth Amendment includes a right to continuity of representation by a particular appointed counsel even though it does not include a right to initial selection of appointed counsel.

The Colorado Supreme Court considers whether criminal defendants have a Sixth Amendment right to continued representation by a particular public defender, and under what standard a trial court should determine a defendant's continuance request to enable continued representation with appointed counsel.

The court holds that, although indigent defendants have an interest in continuity of counsel that must be considered by a court, it is not a right guaranteed under the Sixth Amendment. Any Sixth Amendment right to continuity of counsel is a component of the right to choose counsel, and it is settled law that defendants do not have a right to choose a particular appointed attorney. However, a court considering a requested continuance to allow appointed counsel to represent a defendant at trial should consider whether the denial of the continuance and substitution of counsel would prejudice the defendant.

The Supreme Court of the State of Colorado
2 East 14th Avenue • Denver, Colorado 80203

2023 CO 15

Supreme Court Case No. 21SC388
Certiorari to the Colorado Court of Appeals
Court of Appeals Case No. 18CA641

Petitioner:

The People of the State of Colorado,

v.

Respondent:

William Allen Davis.

Judgment Reversed
en banc
April 10, 2023

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JUSTICE HART delivered the Opinion of the Court, in which **CHIEF JUSTICE BOATRIGHT**, **JUSTICE MÁRQUEZ**, **JUSTICE HOOD, JUSTICE SAMOUR,** and **JUSTICE BERKENKOTTER** joined.
JUSTICE GABRIEL dissented.

JUSTICE HART delivered the Opinion of the Court.

¶1 As we explain in more detail in *People v. Rainey*, 2023 CO 14, a companion case to this one, the Sixth Amendment to the United States Constitution does not guarantee a criminal defendant continued representation by a particular court-appointed attorney. Therefore, a court confronted with a request for a continuance in which a defendant seeks continued representation by their appointed attorney is not required to apply the eleven-factor test we established in *People v. Brown*, 2014 CO 25, 322 P.3d 214. Instead, such a request should be considered with a view to determining whether a defendant can show that replacing particular appointed counsel would prejudice the case. Only then is that defendant entitled to a continuance to enable that attorney to continue the representation.

¶2 Here, the trial court correctly considered whether defendant William Allen Davis would be prejudiced if his appointed counsel was replaced by a different public defender and concluded that he would not be. We therefore reverse the division's opinion remanding for application of the *Brown* factors.

I. Facts and Procedural History

¶3 On April 20, 2017, Davis was charged with vehicular eluding, reckless driving, and driving under restraint after failing to yield to a Parks and Wildlife

officer at Golden Gate Canyon State Park. The court appointed Garen Gervey as Davis's public defender and set the trial for November 20, 2017.

¶4 On October 30, 2017, Davis, through counsel, moved for a continuance because (1) Gervey had another trial set for the same day and (2) due to a scheduling misunderstanding, investigation was still being completed in the case. The trial court denied the motion.

¶5 Davis then filed a second motion to continue the trial, this time asserting his "right to continued representation by counsel of choice [under] *People v. Harlan*, 54 P.3d 871, 878 (Colo. 2002)," and stating that he "does not consent to a new attorney stepping in to handle his trial."

¶6 The court denied the motion after holding a hearing in which it emphasized the scheduling difficulties it was having in trying to set a trial date and stated that because this case was "essentially a traffic case," it would likely be straightforward enough to be tried in a single day. In denying the motion, the court also observed, quoting from *People v. Coria*, 937 P.2d 386, 389 (Colo. 1997), that the "substitution of one public defender with another does not violate the Sixth Amendment right to counsel, absent evidence of prejudice." The court explained that it perceived no prejudice because it would not take an attorney "of any competence any time to prepare," and therefore denied Davis's motion.

¶7 On the morning of trial, Davis, through newly substituted counsel, again moved for a continuance. The court denied the motion, and the trial proceeded. The jury convicted Davis of vehicular eluding, reckless driving, and driving under restraint.

¶8 Davis appealed his conviction, asserting, as relevant here, that the trial court should have granted his continuance because he had a right to be represented by his original public defender.

¶9 The division adopted the holding from *People v. Rainey*, 2021 COA 35, 491 P.3d 531, that indigent defendants have a constitutional right to continued representation by appointed counsel and district courts must apply the *Brown* factors when considering a continuance to enable continued representation by appointed counsel. *People v. Davis,* No. 18CA641, ¶¶ 10, 15, 18–19 (Apr. 22, 2021). Accordingly, the division reversed Davis's conviction and remanded for further proceedings. *Id.* at ¶¶ 20–21.

¶10 The People petitioned this court for review, and we granted certiorari to determine whether the Sixth Amendment provides a right to continued representation by appointed counsel and whether a trial court is required to apply

the *Brown* test when ruling on a defendant's continuance to enable continued representation.[1]

II. Analysis

¶11 After setting out the applicable standard of review, we explain the two Sixth Amendment rights that have been recognized by the United States Supreme Court and this court—the right to the effective assistance of counsel and the more limited right to choice of counsel. We then explain why any right to continued representation by a particular attorney flows from the initial right to choose that attorney. Next, we reaffirm that the conflict line of cases discussing a defendant's entitlement to waive a potential attorney-client conflict does not establish a Sixth Amendment right to continued representation by a specific appointed attorney. Finally, we explain that a trial court considering a defendant's request for a continuance so that a particular court-appointed attorney can continue the

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[1] We granted certiorari on the following issues:

1. [REFRAMED] Whether the Sixth Amendment right to counsel of choice encompasses continued representation by a particular public defender once appointed.
2. [REFRAMED] Whether trial courts are required to apply and make record findings on the eleven-factor test from *People v. Brown*, 2014 CO 25, 322 P.3d 214, when assessing a defendant's request to continue trial so that a particular public defender can continue to represent him.

representation should consider whether the defendant would be prejudiced by denial of the continuance.

A. Standard of Review

¶12 Appellate courts review a trial court's denial of a motion for a continuance for an abuse of discretion. *Brown*, ¶ 19, 322 P.3d at 219. However, where, as here, the question is whether the appellate court applied the correct legal standard, we review de novo. *Ronquillo v. People*, 2017 CO 99, ¶ 13, 404 P.3d 264, 267.

B. The Sixth Amendment Right to Counsel

¶13 The Sixth Amendment provides that "[in] all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. Const. amend. VI; *see also* Colo. Const. art. II, § 16. Both federal and state case law define the precise contours of this right to counsel.

¶14 Because legal representation "is critical to the ability of the adversarial system to produce just results," *Strickland v. Washington*, 466 U.S. 668, 685 (1984), criminal defendants have the right to a court-appointed attorney if they cannot otherwise retain counsel. *Gideon v. Wainwright*, 372 U.S. 335, 343–44 (1963). Moreover, "the right to counsel is the right to the effective assistance of counsel." *Strickland*, 466 U.S. at 686 (quoting *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970)). This right to effective representation derives "from the purpose of ensuring a fair trial," *United States v. Gonzalez-Lopez*, 548 U.S. 140, 147 (2006), and

is constitutionally guaranteed to all criminal defendants, *Strickland*, 466 U.S. at 685. The right to effective assistance of counsel "imposes a baseline requirement of competence on whatever lawyer is chosen or appointed." *Gonzalez-Lopez*, 548 U.S. at 148.

¶15 For those defendants who hire counsel or find private counsel to represent them pro bono, the Sixth Amendment also provides a distinct right to choose a particular attorney. *See id.*, at 144. The right to hire counsel of choice "is the right to a particular lawyer regardless of comparative effectiveness." *Id.* at 148.

¶16 The right to the effective assistance of counsel is constitutionally guaranteed for all criminal defendants. The right to choice of counsel is not. *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 624 (1989). As the Supreme Court has explained, this is because "the essential aim of the Amendment is to guarantee an effective advocate for each criminal defendant rather than to ensure that a defendant will inexorably be represented by the lawyer whom he prefers." *Wheat v. United States*, 486 U.S. 153, 159 (1988). The right to choose an attorney is therefore more limited than the right to the effective assistance of counsel.

¶17 Even for defendants who hire counsel, the right to counsel of choice is circumscribed. For example, there are times when "judicial efficiency or 'the public's interest in maintaining the integrity of the judicial process,' may be deemed more important than the defendant's interest in being represented by a

particular attorney." *Brown*, ¶ 17, 322 P.3d at 219 (quoting *Rodriguez v. Dist. Ct.*, 719 P.2d 699, 706 (Colo. 1986)). Thus, when defendants request a continuance to enable their hired counsel of choice to represent them in a particular proceeding, the court must balance the right to counsel of choice against the public's interest in a fair and efficient judicial system. *Id.* at ¶ 22, 322 P.3d at 220. In *Brown*, we established a multi-factor test that courts should apply in considering that balance. *Id.* at ¶ 24, 322 P.3d at 221.

¶18 For the reasons we describe in more detail in *Rainey*, the Sixth Amendment does not include a third right—independent of the right to the effective assistance of counsel or the right to hire counsel of choice—to continued representation by a particular appointed attorney from the moment that attorney has been appointed. The United States Supreme Court has not recognized such a right, and we decline to do so here.

C. Defendants' Interest in Continued Representation by Particular Counsel

¶19 Still, as we explained in *Rainey*, a defendant with appointed counsel has an interest in continued representation by that attorney if they can demonstrate that prejudice would result from substitution with a different court-appointed attorney.

¶20 The division here concluded that the right to continued representation was a constitutional right and therefore followed the *Rainey* division's analysis and

asserted that the eleven-factor *Brown* test was the proper standard to apply. But where, as here, a defendant's continuance request does not implicate the Sixth Amendment, the *Brown* test does not apply. *People v. Travis*, 2019 CO 15, ¶¶ 13–17, 438 P.3d 718, 721–22 (declining to apply *Brown* where the "right to be represented by counsel of the defendant's choosing" was not implicated).

¶21 That does not, however, mean that a trial court has unbounded discretion to grant or deny a continuance in the face of an indigent defendant's request for more time to allow appointed counsel to continue the representation. Every defendant enjoys a basic due process right to a fair trial and "an unreasoning and arbitrary insistence upon a trial date in the face of a justifiable request for delay can amount to an abuse of discretion." *People v. Hampton*, 758 P.2d 1344, 1353 (Colo. 1988). The decision to grant or deny a continuance is within the broad discretion of the trial court, and "[t]here are no mechanical tests for determining whether the denial of a continuance constitutes an abuse of discretion." *Id.* Rather, whether such a denial is so arbitrary as to violate due process can "be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied." *Id.* (quoting *Ungar v. Sarafite*, 376 U.S. 575, 589 (1964)); s*ee also Travis*, ¶ 12, 438 P.3d at 721 (explaining that a court considering a request for a continuance where the right to choice of counsel is not involved will look at the totality of the circumstances).

¶22 Where, as here, the circumstances involve a defendant's request for a continuance to allow continued representation by appointed counsel, the trial court must consider whether denying the continuance would prejudice the defendant's right to a fair trial. *See People v. Gardenhire*, 903 P.2d 1165, 1168 (Colo. App. 1995) (holding that, "[a]bsent any evidence of prejudice based on the public defender's replacement with another public defender," there is "no reversible error in the trial court's ruling"); *see also Coria*, 937 P.2d at 389 (citing *Gardenhire* and, while addressing an adjacent question, stating that "[t]he substitution of one public defender with another does not violate the Sixth Amendment right to counsel, absent evidence of prejudice"). The court must balance the risk of prejudice against any concerns about the fair and efficient administration of the justice system.[2]

¶23 Here, the trial court, correctly applied this prejudice standard in ruling on Davis's motion. The court noted that Davis's case was "essentially a traffic case," there were no experts, and the case would "not take any lawyer of any competence

[2] It bears mentioning that although the standard we adopt today differs in form from *Brown*'s eleven-factor test, its function is not so different as to deny a defendant with appointed counsel any meaningful protection enjoyed by a defendant who hires counsel or finds a private attorney to take their case pro bono.

any time to prepare." The trial court thus concluded that it could not find any prejudice in denying Davis's continuance request.

III. Conclusion

¶24 Defendants with court-appointed attorneys do not have the right to choose a specific attorney. Without the right to choose counsel at the outset of a representation, there is no basis under the Sixth Amendment for a right to continuity of counsel.

¶25 Nevertheless, such defendants do have an interest in continued and effective representation by court-appointed counsel, and this interest must be given weight by district courts in the face of a request for a continuance. Because we find that continuity of counsel for defendants with appointed counsel is an aspect of their general interest in due process rather than a right guaranteed by the Sixth Amendment, prejudice is the proper standard for a district court to follow when deciding whether to grant such a continuance.

¶26 Accordingly, we reverse the division's decision to the contrary and remand for further proceedings consistent with this opinion.

JUSTICE GABRIEL dissented.

JUSTICE GABRIEL, dissenting.

¶27 For the reasons set forth in my dissent in *People v. Rainey*, 2023 CO 14, ¶¶40–45, 52–74, 89–93 (Gabriel, J., dissenting), I believe that under long-settled precedent of this court, the Sixth Amendment guarantees criminal defendants, whether of means or indigent, the right to the continuity of counsel. Accordingly, I would conclude here that, in denying Davis's request for a continuance without recognizing his Sixth Amendment rights, the trial court misapplied the law and therefore abused its discretion. *See People v. Johnson*, 2021 CO 35, ¶ 16, 486 P.3d 1154, 1158 ("A trial court abuses its discretion when its ruling is manifestly arbitrary, unreasonable, or unfair, or when it misapplies the law.") (citations omitted).

¶28 In light of the foregoing, I would further conclude, as I did in my dissent in *Rainey*, ¶ 74, that the factors that we adopted in *People v. Brown*, 2014 CO 25, ¶ 24, 322 P.3d 214, 221, apply in this context to guide the determination as to whether an indigent defendant is entitled to a continuance to ensure the continuity of court-appointed counsel. Unlike in *Rainey*, however, I do not believe that the record here is sufficiently developed to allow us to assess the *Brown* factors in the first instance. *Cf. People v. Gilbert*, 2022 CO 23, ¶ 27, 510 P.3d 538, 546–47 (noting that when the record is sufficient to allow an appellate court to assess the *Brown* factors, it may do so). Specifically, the trial court in this case did not consider *any*

of the factors outlined in *Brown*. Instead, relying on what I believe to be inapposite dicta from *People v. Coria*, 937 P.2d 386, 389 (Colo. 1997), *see Rainey*, ¶¶ 69–71, the court addressed only whether Davis would be prejudiced by the substitution of counsel and whether substitute counsel could provide Davis effective assistance of counsel. Accordingly, like the division below, I would reverse Davis's conviction and remand this case to the trial court to make findings on the record as to each of the applicable *Brown* factors and to apply the correct legal standard. *See People v. Davis*, No. 18CA641, ¶ 20 (Apr. 22, 2021).

¶29 For these reasons, I would affirm the division's judgment. I therefore respectfully dissent.