APPENDIX

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APPENDIX A

Supreme Court of Colorado

The PEOPLE of the State of Colorado, Petitioner,

v.

Robert James RAINEY, Respondent.

Supreme Court Case No. 21SC285

April 10, 2023

Certiorari to the Colorado Court of Appeals, Court of Appeals Case No. 17CA1133

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En Banc

JUSTICE HART delivered the Opinion of the Court, in which CHIEF JUSTICE BOATRIGHT, JUSTICE MARQUEZ, JUSTICE HOOD, JUSTICE SAMOUR, and JUSTICE BERKENKOTTER joined.

JUSTICE HART delivered the Opinion of the Court.

¶1 The Sixth Amendment to the United States Constitution guarantees all criminal defendants the right to counsel to assist in their defense. That right includes a right to effective representation by counsel. For a defendant who hires their own attorney or finds one to represent them pro bono, the Sixth Amendment right to counsel also encompasses a right to choose their counsel. However, when the state appoints and pays for an attorney for an indigent defendant, that defendant does not have a constitutional right to select the particular attorney.

¶2 This case presents a question related to these settled legal principles: When counsel has been appointed for a defendant, does that defendant have a Sixth Amendment right to continued representation by that particular lawyer? We conclude that they do not. The right to continued representation by a particular attorney flows from the right to choose that attorney, which does not apply when counsel is appointed. Still, if a defendant represented by an appointed attorney can show that denying a continuance and replacing that appointed attorney would prejudice their case, due process requires that the defendant be given a continuance so the attorney can continue the representation.

I. Facts and Procedural History

¶3 Robert James Rainey was charged with nine criminal counts related to domestic violence in July 2016. The trial court appointed Sara Schaefer as Rainey's public defender and set trial for January 9, 2017.

¶4 The night before trial, a storm damaged the courthouse, and the trial was reset to the following

day. The morning of the newly set trial, the People were granted a continuance over Rainey's objection because the victim failed to appear. Trial was again delayed on February 2 because there weren't enough jurors available.

¶5 On February 23, Rainey appeared for the first time with Neil DeVoogd, a public defender who had just taken over Rainey's case. At the hearing, the People moved for another continuance over Rainey's objection because one of their witnesses was unavailable. The trial court granted the motion and reset the trial for March 6, 2017 — the day before the expiration of the speedy-trial deadline. DeVoogd confirmed that the date would work for trial and agreed to appear for the pretrial readiness conference, which was set for March 3.

¶6 At the pretrial readiness conference, DeVoogd raised for the first time that he would not in fact be available on March 6 for trial because of pre-existing vacation plans. He explained that when he substituted onto Rainey's case a "little bit more than a week ... ago," he had accepted the March 6 date because a plea deal was being negotiated and he had not anticipated going to trial. At this point, Rainey offered to waive the speedy-trial deadline to obtain another continuance so that DeVoogd could represent him at trial.

¶7 The court refused to grant the continuance, emphasizing the difficulty it had in securing a judge to cover Rainey's trial and observing that the proper time for DeVoogd to have raised his vacation plans was when it set the trial date two weeks earlier. It noted that, if it had to reset Rainey's trial again, the

trial couldn't be set until July because of docket congestion.

¶8 The trial court further observed that Rainey's case was factually simple, and counsel would not need a substantial amount of time to prepare. DeVoogd conceded that he could not think of any reason why another public defender could not adequately prepare for the trial over the weekend.

¶9 The trial took place on March 6, after Rainey's two new attorneys announced that they were ready to proceed. The jury convicted Rainey on two of the nine counts — second degree kidnapping and criminal mischief — with a further finding that both crimes constituted acts of domestic violence.

¶10 Rainey appealed his convictions, arguing that the trial court violated his Sixth Amendment right to continued representation of appointed counsel when it denied his request for a continuance and forced him to proceed with public defenders other than DeVoogd.

¶11 On appeal, the division reversed the trial court's judgment and held that, while defendants do not have an *initial* right to choose their appointed counsel, once an attorney is appointed, they do have a constitutional right to choose *continued* representation by that specific attorney. *People v. Rainey,* 2021 COA 35, ¶¶ 13, 29, 491 P.3d 531, 535, 538. The division further concluded that trial courts must therefore apply the test announced in *People v. Brown,* 2014 CO 25, 322 P.3d 214, when considering a defendant's request for a continuance so that they can be represented by their preferred appointed counsel at trial. *Rainey,* ¶ 25, 491 P.3d at 538.

¶12 The People petitioned this court for certiorari review. We granted certiorari to determine whether the Sixth Amendment provides a right to continued representation by appointed counsel and whether trial courts are required to apply the *Brown* test when ruling on a defendant's request for a continuance so that a particular public defender can represent them at trial.[1]

II. Analysis

¶13 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 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 right to choice of counsel. Next, we examine why the Colorado cases discussing a defendant's entitlement to waive a potential conflict of interest to retain particular counsel do not establish a Sixth Amendment right to continued representation by a specific appointed attorney. Finally, we consider what standard courts should apply when assessing a defendant's request for a trial continuance so that a particular court-appointed attorney

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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.

can continue the representation. We conclude that the proper analysis focuses on whether the substitution of counsel would prejudice a defendant's case.

A. Standard of Review

¶14 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. The interpretation of a constitutional provision is also a question of law that we review de novo. *Gessler v. Colo. Common Cause,* 2014 CO 44, ¶ 7, 327 P.3d 232, 235.

B. The Sixth Amendment Right to Counsel

¶15 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.

¶16 Most fundamentally, because legal representation "is critical to the ability of the adversarial system to produce just results," *Strickland v. Washington,* 466 U.S. 668, 685, 104 S.Ct. 2052, 80 L.Ed.2d 674 (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, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). But a lawyer's mere presence alongside a criminal defendant is not enough to satisfy the Sixth Amendment's right to counsel. *Strickland,* 466 U.S. at 685, 104

S.Ct. 2052. Rather, "the right to counsel is the right to the effective assistance of counsel." *Id.* at 686, 104 S.Ct. 2052 (quoting *McMann v. Richardson,* 397 U.S. 759, 771 n.14, 90 S.Ct. 1441, 25 L.Ed.2d 763 (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, 126 S.Ct. 2557, 165 L.Ed.2d 409 (2006), and is constitutionally guaranteed to all criminal defendants, *Strickland,* 466 U.S. at 685, 104 S.Ct. 2052.

¶17 Properly understood, the right to the effective assistance of counsel "imposes a baseline requirement of competence on whatever lawyer is chosen or appointed." *Gonzalez-Lopez,* 548 U.S. at 148, 126 S.Ct. 2557. It thereby ensures that all criminal defendants — regardless of means — have the right to be represented at trial by an effective advocate, and in turn "assures fairness in the adversary criminal process." *United States v. Morrison,* 449 U.S. 361, 364, 101 S.Ct. 665, 66 L.Ed.2d 564 (1981).

¶18 For those defendants who hire their own counsel or find private counsel to represent them pro bono, the Sixth Amendment also provides a distinct right to choose a particular attorney. *See Gonzalez-Lopez,* 548 U.S. at 144, 126 S.Ct. 2557. The right to hire counsel of choice "is the right to a particular lawyer regardless of comparative effectiveness." *Id.* at 148, 126 S.Ct. 2557.

¶19 The right to the effective assistance of counsel is constitutionally guaranteed for all criminal defendants. The right to choice of counsel is not. It is well settled that the right to counsel of choice does not extend to defendants for whom the court appoints counsel. *Caplin & Drysdale, Chartered v.*

United States, 491 U.S. 617, 624, 109 S.Ct. 2646, 105 L.Ed.2d 528 (1989) ("[T]hose who do not have the means to hire their own lawyers have no cognizable complaint so long as they are adequately represented by attorneys appointed by the courts."); *People v. Arguello,* 772 P.2d 87, 92 (Colo. 1989) ("[A]lthough an indigent criminal defendant has an absolute right to be represented by counsel, this does not mean a defendant has a right to demand a particular attorney."); *People v. Travis,* 2019 CO 15, ¶ 8, 438 P.3d 718, 720 ("Indigent defendants have a right to effective assistance of counsel, but not to counsel of their choice."). As the Supreme Court has explained, this is because, although a right to hire one's preferred counsel is comprehended by the Sixth Amendment, "the essential aim of the Amendment is to guarantee an effective advocate for each criminal defendant rather than to ensure that a defendant will inexorably be represented by the lawyer whom he prefers." *Wheat v. United States,* 486 U.S. 153, 159, 108 S.Ct. 1692, 100 L.Ed.2d 140 (1988). The right to choice of counsel is therefore more limited than the right to the effective assistance of counsel.

¶20 Importantly, 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.[2] *Id.* at ¶ 24, 322 P.3d at 221.

¶21 The question we are asked to decide here is whether the Sixth Amendment includes a third right — one independent of the right to the effective assistance of counsel or the right to hire counsel of choice. That proposed right is described by Rainey as the right to continued representation by a particular appointed attorney from the moment that attorney has been appointed. In other words, although a defendant cannot choose their original appointed counsel, Rainey argues — and the division concluded — that once a particular lawyer has been appointed by the state, the Sixth Amendment provides the defendant

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[2] The *Brown* factors include:
1. the defendant's actions surrounding the request and apparent motive for making the request;
2. the availability of chosen counsel;
3. the length of continuance necessary to accommodate chosen counsel;
4. the potential prejudice of a delay to the prosecution beyond mere inconvenience;
5. the inconvenience to witnesses;
6. the age of the case, both in the judicial system and from the date of the offense;
7. the number of continuances already granted in the case;
8. the timing of the request to continue;
9. the impact of the continuance on the court's docket;
10. the victim's position, if the victims' rights act applies; and
11. any other case-specific factors necessitating or weighing against further delay.
Brown, ¶ 24, 322 P.3d at 221.

with the right to insist on continued representation by that specific lawyer.

¶22 The United States Supreme Court has not recognized such a right, and we decline to do so here.[3] While, as we discuss further below, a defendant has an interest in continued representation by a particular court-appointed attorney under some circumstances, it is not an interest that derives from the Sixth Amendment. The only way that a right to continued representation by a specific attorney can derive from the Sixth Amendment is as a corollary of the right to counsel of choice. If a defendant has the right to choose their attorney, they have the right to continued representation by that attorney — subject to balancing against the needs of a fair and efficient judicial system. But since defendants who receive court-appointed counsel do not have a right to choose their attorneys, they do not have a constitutional right to continued representation by any particular appointed attorney.

C. Defendants' Interest in Continued Representation by Particular Counsel

¶23 That the Sixth Amendment does not guarantee an indigent defendant the right to continued representation does not mean that indigent defendants

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[3] Rainey urges us to follow the lead of other state courts that have found a constitutional right to continuity of counsel. This line of cases begins with the California Supreme Court's decision in *Smith v. Superior Court,* 68 Cal.2d 547, 68 Cal.Rptr. 1, 440 P.2d 65 (1968). The California Supreme Court has since called that early decision into question, observing that it is "far from clear" that the Sixth Amendment actually encompasses such a right. *People v. Jones,* 33 Cal.4th 234, 14 Cal.Rptr.3d 579, 91 P.3d 939, 945 (2004).

never have an interest in continued representation by their appointed counsel. In fact, in a line of cases considering the defendant's right to waive potential conflicts of interest with their counsel, we have recognized that a defendant's interest in continued representation by a lawyer they have been working with is "entitled to great weight." *People v. Nozolino,* 2013 CO 19, ¶ 18, 298 P.3d 915, 920. We reaffirm that proposition here by concluding that a defendant with appointed counsel has an interest in continued representation by that counsel if they can demonstrate that prejudice would result from substitution with a different court-appointed attorney. Moreover, this interest is one that must be considered by a trial court in determining whether to grant a continuance to permit continued representation in order to ensure the basic fairness of the proceeding. However, we also make clear that this line of cases does not establish a Sixth Amendment right to continuity of counsel.

¶24 The first in this line of cases is *Williams v. District Court,* 700 P.2d 549 (Colo. 1985). In that case, the prosecution served a subpoena on the defendant's current and former attorneys, asserting that the government intended to call the attorneys as witnesses against their client. *Id.* at 550. This court quashed the subpoenas, noting that if the prosecution could call a defendant's attorneys as witnesses without demonstrating compelling need, it would effectively allow the prosecution to disqualify attorneys with ease and inhibit defense counsel from vigorous investigation. *Id.* at 555, 558. We explained that "[w]hile indigent defendants have no right to an attorney of their choice, they are entitled to contin-

ued and effective representation by court appointed counsel in the absence of a demonstrable basis in fact and law to terminate that appointment." *Id.* at 555. We did not discuss where we derived this entitlement, and we certainly did not say that it was grounded in the Sixth Amendment. Our focus was on the risk that the prosecution could have an undue impact on the defendant's right to effective representation if it could wield the sword of threatened disqualification.

¶25 Many years later, in *People v. Harlan,* 54 P.3d 871, 875 (Colo. 2002), we were faced with a district court's decision to disqualify the entire public defender's office from representing Harlan because of the possibility that he might later argue that a conflict of interest rendered the representation ineffective.[4] We emphasized that "[d]isqualification is a severe remedy that should be avoided if possible" and that it is only proper when a court deems it "reasonably necessary to ensure 'the integrity of the fact-finding process, the fairness or appearance of fairness of trial, the orderly or efficient administration of justice, or public trust or confidence in the crimi-

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[4] Colorado Rule of Professional Conduct 1.7, which governs conflicts of interest between a lawyer and a client, provides in relevant part that "a lawyer shall not represent a client if the representation involves a concurrent conflict of interest." Colo. RPC 1.7(a). The purpose of this rule is to ensure loyalty and independent judgment in the lawyer's relationship to the client. Colo. RPC 1.7, cmt. 1. If one attorney in a law practice is barred from representing a client, that bar is imputed to the entire practice. Colo. RPC 1.10(a). Importantly, however, Rule 1.7 explains that some conflicts can be waived by the client if the client is willing to continue the attorney-client relationship despite the conflict. Colo. RPC 1.7(b).

nal justice system.' " *Id.* at 877 (quoting *People v. Garcia,* 698 P.2d 801, 806 (Colo. 1985)).

¶26 We reaffirmed that defendants have no right to appointed counsel of choice, and we also emphasized that continued and effective representation by court-appointed counsel was a factor that the court should weigh when considering whether to disqualify counsel. We explained that a court considering whether a defendant may waive the right to conflict-free representation must examine: (1) the defendant's preference for particular counsel; (2) the public's interest in maintaining the integrity of the judicial process; and (3) the nature of the particular conflict. *Id.* (citing *Rodriguez,* 719 P.2d at 706-07). This balancing approach ensures careful scrutiny of the various interests that arise in the context of conflicts. *Nozolino,* ¶ 16, 298 P.3d at 920.

¶27 In the context of Harlan's case, we observed that his appointed attorney had "represented him over the course of a complex, seven-year death-penalty case." *Harlan*, 54 P.3d at 878. Over the course of that lengthy representation, Harlan had never expressed doubts about counsel's competence or loyalty. And the asserted conflict was speculative, creating relatively little risk that the public would question the integrity of the process.

¶28 Nowhere in *Harlan* did we suggest that the desire for continued representation flowed from the Sixth Amendment. Instead, we emphasized that the defendant's interest in retaining his counsel of seven years had to be weighed against the possibility of, and risks associated with, conflicts of interest between attorney and client. In other words, *Harlan's* "counsel of choice" language stands for the proposi-

tion that a defendant has a right to choose continued representation by conflicted counsel — where the conflict is waivable — *not* that a defendant has a right to continued representation by a particular court-appointed attorney under the Sixth Amendment.

¶29 The division also relied heavily on *Nozolino,* ¶ 18, 298 P.3d at 920, where this court, in recognizing the "great weight" accorded the defendant's desire for continued representation, again held that the defendant should have the opportunity to waive conflict-free representation and continue with his originally appointed counsel.

¶30 In *Nozolino,* the trial court ruled that the public defender's office had an unwaivable conflict of interest and therefore disqualified the entire office. *Id.* at ¶ 5, 298 P.3d at 918. On review, this court held that the trial court abused its discretion when it disqualified the public defender's office because (1) the alleged conflict was potential rather than actual; (2) the potential conflict was waivable; and (3) the defendant had expressed a strong preference for continuing with his originally appointed counsel who had been working with him for two years. *Id.* at ¶¶ 24-25, 298 P.3d at 921. We emphasized that "[d]isqualification of a party's chosen attorney is an extreme remedy and is only appropriate where required to preserve the integrity and fairness of the judicial proceedings." *Id.* at ¶ 13, 298 P.3d at 919. Indeed, we explained that before disqualifying an attorney, the court must determine that "any remedy short of disqualification would be ineffective." *Id.* (quoting *In re Estate of Myers,* 130 P.3d 1023, 1027 (Colo. 2006)). On the facts of Nozolino's case, we con-

cluded, there was no such showing. Thus, "the balance weigh[ed] in favor of" allowing Nozolino to waive conflict-free representation and continue with the attorneys he had been working with for the preceding two years. *Id.* at ¶ 25, 298 P.3d at 921; *see also Rodriguez,* 719 P.2d at 707 (noting that the balance favored permitting the defendant to waive a potential conflict where counsel had represented him from the inception of the case and the defendant had expressed no concerns about counsel's loyalty or competence).

¶31 The division here ascribed Sixth Amendment significance to the language in *Nozolino* and held that Rainey's desire to continue being represented by DeVoogd — his appointed lawyer of just a few weeks — was not just a "preference" but a right of constitutional dimension. *Rainey*, ¶ 22, 491 P.3d at 537. However, as in *Harlan* and *Williams*, this court's decision in *Nozolino* simply explained the contours of a defendant's right to waive a potential conflict of interest with their attorney. Ultimately the "great weight" we accord to a defendant's decision to waive a conflict of interest and continue with originally appointed counsel stems from the fact that disqualification of counsel without a client's consent is an extreme remedy that courts should resort to only where required for the fairness and integrity of the judicial process.

¶32 This line of conflicts cases does not establish a Sixth Amendment right to continuity of appointed counsel. It does, however, affirm that indigent defendants retain some interest in continuous representation that the court must balance against other

competing interests when determining whether to replace appointed counsel.

D. When Balancing a Defendant's Interest in Continuity of Counsel Against the Disruption Caused by a Continuance, Prejudice is the Proper Standard

¶33 So how should a court balance the defendant's interest in continued representation by a particular appointed attorney against other interests in the context of a request for a continuance? The division, having concluded that the right to continued representation by appointed counsel was a Sixth Amendment right, asserted that the eleven-factor *Brown* test was the proper standard to apply. *Rainey*, ¶ 25, 491 P.3d at 538. This was error. Where, as here, a defendant's continuance request does not implicate the Sixth Amendment, the *Brown* test does not apply. *Travis,* ¶¶ 13-17, 438 P.3d at 721-22 (declining to apply *Brown* where the "right to be represented by counsel of the defendant's choosing" was not implicated).

¶34 That fact 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). However, we have been clear that the decision to grant or deny a continuance is within the broad discretion of the tri-

al 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, 84 S.Ct. 841, 11 L.Ed.2d 921 (1964)); *see 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).

¶35 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 actually prejudice the defendant's case. *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 People v. Coria,* 937 P.2d 386, 389 (Colo. 1997) (citing *Gardenhire,* while addressing an adjacent question, and stating that "[t]he substitution of one public defender with another does not violate the Sixth Amendment right to counsel, absent evidence of prejudice"). Moreover, as in the conflict-of-interest cases, the court must balance the risk of prejudice against any

concerns about the fair and efficient administration of the justice system.[5]

¶36 Here, the trial court did not consider whether substitution of appointed counsel would prejudice Rainey. However, both DeVoogd and the two public defenders who replaced him conceded that the case was a straightforward one that could be handled by newly appointed counsel. Indeed, DeVoogd noted that he had represented Rainey for a very short period of time and therefore did not have any significant knowledge about the case that replacement counsel could not acquire. Given the state of the record, we do not perceive a need to remand this case for further findings. Rainey was not prejudiced by the fact that he was represented by appointed counsel other than DeVoogd.

III. Conclusion

¶37 Defendants with court-appointed attorneys do not have the right to choose a specific appointed 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.

¶38 Nevertheless, these defendants do have an interest in continued and effective representation by court-appointed counsel, and district courts must afford this interest weight in the face of a request for a continuance. Because we conclude that continuity of

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[5] 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 a case pro bono.

counsel for defendants with appointed counsel is an aspect of their general right to due process rather than a right specifically guaranteed by the Sixth Amendment, a district court deciding whether to grant or deny such a continuance should consider whether the denial will prejudice the defendant.

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

JUSTICE GABRIEL, dissenting.

¶40 Almost forty years ago, Justice Brennan wrote, "Given the importance of counsel to the presentation of an effective defense, it should be obvious that a defendant has an interest in his relationship with his attorney." *Morris v. Slappy,* 461 U.S. 1, 20-21, 103 S.Ct. 1610, 75 L.Ed.2d 610 (1983) (Brennan, J., concurring in the result). Justice Brennan further observed, "Nothing about indigent defendants makes their relationships with their attorneys less important, or less deserving of protection, than those of wealthy defendants." *Id.* at 22, 103 S.Ct. 1610.

¶41 For almost the same length of time, in an unbroken line of cases, this court has continuously recognized a criminal defendant's Sixth Amendment right to the continuity of representation by court-appointed counsel: "While indigent defendants have no right to an attorney of their choice, they are entitled to continued and effective representation by court appointed counsel in the absence of a demonstrable basis in fact and law to terminate that appointment." *Williams v. Dist. Ct.,* 700 P.2d 549, 555 (Colo. 1985) (citing *Gideon v. Wainwright,* 372 U.S.

335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963)); *accord People v. Nozolino,* 2013 CO 19, ¶ 17, 298 P.3d 915, 920; *People v. Shari,* 204 P.3d 453, 460 (Colo. 2009); *People v. Harlan,* 54 P.3d 871, 878 (Colo. 2002).

¶42 Today, however, without a single mention of stare decisis, the court jettisons this longstanding and until now unquestioned line of precedent in favor of an inapposite opinion of a division of our court of appeals and dicta from a case that we have not followed since that case was decided. In charting this course, the majority enshrines into constitutional law two principles that I find equally troubling.

¶43 First, the court essentially concludes that criminal defendants with means have a Sixth Amendment right to the continuity of counsel, but indigent defendants have no such right. In reaching this conclusion, however, the court provides no persuasive rationale for allowing such a means-based distinction as to who is entitled to the protection of this constitutional right.

¶44 Second, the majority sends a message that court-appointed defense counsel are fungible and can be substituted in lieu of granting a reasonable continuance whenever, as occurred here, the court decides that substitution will be more convenient for the court.

¶45 Because I can conceive of no sound basis for departing from long-settled precedent, endorsing such a two-tiered system of justice, or sending so demeaning a message to an entire class of dedicated public servants, I respectfully dissent.

I. Factual and Procedural Background

¶46 As pertinent to my analysis, defendant Robert James Rainey's trial was originally scheduled to begin on January 9, 2017. His trial was continued on four separate occasions, however, for reasons not attributable to the defense.

¶47 Specifically, on January 9, the court delayed the trial to the following day because a storm had damaged the courthouse. Then, on January 10, the prosecution moved for a continuance because the victim had failed to appear, and the court granted that motion over Rainey's objection and ultimately rescheduled the trial to February 2. February 2 then came, and the jury commissioner advised the court that she had not summoned enough jurors. So, the court continued the trial again, ultimately setting it for February 23. And on February 23, the prosecution moved for another continuance, again because one of its witnesses (this time, the police officer who had taken Rainey's statement) was unavailable. The court granted the prosecution's motion, again over Rainey's objection, resetting the trial for March 6 (although when the court did so, it noted that "there is a reasonable chance we won't have a Judge to hear the case"). At no time in granting any of these motions (two at the court's insistence and two on the prosecution's motion) did the court hesitate based on concerns regarding its docket or scheduling issues (including when the court recognized the possibility that no judge would be available to try the case on March 6).

¶48 Thereafter, at a pretrial conference held on March 3, Rainey, *for the first time,* requested a continuance of his own. In support of this motion,

Rainey asserted that his public defender, Neil DeVoogd, was going to be out of town the following week for a previously scheduled vacation. DeVoogd explained that at the time he had acquiesced in the March 6 tentative trial date, the parties had reached an agreement and there was "not any [likelihood] that [the case] was going to be going to trial." That agreement, however, "ended up not going through." In thus requesting a continuance on Rainey's behalf, DeVoogd emphasized that (1) Rainey wanted DeVoogd to represent him; (2) it made Rainey "substantially uncomfortable to be going forward to trial with somebody who would be prepping the trial over the weekend," and he had the right to his counsel of choice; and (3) he was willing to waive his speedy trial right to protect his right to the continuity of counsel.

¶49 Even though the court had previously continued the trial twice on its own motion and twice on the prosecution's motion (all on days the trial was to begin), and even though Rainey had not previously requested *any* continuances, the court denied Rainey's motion. In so ruling, the court relied exclusively on its finding that it would be difficult to fit the trial into the court's busy docket, a concern that the court had not expressed when it had previously continued the trial twice on its own and twice at the prosecution's behest (all within the prior two months). The court did not, however, deny the continuance based on a finding of inappropriate conduct or "gamesmanship" by Rainey or his counsel. To the contrary, the court expressly *rejected* any finding of gamesmanship by Rainey or DeVoogd and observed that it was "sympathetic" to DeVoogd's request, even

acknowledging DeVoogd's statement that it was unfair to deny Rainey's first request for a continuance when every prior continuance was attributable to the prosecution or the court system. As a result, I perceive no basis for any suggestion that DeVoogd had "lied" to the court when he acquiesced in the March 6 tentative trial date, as was suggested at oral argument, any more than the prosecution had lied in accepting multiple trial dates and then seeking continuances of its own.

¶50 Based on the court's ruling, two other public defenders stepped in to represent Rainey, after having had only a weekend to prepare for a trial in which Rainey was facing numerous charges, including a felony kidnapping charge.

¶51 Rainey was ultimately convicted on two counts, including second degree kidnapping. He appealed, and a division of our court of appeals reversed and remanded, concluding that the trial court had applied the wrong legal standard in considering the motion to continue and that further findings were necessary. *People v. Rainey,* 2021 COA 35, ¶¶ 2, 25-29, 491 P.3d 531, 533, 538. We then granted certiorari.

II. Analysis

¶52 I begin by setting forth our heretofore longstanding case law concerning an indigent defendant's Sixth Amendment right to the continuity of counsel. I then explain why principles of stare decisis provide no basis for overturning this longstanding precedent or for adopting as our rule of decision an inapposite principle recited in a court of appeals division's opinion and dicta from a prior case of ours

that we have not previously followed. Next, I address whether, in light of my view of the applicable law, the factors that we set forth in *People v. Brown,* 2014 CO 25, ¶ 24, 322 P.3d 214, 221, regarding continuances should apply here. I would conclude that they do and that, based on their application, the trial court abused its discretion in denying Rainey's requested continuance in this case. I end by setting forth what I perceive to be the unfortunate ramifications of the majority's ruling today.

A. The Sixth Amendment Right to Continuity of Counsel

¶53 The Sixth Amendment provides, in pertinent part, "In all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defence." U.S. Const. amend. VI. Although the Sixth Amendment contains no express language guaranteeing an indigent defendant's right to appointed counsel, the Supreme Court recognized such a right in *Gideon,* 372 U.S. at 344, 83 S.Ct. 792. Likewise, although the Sixth Amendment contains no express language guaranteeing a defendant's right to the effective assistance of counsel, the Supreme Court recognized that right in *McMann v. Richardson,* 397 U.S. 759, 771 n.14, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970), and then again in *Strickland v. Washington,* 466 U.S. 668, 686, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). And although the Sixth Amendment contains no express language regarding counsel of choice, it has long been settled that those who can afford counsel have a right to counsel of choice, although indigent defendants for whom counsel are appointed do not. *Ronquillov. People,* 2017

CO 99, ¶¶ 16, 18, 404 P.3d 264, 268 (citing *United States v. Gonzalez-Lopez,* 548 U.S. 140, 144, 151, 126 S.Ct. 2557, 165 L.Ed.2d 409 (2006)).

¶54 In my view, treating parties differently at the appointment of counsel stage makes practical sense — indeed, is a practical necessity — because allowing indigent defendants to choose who from the public defender's or alternate defense counsel's offices will represent them would simply be unworkable for both of those offices and for courts alike. For the same reason, we have long held that an indigent defendant for whom counsel has been appointed and who wants to substitute counsel with another court-appointed attorney must show "good cause, such as a conflict of interest, a complete breakdown of communication or an irreconcilable conflict." *Id.* at ¶ 19, 404 P.3d at 268 (quoting *People v. Arguello,* 772 P.2d 87, 94 (Colo. 1989)). Such a rule is also necessary in light of the limited resources available and to avoid gamesmanship by defendants who might seek to cause lengthy delays by requesting repeated substitutions of counsel.

¶55 The same concerns do not apply, however, to the scenario presented here, where defendants wish to *retain* their appointed counsel. Indeed, as we explained in *Harlan,* 54 P.3d at 878, the right to *"continued* representation by court-appointed counsel" is distinct from the "right to *choose* that court-appointed counsel." Indeed, for decades, we have recognized that there is no reason to treat defendants with means differently from indigent defendants when it comes to the right to the continuity of counsel.

¶56 Specifically, in *Williams*, 700 P.2d at 555, we said that although "indigent defendants have no right to an attorney of their choice, they are entitled to continued and effective representation by court appointed counsel in the absence of a demonstrable basis in fact and law to terminate that appointment," citing *Gideon,* 372 U.S. 335, 83 S.Ct. 792, in support of this proposition (thus indicating that the proposition was, indeed, grounded in the Sixth Amendment). *Williams* involved subpoenas to compel testimony from, among others, the defendant's public defender, which we deemed "the functional equivalent of a motion to disqualify." *Williams,* 700 P.2d at 550, 555. The defendant filed a motion to quash the subpoenas, but the trial court denied that motion. *Id.* at 552. The defendant then sought relief in this court under C.A.R. 21, we issued a rule to show cause, and we ultimately made the rule absolute, concluding that the subpoena had to be quashed. *Id.* at 558. In so concluding, we recognized that "the right to have counsel of one's choosing in the defense of a criminal charge is of constitutional dimensions" and "[t]hus, any potential infringement of this right must only be as a last resort." *Id.* at 555 (quoting *In re Grand Jury Subpoena Served Upon John Doe, Esq.,* 759 F.2d 968, 975 (2d Cir. 1985), *vacated,* 781 F.2d 238 (2d Cir. 1986) (en banc)).

¶57 The following year, in *Rodriguez v. District Court*, 719 P.2d 699, 703-05 (Colo. 1986), we concluded that disqualification of the public defender's office was not required when one of the public defenders would likely have been required to cross-examine, and possibly impeach the testimony and credibility of, a former client at trial. Instead, we

opined that because a "defendant's right to be represented by counsel of choice is grounded in the jurisprudence of the sixth amendment to the United States Constitution and is entitled to great deference[,]" a defendant may waive their right to conflict-free representation. *Id.* at 705-06, 708.

¶58 Sixteen years later, in *Harlan,* 54 P.3d at 878, we confirmed this Sixth Amendment right, specifically reaffirming an indigent defendant's Sixth Amendment right to the continuity of counsel. There, the trial court had disqualified Harlan's court-appointed counsel based on an alleged conflict of interest, despite Harlan's desire to continue to be represented by his appointed counsel. *Id.* at 876. We ultimately concluded that in doing so, the trial court had abused its discretion because "an indigent defendant has a presumptive right to continued representation by court-appointed counsel." *Id.* at 878. In reaching this conclusion, we explained that although "there is no Sixth Amendment right for an indigent defendant to choose his appointed counsel," indigent defendants are "entitled to continued and effective representation by court-appointed counsel in the absence of a demonstrable basis in fact and law to terminate that appointment." *Id.* at 878 (quoting *Williams*, 700 P.2d at 555). Thus, "once counsel is appointed, the attorney-client relationship 'is no less inviolable than if the counsel had been retained by the defendant.' " *Id.* (quoting *People v. Isham*, 923 P.2d 190, 193 (Colo. App. 1995)). We therefore recognized a "presumption in favor of a defendant's choice of counsel" that "extends to indigent defendants" who "desire ... continued representation by a court-appointed public defender," noting that this

desire is "entitled to great weight." *Id.* at 878 (quoting *Rodriguez,* 719 P.2d at 707).

¶59 Following the principles established in *Williams, Rodriguez,* and *Harlan,* we have consistently recognized that the Sixth Amendment guarantees defendants, whether of means or indigent, the right to the continuity of counsel. *See, e.g., Nozolino,* ¶ 17, 298 P.3d at 920 (quoting *Williams,* 700 P.2d at 555, and citing *Harlan,* 54 P.3d at 878, and *Rodriguez,* 719 P.2d at 707); *Shari,* 204 P.3d at 460 (quoting *Harlan,* 54 P.3d at 878, and then *Rodriguez,* 719 P.2d at 707); *see also Isham,* 923 P.2d at 193 (quoting *Williams,* 700 P.2d at 555, and citing *Rodriguez,* 719 P.2d at 707). And nothing in the broad language of these cases suggests that the Sixth Amendment right is limited to cases involving alleged conflicts of interest, as the majority repeatedly suggests. Maj. op. ¶¶ 13, 23-32.

¶60 In following this rule these many years, Colorado courts have hardly been outliers. To the contrary, as the People conceded at oral argument, the principle to which we have long adhered reflects the majority rule among the state courts. *See, e.g., Lane v. State,* 80 So.3d 280, 295-99 (Ala. Crim. App. 2010) ("With respect to continued representation, however, there is no distinction between indigent defendants and nonindigent defendants.") (collecting cases); *State v. McKinley,* 860 N.W.2d 874, 879-80 (Iowa 2015) ("[S]everal courts have concluded once an attorney is appointed, the court should be just as hesitant to remove them as it would be to remove a privately-retained attorney.") (collecting cases).

¶61 The question thus becomes whether any reason exists to depart from our above-described line of precedent. I turn to that question next.

B. Stare Decisis

¶62 "Stare decisis is a judge-made doctrine that requires courts to follow preexisting rules of law." *Love v. Klosky,* 2018 CO 20, ¶ 14, 413 P.3d 1267, 1270. "Stare decisis is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Id.* (quoting *Payne v. Tennessee,* 501 U.S. 808, 827, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991)). We are therefore "reluctant to undo settled law," and we may do so "only if we are clearly convinced that (1) the rule was originally erroneous or is no longer sound because of changing conditions and (2) more good than harm will come from departing from precedent." *Id.* at ¶¶ 14-15, 413 P.3d at 1270.

¶63 Here, I perceive no basis for concluding that *Williams*, *Rodriguez*, *Harlan*, and their progeny were originally erroneous, that the logic of those opinions is no longer sound, or that more good than harm will come from departing from those decisions. Indeed, as noted above, the majority of jurisdictions continue to follow the principles that we consistently affirmed in *Williams, Rodriguez,* and *Harlan.* Moreover, as I discuss more fully below, more harm than good will come from departing from our longstanding precedent here.

¶64 The majority's analysis does not establish otherwise. Rather, the majority effectively overrules

our decades-long line of consistent precedent without a single mention of stare decisis. Although the majority attempts to justify this course by suggesting that our case law has never recognized a Sixth Amendment right to the continuity of counsel, as my discussion of our case law shows, this simply belies what we have consistently said for decades. Indeed, as noted above, when we first recognized the right to the continuity of counsel for indigent defendants, we supported this right by citing to *Gideon,* which is perhaps the Supreme Court's preeminent Sixth Amendment case. *See Williams,* 700 P.2d at 555.

¶65 In this regard, I note that although the majority eschews any Sixth Amendment right to the continuity of counsel (I gather based on this right's lack of *express* grounding in the Sixth Amendment), the majority hastens to note that indigent defendants have an "interest" in such a right. Maj. op. ¶¶ 22-23, 38. The majority does not indicate, however, where this "interest" comes from if not from the Sixth Amendment.

¶66 Moreover, instead of following our long, unbroken line of precedent, the majority adopts as its rule of decision the principle that substituting appointed counsel is proper as long as the defendant would not be prejudiced by the substitution. *Id.* at ¶ 35. In support of this proposition, the majority cites *People v. Gardenhire,* 903 P.2d 1165, 1168 (Colo. App. 1995), and *People v. Coria,* 937 P.2d 386, 389 (Colo. 1997). In my view, however, neither of these authorities is persuasive.

¶67 Specifically, the majority cites *Gardenhire,* 903 P.2d at 1168, as "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.' " Maj. op. ¶ 35. The division's holding, however, was not nearly so broad. The question before the division was whether the trial court's refusal to grant the defendant's motion for a continuance violated his Sixth Amendment right to the effective assistance of counsel. *Gardenhire,* 903 P.2d at 1168. The division concluded:

> Defendant has not set forth any evidence in the record to support his contention that the denial of his motion to continue rendered the assistance of counsel ineffective. Thus, the substitution of one public defender with another does not constitute a violation of defendant's *Sixth Amendment right to effective assistance of counsel.*

Id. (emphasis added).

¶68 Accordingly, *Gardenhire* adopted a narrow proposition in a different context. The case in no way addressed the constitutional right to the continuity of counsel, and the out-of-context statement on which the majority relies is inapposite here.

¶69 Similarly, the majority cites to our statement in *Coria,* 937 P.2d at 389, that "[t]he substitution of one public defender with another does not violate the Sixth Amendment right to counsel, absent evidence of prejudice." Maj. op. ¶ 35. In *Coria,* however, the pertinent question before us was whether a defendant has the right to be represented by an unlicensed law student intern. *Coria*, 937 P.2d at 387-88. We concluded that the Sixth Amendment confers no such right on criminal defendants. *Id.* at 389. We did not, however, address in that case the disqualifica-

tion of licensed counsel or whether an indigent defendant has a right to continued representation by their appointed counsel. *Id.* at 389-91. Nor did *Coria* even cite to *Williams* or *Rodriguez*, which directly addressed those issues over a decade earlier (and when *Harlan* was decided five years later, it did not mention *Coria,* apparently recognizing that that case was not pertinent).

¶70 In short, the statement from *Coria* on which the majority relies was dicta in that case and is inapplicable here because the Sixth Amendment right to the continuity of court-appointed licensed counsel was outside the scope of the issues addressed and resolved by the *Coria* court.

¶71 For these reasons, I would not depart from our long-settled precedent in favor of an inapposite statement in *Gardenhire* and dicta in *Coria,* and I would reaffirm the long-established Sixth Amendment right to the continuity of counsel. Accordingly, I would conclude that in denying Rainey'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).

C. *Brown* Factors and Continuance Here

¶72 Having thus concluded that an indigent defendant has the right to the continuity of counsel and that the trial court abused its discretion in denying Rainey's request for a continuance without recognizing that right, I must next decide the second

question on which we granted certiorari, namely, whether the factors that we adopted in *Brown,* ¶ 24, 322 P.3d at 221, apply to determine whether a trial court should grant a continuance in the context of an indigent defendant's right to the continuity of counsel.

¶73 *Brown* concerned the denial of a motion for a continuance filed eight days before trial to allow a defendant to exercise his right to counsel of choice by replacing appointed counsel with retained counsel who was available and willing to represent the defendant but who needed more time to prepare. *Id.* at ¶¶ 7-9, 322 P.3d at 217. In that case, we observed that in deciding whether to grant such a continuance, the trial court must balance the defendant's Sixth Amendment right to counsel of choice against the public's interest in ensuring the efficient administration of justice and the integrity of the judicial process. *Id.* at ¶ 22, 322 P.3d at 220. We then identified eleven non-exclusive factors for trial courts to consider in deciding whether to grant such a continuance:

> 1. the defendant's actions surrounding the request and apparent motive for making the request;
>
> 2. the availability of chosen counsel;
>
> 3. the length of continuance necessary to accommodate chosen counsel;
>
> 4. the potential prejudice of a delay to the prosecution beyond mere inconvenience;
>
> 5. the inconvenience to witnesses;
>
> 6. the age of the case, both in the judicial system and from the date of the offense;

> 7. the number of continuances already granted in the case;
>
> 8. the timing of the request to continue;
>
> 9. the impact of the continuance on the court's docket;
>
> 10. the victim's position, if the victims' rights act applies; and
>
> 11. any other case-specific factors necessitating or weighing against further delay.

Id. at ¶ 24, 322 P.3d at 221. We emphasized that "no single factor is dispositive and [that] the weight accorded to each factor will vary depending on the specific facts at issue in the case." *Id.*

¶74 Because I believe that the right to the continuity of appointed counsel is grounded in the Sixth Amendment, I have little difficulty in concluding that *Brown,* which involved a continuance in the context of the Sixth Amendment right to counsel of choice, should likewise apply here. Simply stated, I perceive no reason to treat the related Sixth Amendment rights differently.

¶75 Although in some cases, my conclusion might counsel in favor of a remand, we have recently made clear that when the record is sufficient to allow an appellate court to assess the *Brown* factors, it may do so. *See People v. Gilbert,* 2022 CO 23, ¶ 27, 510 P.3d 538, 546-47. In my view, this is such a case.

¶76 Here, we begin with a presumption in favor of Rainey's Sixth Amendment right to the continuity of counsel. *See id.* at ¶ 30, 510 P.3d at 547. Although this presumption may be overcome, the record in this case does not establish that Rainey's Sixth Amendment right to the continuity of counsel was

outweighed by "the demands of fairness and efficiency." *Id.* (quoting *Brown,* ¶ 20, 322 P.3d at 219). Rather, the record before us makes clear that virtually all of the *Brown* factors favored a continuance to allow Rainey to be represented by his appointed counsel.

¶77 First, the trial court explicitly rejected the People's argument that Rainey's request for a continuance was motivated by an improper purpose or any sort of gamesmanship. In fact, the record indicates that the court was "sympathetic" to Rainey's request and believed that granting the request (which would have allowed DeVoogd to represent Rainey at trial) would have made Rainey "a little more comfortable."

¶78 Second, Rainey's appointed counsel, DeVoogd, was only temporarily unavailable, and if the continuance were granted, DeVoogd would have been available to represent Rainey as early as the following week.

¶79 Third, the defense requested only a short continuance that would have accommodated DeVoogd's one-week vacation.

¶80 Fourth, the prosecution offered nothing in the record indicating that it would suffer any prejudice. Rather, the prosecution argued that a continuance would merely be inconvenient for its witnesses, a position that was inconsistent with its own prior continuance requests, which the trial court had granted.

¶81 Fifth, the case involved only six witnesses, all of whom appear to have lived in the same city in which the trial was to occur. Although the prosecution now claimed that attending "every single Court

appearance; even the ones that have been continued" was "a great burden" for the witnesses, it offered no explanation as to why the witnesses would be greatly burdened by Rainey's request when they apparently suffered no such inconvenience as a result of either of the prosecution's two prior requests.

¶82 Sixth, on the date Rainey requested a continuance, the case was only about eight months old, both in the judicial system and from the date of the charged offenses.

¶83 Seventh, Rainey had not sought *any* prior continuances. Although the trial court had granted four prior continuances, none of them was attributable to the defense. Indeed, as the court itself expressly acknowledged, all of these continuances had "either been the Court[']s fault or the DA's fault[,] not the Defense[']s fault."

¶84 Eighth, Rainey requested the continuance on March 3, for a trial scheduled to begin on March 6. In contrast, both of the prosecution's continuances were requested and granted on the day trial was to begin, with the defense announcing ready on both of those occasions.

¶85 Ninth, although when Rainey sought his one and only continuance, the court expressed that it had a crowded docket and that it would have difficulty rescheduling the trial (the only *Brown* factor arguably weighing in favor of denying Rainey's request for a continuance), when granting the prosecution's two continuances or continuing the case twice on its own motion, the court expressed no such docket or scheduling concerns, rendering reliance on this factor questionable at best.

¶86 Tenth, the alleged victim in this case had refused to cooperate or appear for any of the scheduled trials. Accordingly, the victim's position has no bearing on the analysis here.

¶87 And finally, denying Rainey's request for a continuance so that he could be represented by his appointed counsel meant that his replacement counsel had only one weekend to prepare for trial in a nine-count case, which included a class four felony kidnapping charge. As a result, the consequences to Rainey from the denial of his right to the continuity of counsel were substantial.

¶88 On this record, and as a matter of simple and basic fairness, I have little difficulty concluding that the trial court abused its discretion in denying Rainey's one and only request for a continuance here and, in doing so, violated Rainey's Sixth Amendment right to the continuity of counsel. Simply stated, on the undisputed facts presented, Rainey's Sixth Amendment right to the continuity of counsel far outweighed any of the court's docket concerns, particularly when the court expressed no such concerns when it previously granted two continuances on its own motion and two at the prosecution's request, all on days when the trial was set to begin and Rainey had announced ready.

D. Ramifications of Today's Ruling

¶89 In concluding, as I would, that indigent defendants have a Sixth Amendment right to the continuity of counsel and that the trial court abused its discretion in denying Rainey's request for a continuance to protect that right here, I feel compelled to

comment on the ramifications of the majority's ruling today.

¶90 First and foremost, the majority enshrines into constitutional law the notion that people of means have a right to the continuity of counsel but indigent defendants do not. I, however, can discern no basis for making such a distinction, which, to me, flies in the face of the fundamental principle of equal justice under the law.

¶91 In this regard, I am unpersuaded by the majority's statement that the only way that the Sixth Amendment could support a right to the continuity of counsel is if that right is corollary to the right of counsel of choice. Maj. op. ¶ 22. The majority cites no authority in support of this assertion, and I am aware of none. Accordingly, the statement, which is central to the majority's analysis in this case, amounts to nothing more than the majority's own outcome-determinative construct. And this construct is particularly dubious, given that under the majority's implicitly textualist approach, the majority should likewise eschew the longstanding right to counsel of choice because the Sixth Amendment does not expressly reference that right either.

¶92 Second, and equally troubling to me, the majority sends a message that public defenders and alternate defense counsel are essentially fungible and that they can be substituted in lieu of granting a reasonable continuance whenever, as occurred here, the court decides that substitution of counsel will be more convenient for its docket.

¶93 Although I recognize that indigent defendants have no right to a meaningful relationship with their counsel, *Morris,* 461 U.S. at 14, 103 S.Ct. 1610, that

does not mean that an established relationship between an attorney and client can be severed merely because the client for whom the attorney was appointed is indigent, *see Polk Cnty. v. Dodson,* 454 U.S. 312, 318, 102 S.Ct. 445, 70 L.Ed.2d 509 (1981) ("Once a lawyer has undertaken the representation of an accused, the duties and obligations are the same whether the lawyer is privately retained, appointed, or serving in a legal aid or defender program.") (quoting ABA Standards for Criminal Justice 4-3.9 (2d ed. 1980)). In my view, the attorney-client relationship is entitled to far more respect than the majority's conclusion affords.

III. Conclusion

¶94 Because I perceive no basis for overturning our decades of precedent recognizing an indigent defendant's right to the continuity of appointed counsel, and because I believe that on the undisputed facts before us, the trial court abused its discretion in denying Rainey's request for a continuance, I would affirm the judgment of the division below.

¶95 Accordingly, I respectfully dissent.

APPENDIX B

Colorado Court of Appeals, Division I

The PEOPLE of the State of Colorado, Plaintiff-Appellee,

v.

Robert James RAINEY, Defendant-Appellant.

Court of Appeals No. 17CA1133

Announced March 18, 2021

El Paso County District Court No. 16CR3477, Honorable Robin Chittum, Judge

Philip J. Weiser, Attorney General, Kevin E. McReynolds, Assistant Attorney General, Denver, Colorado, for Plaintiff-Appellee

Megan A. Ring, Colorado State Public Defender, Brian Sedaka, Deputy State Public Defender, Denver, Colorado, for Defendant-Appellant

Opinion by JUDGE HARRIS

¶ 1 Defendant, Robert James Rainey, appeals the judgment of conviction entered on jury verdicts finding him guilty of second degree kidnapping and criminal mischief.

¶ 2 On appeal, one claim is potentially dispositive. Rainey contends that the district court violated his Sixth Amendment right to continued representation when it denied a continuance on grounds of judicial efficiency, thereby forcing him to proceed with a different public defender. We conclude that the district court applied the wrong legal standard in consider-

ing the motion to continue, and we therefore reverse and remand for further findings.

I. Background

¶ 3 Rainey was charged with second degree kidnapping, a felony, and several misdemeanor domestic violence offenses following an altercation with the victim. The district court appointed counsel to represent him.

¶ 4 Trial was originally scheduled to begin January 9, 2017, but was thereafter delayed and continued multiple times for reasons not attributable to the defense:

- The court delayed trial to January 10 because a storm had damaged the courthouse.
- On January 10, the prosecution moved for a continuance because the victim failed to appear. Over Rainey's objection, the court granted the continuance and rescheduled trial for February 2.
- The jury commissioner did not have enough jurors available on February 2, so the court continued the case to February 23.
- On February 23, the prosecution moved for a second continuance because one of its witnesses was unavailable. The court granted the continuance (again, over Rainey's objection) and reset trial for March 6, 2017, the day before the speedy trial deadline.

¶ 5 At a pretrial hearing on March 3, Rainey, through his public defender, Neil DeVoogd,[1] request-

[1] DeVoogd had recently replaced Rainey's initial public defender, who, according to Rainey's wife, had "called [Rainey] an

ed a continuance. DeVoogd explained that he would be out of town for the week of March 6, and that when he had accepted that date, the parties had reached an agreement and there was "not any [likelihood] that [the case] was going to be going to trial," but the agreement "ended up not going through." He said that Rainey wanted to continue the representation and was asserting his "right to have [DeVoogd] as his attorney" at trial. DeVoogd told the court that Rainey would agree to waive his right to a speedy trial.

¶ 6 The court recognized that every prior delay or continuance had "either been attributable to the DA or the Court" and that "none of them [we]re attributable to the Defense." The trial judge rejected any notion that the continuance request was a dilatory tactic and indicated that she personally "felt terrible for Mr. Rainey in the midst of all of this" and was "sympathetic" to the request.

¶ 7 Nonetheless, the trial judge denied the continuance, finding, primarily, that it had been difficult to find a substitute judge to hear the case and, due to the nature of the case, it would be difficult to fit the trial back into her docket:

> It would have been great to have [DeVoogd] do it and that would have been a little more comfortable, I think for Mr. Rainey. But what the factual [sic] comes down to is that this isn't a [complicated] case. It's not a case that involved anything technical. It's just straight forward

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asshole, had called him stupid at some point," and did not "communicate back in a timely manner."

> witnesses and a victim who doesn't want to co-operate.
>
> ....
>
> If I have to reset this case, it's getting reset [in] July, and then even then it's not a high priority case. Every week I have sex assault on a child, I have homicides set, I have [serious] assault cases set, crimes of violence set. There is a darn good chance that if we continue this, he gets bumped again. And I can't do that. I just can't do that for the sake of this case. He is getting his attorney of choice. He's getting the Public Defender and a fine one too. So, I understand where you're coming from, record so noted. But I'm gonna deny the request for a continuance.

¶ 8 Accordingly, in place of DeVoogd, two other public defenders from the same office represented Rainey at trial.

II. Sixth Amendment Right to Counsel

¶ 9 Rainey contends that the district court's denial of his request for a continuance violated his constitutional right to continued representation by DeVoogd, his counsel of choice.

A. Standard of Review

¶ 10 We review the district court's denial of a continuance motion for an abuse of discretion. *People v. Brown*, 2014 CO 25, ¶ 19, 322 P.3d 214. The court's "failure to understand the ... criteria upon which [its] discretion is to be exercised can amount to an abuse of that discretion." *Pierson v. People*, 2012 CO 47, ¶ 21, 279 P.3d 1217. And the court necessarily abuses its discretion if it bases its ruling on an erroneous

view of the law. *People v. Wadle*, 97 P.3d 932, 936 (Colo. 2004). Whether the court applied the correct legal standard is a question of law we review de novo. *Ronquillo v. People*, 2017 CO 99, ¶ 13, 404 P.3d 264.

B. Analysis

¶ 11 The Sixth Amendment guarantees a criminal defendant "the Assistance of Counsel for his defence." U.S. Const. amend. VI; *see also* Colo. Const. art. II, § 16. That guarantee has been interpreted to include, among other things, the right to appointed counsel for indigent defendants, *Gideon v. Wainwright*, 372 U.S. 335, 345, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963), and the right to "select and be represented by one's preferred attorney" for defendants of means, *Wheat v. United States*, 486 U.S. 153, 159, 108 S.Ct. 1692, 100 L.Ed.2d 140 (1988).

¶ 12 The People argue that because Rainey, as an indigent defendant, had no constitutional right to choose his lawyer, he also had no right to continued representation by his appointed lawyer. That argument cannot be squared with our supreme court's well-settled precedent.

¶ 13 To be sure, an indigent defendant does not have a right to select his appointed counsel. *Ronquillo*, ¶ 25 ("[A] defendant requesting a free lawyer can't choose which one he's given." (citing *United States v. Gonzalez-Lopez*, 548 U.S. 140, 151, 126 S.Ct. 2557, 165 L.Ed.2d 409 (2006))). But "[t]he right to continued representation by counsel of choice [is distinct] from an asserted right to have particular counsel of choice appointed." *People v. Harlan*, 54 P.3d 871, 878 (Colo. 2002). "[O]nce counsel is ap-

pointed, the attorney-client relationship is no less inviolable than if the counsel had been retained by the defendant." *People v. Shari*, 204 P.3d 453, 460 (Colo. 2009) (quoting *Harlan*, 54 P.3d at 878). So, "[w]hile there is no Sixth Amendment right for an indigent defendant to choose his appointed counsel, that defendant is 'entitled to continued and effective representation' " by court-appointed counsel of choice "in the absence of a demonstrable basis in fact and law to terminate that appointment." *Harlan*, 54 P.3d at 878 (citation omitted); *accord People v. Nozolino*, 2013 CO 19, ¶ 17, 298 P.3d 915.

¶ 14 The People's argument, which conflates the right to select counsel with the right to continued representation, was expressly rejected by the supreme court in *Harlan*. In that case, after the defendant was convicted at trial and while two post-conviction motions were pending, the district court disqualified appointed counsel based on an alleged conflict of interest. *Harlan*, 54 P.3d at 876. On appeal, the prosecution contended that the court's interest in avoiding a potential conflict necessarily outweighed any interest the defendant had in keeping his appointed counsel, noting that an indigent defendant has no right to counsel of his choice. *Id.* at 878. The court deemed that contention a non sequitur:

> [T]he People's contention that indigent defendants are not entitled to choose court-appointed counsel is irrelevant to the issue before us.... As noted above, an indigent defendant has a presumptive right to continued representation by court-appointed counsel absent a factual and legal basis to terminate that appointment. Be-

> cause the issue presented in this case is whether Harlan may continue to be represented by his current counsel, and not whether he may choose his counsel, this argument by the People, and the case law cited to support the argument, is inapposite.

Id. (citation omitted); *see also Nozolino*, ¶ 17; *Shari*, 204 P.3d at 460; *Lane v. State*, 80 So. 3d 280, 296-99 (Ala. Crim. App. 2010) (explaining that the right to continued representation applies equally to indigent defendants and collecting state and federal cases applying the rule); *State v. McKinley*, 860 N.W.2d 874, 879-80 (Iowa 2015) (adopting *Harlan*'s view and collecting cases).

¶ 15 In light of this case law, we reject the People's position that if a defendant does not pay for his lawyer, he has no grounds to object to his lawyer's replacement as long as the replacement lawyer handles the case competently. *See Lane*, 80 So. 3d at 296. "To allow trial courts to remove an indigent defendant's court-appointed counsel with greater ease than a non-indigent defendant's retained counsel would stratify attorney-client relationships based on defendants' economic backgrounds." *Weaver v. State*, 894 So. 2d 178, 189 (Fla. 2004).

¶ 16 And the right to continued representation means that an indigent defendant has a right to proceed with his specific appointed lawyer, not just any appointed lawyer from the public defender's office.

¶ 17 We have recognized that non-indigent defendants have this right. In *People v. Stidham*, 2014 COA 115, ¶ 10, 338 P.3d 504, a division of this court held that a defendant has a Sixth Amendment right to proceed with his specific lawyer, and that the dis-

trict court erred by denying a motion to continue and thereby requiring the defendant to proceed with another lawyer from the same firm. *See also Gonzales v. State*, 408 Md. 515, 970 A.2d 908, 920 (2009) (trial court erred by denying the defendant's request to continue with his own lawyer and instead requiring him to choose between proceeding to trial with a different lawyer from the same firm or representing himself).

¶ 18 If, as *Harlan* says, the attorney-client relationship between an indigent defendant and his appointed counsel is no less inviolable than the relationship between a non-indigent defendant and his retained counsel, then the Sixth Amendment limits the district court's power to replace a defendant's appointed lawyer with another from the same firm or organization.[2] *See Stearnes v. Clinton*, 780 S.W.2d

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[2] *People v. Coria*, 937 P.2d 386 (Colo. 1997), does not affect our conclusion. In that case, after noting that an indigent defendant does not have "an absolute right to demand a particular attorney," the supreme court stated that "[t]he substitution of one public defender with another does not violate the Sixth Amendment right to counsel, absent evidence of prejudice." *Id.* at 389. The question on appeal, though, was whether a defendant has a right to be represented by a law student intern. *Id.* at 387, 388. The supreme court never purported to address whether an indigent defendant has a right to continued representation by his appointed counsel. That precise issue was resolved five years later in *People v. Harlan*, 54 P.3d 871, 878 (Colo. 2002), which did not mention *Coria*. Because the propriety of substituting appointed counsel over a defendant's Sixth Amendment-based objection was outside the scope of the issue decided by the *Coria* court, the court's statement is "mere dictum which is not binding on us." *McCallum Fam. L.L.C. v. Winger*, 221 P.3d 69, 73 (Colo. App. 2009).

The *Coria* court's statement was taken from *People v. Gardenhire*, 903 P.2d 1165 (Colo. App. 1995), in which a division of

216, 223 (Tex. Crim. App. 1989) ("[T]he power of the trial court to appoint counsel to represent indigent defendants does not carry with it the concomitant power to remove counsel at [its] discretionary whim."); *State v. Huskey*, 82 S.W.3d 297, 305 (Tenn. Crim. App. 2002) ("[A]ny meaningful distinction between indigent and non-indigent defendants' right to representation by counsel ends once a valid appointment of counsel has been made."). To the client — whether indigent or wealthy — "[a]ttorneys are not fungible, as are eggs, apples and oranges." *United States v. Laura*, 607 F.2d 52, 56 (3d Cir. 1979). Once counsel has been appointed, and the defendant has reposed his trust and confidence in the attorney assigned to represent him, the district court may not "rend that relationship by dismissing the originally appointed attorney and then thrusting unfamiliar and unwelcome counsel upon the defendant." *McKinnon v. State*, 526 P.2d 18, 22-23 (Alaska 1974); *see also English v. State*, 8 Md.App. 330, 259 A.2d 822, 826 (1969) ("[O]nce counsel has been chosen, whether by the court or the accused, the accused is entitled to the assistance of *that* counsel at trial.") (emphasis added).

¶ 19 The right to counsel of choice, including the right to continued representation, is not absolute. *See Rodriguez v. Dist. Ct.*, 719 P.2d 699, 706 (Colo.

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this court held that, absent some showing of prejudice, "the substitution of one public defender with another does not constitute a violation of defendant's *Sixth Amendment right to effective assistance of counsel*." *Id.* at 1168 (emphasis added). That narrow proposition is unrelated to the issue in this case. And to the extent a broader rule was intended, we decline to adopt it. *See Chavez v. Chavez*, 2020 COA 70, ¶ 13, 465 P.3d 133.

1986). But, as *Harlan* recognizes, there is "a presumption in favor of a defendant's choice of counsel" that "extends to indigent defendants: A defendant's desire for continued representation by a court-appointed public defender is 'entitled to great weight.'" 54 P.3d at 878 (quoting *Rodriguez*, 719 P.2d at 707); *accord Nozolino*, ¶ 17. Only when that presumption is overcome may a court disregard a defendant's choice. *See Brown*, ¶ 21 (refusing to allow the defendant to proceed with his counsel of choice "is an 'extreme remedy' that should not be used absent a showing of prejudice") (citation omitted); *Harlan*, 54 P.3d at 877. For instance, if the defendant's choice of counsel has a conflict of interest, the presumption may be outweighed by the public's interest in maintaining the integrity of the judicial process and the defendant's Sixth Amendment right to conflict-free counsel. *See Nozolino*, ¶ 16; *Harlan*, 54 P.3d at 877. Likewise, if counsel of choice is unable to appear without a continuance, some combination of interests including prejudice to the prosecution and the victim's rights may overcome the presumption. *Brown*, ¶ 24.

¶ 20 In determining whether competing interests overcome the presumption, the court "must balance the defendant's right to counsel of choice against the public's interest in both the 'efficient administration of justice' and maintaining the integrity of the judicial process." *Id.* at ¶ 22 (quoting *Harlan*, 54 P.3d at 877). As noted, when balancing those interests, the court must afford "great weight" to the defendant's choice. *Nozolino*, ¶ 17 (citing *Harlan*, 54 P.3d at 878); *accord Brown*, ¶¶ 16, 21.

¶ 21 The People argue that even if, in some circumstances, the court should consider the defendant's "desire" to continue with appointed counsel, no such deference was warranted here. DeVoogd had no longstanding or "special" relationship with Rainey, they say, and no substantial history with the case; thus, the court had no obligation to cater to Rainey's "preference" to keep his lawyer.

¶ 22 But the argument arises from the faulty premise that Rainey's interest in continued representation by his counsel of choice amounts to no more than a mere "desire" or "preference," with no constitutional dimension. The premise is irreconcilable with *Harlan* and *Nozolino*. Contrary to the People's assertion, an indigent defendant's right to continued representation is not based on the district court's assessment of the strength or longevity of a particular attorney-client relationship, but on the recognition that "respect and deference must be accorded to a defendant's intelligent and informed choice of counsel under our justice system." *Nozolino*, ¶ 17; *see also Brown*, ¶¶ 7, 11, 28 (remanding to consider whether continuance should have been granted where retained counsel entered his appearance twelve days before trial).

¶ 23 Accordingly, though the decision whether to grant or deny a continuance ultimately falls within the sound discretion of the district court, where constitutional rights are concerned, the court must consider and weigh additional factors to enable our review of whether it properly exercised its discretion. *See Brown*, ¶¶ 19-24; *see also People v. Travis*, 2019 CO 15, ¶ 12, 438 P.3d 718 ("[W]hen the Sixth Amendment right to counsel of choice is at issue," a

court ruling on a motion for a continuance "must demonstrate that it weighed the full range of factors that might affect its exercise of discretion.").

¶ 24 When ruling on a request for a continuance to allow representation by counsel of choice, *Brown* directs the district court "to consider and make a record of the impact" of eleven factors:

> 1. the defendant's actions surrounding the request and apparent motive for making the request;
>
> 2. the availability of chosen counsel;
>
> 3. the length of continuance necessary to accommodate chosen counsel;
>
> 4. the potential prejudice of a delay to the prosecution beyond mere inconvenience;
>
> 5. the inconvenience to witnesses;
>
> 6. the age of the case, both in the judicial system and from the date of the offense;
>
> 7. the number of continuances already granted in the case;
>
> 8. the timing of the request to continue;
>
> 9. the impact of the continuance on the court's docket;
>
> 10. the victim's position, if the victims' rights act applies; and
>
> 11. any other case-specific factors necessitating or weighing against further delay.

Brown, ¶ 24.

¶ 25 Though *Brown* involved a request for a continuance to *change* counsel, *see id.* at ¶¶ 7-9, we conclude that the same factors should guide the district court's discretion when the defendant seeks a con-

tinuance to *continue* with his counsel. In both situations, the defendant's Sixth Amendment right to counsel of choice is implicated, and therefore the same interests must be balanced.

¶ 26 Indeed, the division in *Stidham*, ¶ 17, applied the *Brown* factors where the defendant sought a continuance to allow continued representation by his retained lawyer. Because the right to continued representation applies equally to indigent defendants, we hold that the district court was required to weigh the *Brown* factors before deciding whether to grant or deny a continuance necessary for DeVoogd's continued representation of Rainey at trial.[3] *See Harlan*, 54 P.3d at 878; *see also Lane*, 80 So. 3d at 295 ("With respect to continued representation, however, there is no distinction between indigent defendants and nonindigent defendants.").

¶ 27 It is undisputed that the district court did not consider the *Brown* factors on the record. What is more, it mistakenly concluded that Rainey was still "getting his attorney of choice" — i.e., any lawyer employed by "the Public Defender." *Cf. Nozolino*, ¶ 20; *Stidham*, ¶¶ 14-17. And rather than affording "great weight" to Rainey's choice to continue the representation, *Harlan*, 54 P.3d at 878, the court sug-

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[3] We reject Rainey's argument, relying on *People v. Stidham*, 2014 COA 115, 338 P.3d 504, that when the right to continued representation is at issue, as opposed to the right to select counsel of choice, no balancing test applies, and the district court must simply grant every request for a continuance. The *Stidham* division's analysis in this regard, *see id.* at ¶ 14 & n.1, applied only to a situation where a defendant's chosen counsel fails to appear, through no fault of, and without notice to, the defendant.

gested only that Rainey "would have been a little more comfortable" with DeVoogd as his trial counsel.

¶ 28 As a result, we must remand for the district court to make findings on the record as to each applicable *Brown* factor and apply the correct legal standard. *See, e.g.*, *Brown*, ¶ 29 (remanding for court to make additional findings and apply the correct standard).

III. Conclusion and Remand Order

¶ 29 The judgment is reversed, and the case is remanded for further proceedings. On remand, the district court must make findings on the record as to each applicable *Brown* factor (and state on the record why the remaining factors, if any, do not apply). If the court, after considering those factors and affording great weight to Rainey's choice to continue DeVoogd's representation, concludes that the presumption of continued representation has been overcome, it may reinstate the judgment of conviction, from which Rainey may separately appeal.[4] Otherwise, Rainey is entitled to a new trial. *See People v. Cardenas*, 2015 COA 94M, ¶ 19, 411 P.3d 956 (violation of a defendant's right to counsel of choice is structural error).

Johnson and Vogt*, JJ., concur

*Sitting by assignment of the Chief Justice under provisions of Colo. Const. art. VI, § 5(3), and § 24-51-1105, C.R.S. 2020.

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[4] In light of our disposition, we decline to address Rainey's additional contentions. If, after remand, the judgment of conviction is reinstated and Rainey appeals, he may re-raise his other claims at that time.

APPENDIX C

Colorado Supreme Court, No. 2024SC37

Certiorari to the Court of Appeals, 2017CA1133
District Court, El Paso County, 2016CR3477

Petitioner:

Robert James Rainey,

v.

Respondent:

The People of the State of Colorado

ORDER OF COURT

Upon consideration of the Petition for Writ of Certiorari to the Colorado Court of Appeals and after review of the record, briefs, and the judgment of said Court of Appeals,

IT IS ORDERED that said Petition for Writ of Certiorari shall be, and the same hereby is, DENIED.

BY THE COURT, EN BANC, JUNE 10, 2024.

APPENDIX D

Colorado Court of Appeals

Court of Appeals No. 17CA1133
El Paso County District Court No. 16CR3477
Honorable Robin Chittum, Judge

The People of the State of Colorado,
Plaintiff-Appellee,
v.
Robert James Rainey,
Defendant-Appellant.

JUDGMENT AFFIRMED

Division I

Opinion by JUDGE HARRIS

Dunn and Johnson, JJ., concur

Prior Opinion Announced March 18, 2021, Reversed in 21SC285

NOT PUBLISHED PURSUANT TO C.A.R. 35(e)

Announced December 7, 2023

Philip J. Weiser, Attorney General, Paul Koehler, First Assistant Attorney General, Denver, Colorado, for Plaintiff-Appellee

Megan A. Ring, Colorado State Public Defender, River Sedaka, Deputy State Public Defender, Denver, Colorado, for Defendant-Appellant

¶ 1 A jury convicted defendant, Robert James Rainey, of second degree kidnapping and criminal

mischief. This court previously reversed Rainey's convictions, holding that the trial court erred by denying his request for a trial continuance that would have allowed for continued representation by his appointed counsel. *See People v. Rainey*, 2021 COA 35. After granting the People's petition for a writ of certiorari, the supreme court reversed the decision and remanded the case for further proceedings. *See People v. Rainey*, 2023 CO 14, ¶ 39.

¶ 2 We now address the two remaining issues that Rainey initially raised on appeal: that the trial court erred by admitting evidence that he possessed a knife, and that the prosecutor committed misconduct during voir dire and direct examination. We perceive no reversible error and, therefore, affirm the convictions.

I. Background

¶ 3 As a result of a domestic violence incident involving his wife, the prosecution charged Rainey with second degree kidnapping, third degree assault, telephone obstruction, false imprisonment, harassment, criminal mischief, and child abuse.

¶ 4 At trial (at which neither Rainey nor his wife testified), the prosecution introduced evidence that Rainey assaulted his wife inside their home, threatened to kill her, and broke her cell phone. The wife then went outside to the backyard, and Rainey followed her. Just before Rainey dragged his wife back inside by her hair, she called out to a neighbor for help.

¶ 5 Two neighbors testified that they followed Rainey and his wife back into the home, where they found the couple arguing in the basement. The

neighbors took the wife and children, who were present during the incident, to their home to wait for the police.

¶ 6 The police officer who interviewed Rainey after the incident testified that Rainey denied hitting or injuring his wife, but he admitted that he broke her phone and that, after his wife went outside, he picked her up and "carried" her back inside the house.

¶ 7 The jury returned guilty verdicts on the kidnapping and criminal mischief counts but acquitted Rainey of third degree assault, false imprisonment, and child abuse. (The court dismissed the telephone obstruction and harassment charges mid-trial.)

II. Knife Evidence

¶ 8 Before trial, Rainey moved to exclude evidence that just after the incident, as the neighbors were leaving the house with the wife and children, Rainey grabbed a knife from the kitchen, held it up, and yelled at one of the neighbors. The trial court determined that the knife evidence was probative of Rainey's state of mind and allowed the two neighbors and two responding officers to testify briefly about the knife.[1]

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[1] One neighbor testified that he did not remember seeing a knife. The other neighbor testified that on seeing Rainey with a knife, she stayed inside with him for a few minutes, during which time Rainey "talk[ed] calmly to [her]." Two officers mentioned responding to reports of domestic violence involving "a knife" or "a weapon," and one of the officers said that he later saw a knife in the kitchen sink. Before the neighbors' testimony, the court gave a detailed limiting instruction that precluded the jury from using the knife evidence as character evidence.

¶ 9 On appeal, Rainey contends that the evidence was irrelevant because all of the charged conduct preceded his possession of the knife and none of the charges involved possession or use of a weapon. And, he says, the knife evidence was prejudicial because it painted him "as a violent, dangerous, or unstable person who needed to be punished."

¶ 10 Even assuming the trial court abused its discretion by admitting the evidence, we will not reverse unless the court's error "substantially influenced the verdict or affected the fairness of the trial proceedings." *People v. Snelling*, 2022 COA 116M, ¶ 32 (citation omitted).

¶ 11 Here, the record demonstrates that the admission of the knife evidence neither adversely influenced the jury's verdicts nor rendered the trial unfair. The jury returned a split verdict, showing that it did not misuse the testimony as evidence that Rainey was generally violent, dangerous, or unstable and therefore was likely to have committed the charged offenses. *See People v. Quillen*, 2023 COA 22M, ¶ 39 (a split verdict shows that the jurors "parsed the evidence and were not unduly swayed by any improper evidence"); *Snelling*, ¶¶ 38-39 (a split verdict demonstrates that improper testimony "did not substantially influence the verdict"). Instead, the jury parsed the evidence and found Rainey guilty only of the offenses he effectively confessed to having committed.

¶ 12 Accordingly, we conclude that any error in admitting the knife evidence was harmless.

III. Prosecutorial Misconduct

¶ 13 Rainey contends that the prosecutor committed misconduct during voir dire, by implying that the wife's absence at trial was related to domestic violence, and during direct examination, by eliciting testimony about an officer's decision to arrest Rainey.

¶ 14 We review claims of prosecutorial misconduct using a two-step analysis. *People v. Robinson*, 2019 CO 102, ¶ 18. First, we determine whether the prosecutor's conduct was improper based on the totality of the circumstances. *Id.* Second, if we conclude that the conduct was improper, we must decide whether reversal is warranted under the applicable standard of review. *Id.*

¶ 15 Rainey did not object to any of the alleged misconduct, so we review for plain error. *People v. Rhea*, 2014 COA 60, ¶ 43. To rise to the level of plain error, prosecutorial misconduct must be "flagrant or glaring or tremendously improper," and it must "so undermine the fundamental fairness of the trial as to cast serious doubt on the reliability of the judgment of conviction." *Id.* (quoting *People v. Weinreich*, 98 P.3d 920, 924 (Colo. App. 2004)).

A. Voir Dire

¶ 16 During voir dire, the prosecutor asked whether the prospective jurors were familiar with "domestic violence in the cycle of violence" and later asked whether they would be able to convict a defendant without the alleged victim's testimony. When one of the jurors expressed concern about the victim being absent, the prosecutor asked, "Can you mesh it together with the cycle of violence we've

been talking about?" The juror responded that he could "accept that explanation."

¶ 17 Rainey argues that these comments implied that the prosecutor had personal knowledge of the case apart from the evidence to be presented at trial. According to Rainey, the court plainly erred by "allow[ing] [the prosecutor] to tell the jury that the reason [the wife] was not testifying was that she was a victim of a cycle of violence, despite no evidentiary support for that assertion."

¶ 18 The argument does not hold up, though, because the trial court expressly prohibited the jury from reaching that conclusion. Shortly after the challenged comments, a juror asked the prosecutor why the wife would not be testifying. Though neither party objected, the court interjected with a lengthy instruction. It told the jury that while "there may be a lot of questions that you have as to why a witness or an alleged victim is not here," there "could be 50 different explanations for" the wife's absence, and, therefore, it "order[ed]" the jury "not to speculate as to why" the wife was not testifying.

¶ 19 Generally, a curative instruction will remedy any prejudice caused by improper comments or argument. *See People v. Meils*, 2019 COA 180, ¶ 24; *see also People v. Lovato*, 2014 COA 113, ¶¶ 70, 72 (any prejudice from prosecutor's argument that the defendant "like[d] child abuse" was cured by court's instruction); *People v. Mersman*, 148 P.3d 199, 203 (Colo. App. 2006) (curative instruction generally remedies any harm caused by statements during voir dire). Because we presume that the jury follows a curative instruction to disregard improper comments, the instruction is inadequate only when the

comments "are so prejudicial that, but for the exposure, the jury might not have found the defendant guilty." *People v. Tillery*, 231 P.3d 36, 43 (Colo. App. 2009), *aff'd sub nom. People v. Simon*, 266 P.3d 1099 (Colo. 2011).

¶ 20 On appeal, Rainey does not acknowledge the court's later instruction or explain why it would not have cured any prejudice from the prosecutor's comments. Accordingly, we cannot say that the trial court erred. While the prosecutor might have implied that the wife was absent from trial for some reason related to domestic violence, the court explicitly ordered the jury to disregard that explanation. And because there is no reason to think that the jury did not follow the instruction or that the instruction was inadequate, we conclude that the instruction remedied any potential harm from the prosecutor's misconduct.

B. Testimony Concerning the Decision to Arrest Rainey

¶ 21 Rainey contends that the trial court erred by failing to sua sponte intervene when the prosecutor elicited the following testimony from one of the police officers:

> Q Do you always arrest when you come on scene and conduct a domestic violence investigation?
>
> A No, not always.
>
> . . . .
>
> Q Okay. And what happened as a result of your investigation?

> A The decision was made to arrest [Rainey] on several charges relating to domestic violence.

¶ 22 As a general matter, a prosecutor should not elicit testimony that an officer or investigator "screened" a case for arrest or for filing charges. *See People v. Mullins*, 104 P.3d 299, 301 (Colo. App. 2004) (court erred by allowing an officer to testify about the process for obtaining an arrest warrant); *People v. Mendenhall*, 2015 COA 107M, ¶ 62 (court erred by allowing the district attorney's investigator to testify about the process for deciding when charges should be filed). That evidence is "improper because [it] hint[s] that additional evidence supporting guilt exists that is unknown to the jury, and also reveal[s] the personal opinion of the witness as to the guilt of the defendant." *Mendenhall*, ¶ 63.

¶ 23 But even assuming the officer's testimony amounted to improper "screening" evidence, any error in its admission was not plain because the testimony was neither glaringly improper nor so prejudicial as to render the trial unfair or the verdict unreliable.

¶ 24 For one thing, unlike the witnesses in *Mullins* and *Mendenhall*, the officer in this case did not expressly reference any "screening" process. In *Mullins*, 104 P.3d at 301, the officer described in detail the process for obtaining an arrest warrant, which involved the officers submitting information constituting "probable cause" for the arrest (i.e., their "just reason to pick this person up") to a judge who then reviewed the application and, only if the judge "fe[lt] there [wa]s [probable cause]," signed the warrant. Likewise, in *Mendenhall*, ¶¶ 55-58, the district attorney's investigator testified extensively about the

small number of referrals that resulted in the filing of criminal charges and the reasons he recommended that charges be filed against the defendant.

¶ 25 More importantly, to the extent the officer's testimony might have implied that he arrested Rainey because, unlike other people involved in domestic disputes, Rainey was guilty, the jury was not persuaded. It acquitted Rainey of all the charges except second degree kidnapping and criminal mischief. And as to those charges, the evidence of guilt was overwhelming. *See People v. Dominguez- Castor*, 2020 COA 1, ¶ 86 (strength of the evidence of guilt is a factor to consider in assessing whether prosecutorial misconduct constitutes plain error). Rainey confessed that he broke the wife's phone and that he carried her inside the house away from the view of the neighbors without her consent — the essential elements of each offense. *See* § 18-4-501, C.R.S. 2023 (a person commits criminal mischief when he knowingly damages another person's property); § 18-3-302(1), C.R.S. 2023 (second degree kidnapping is the knowing carrying of a person from one place to another without the person's consent, when the movement increases the risk of harm to the person).

IV. Cumulative Error

¶ 26 Finally, we reject Rainey's contention that the cumulative effect of the alleged errors deprived him of a fair trial.

¶ 27 "For reversal to occur based on cumulative error, a reviewing court must identify multiple errors that collectively prejudice[d]" the defendant's substantial rights. *Howard-Walker v. People*, 2019 CO 69, ¶ 25. Even considering the two assumed er-

rors together, we discern no "cumulative prejudice" that affected Rainey's substantial rights. *Id.*

V. Disposition

¶ 28 The judgment is affirmed.

JUDGE DUNN and JUDGE JOHNSON concur.