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ADVANCE SHEET HEADNOTE
May 31, 2022

2022 CO 23

No. 20S853, *People v. Gilbert*—Motion for Continuance—Sixth Amendment—Counsel of Choice.

The supreme court clarifies that a trial court need not make explicit findings as to each and every factor under *People v. Brown*, 2014 CO 25, 322 P.3d 214, when ruling on a defendant's motion for a continuance to change counsel and that, where the record is adequately developed, an appellate court may review the trial court's denial of a motion to continue under the relevant *Brown* factors rather than remand the case for the trial court to make more express findings under *Brown*.

Here, the court concludes that the district court erred by requiring the defendant to establish good cause before discharging his retained counsel, contrary to *Ronquillo v. People*, 2017 CO 99, ¶ 4, 404 P.3d 264. Because the defendant sought to replace his retained counsel with new retained counsel, the supreme court reviews the *Brown* factors based on the existing record and concludes that the district court abused its discretion in denying the defendant's motion for a continuance and, in so doing, violated his Sixth Amendment right to

counsel of choice. The court therefore affirms the judgment of the court of appeals in part, albeit on different grounds.

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

2022 CO 23

Supreme Court Case No. 20SC853
Certiorari to the Colorado Court of Appeals
Court of Appeals Case No. 18CA2050

Petitioner:

The People of the State of Colorado,

v.

Respondent:

Palmer Gilbert.

Judgment Affirmed in Part and Vacated in Part
en banc
May 31, 2022

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

JUSTICE MÁRQUEZ delivered the Opinion of the Court.

¶1 This criminal case presents two issues for our review. First, we are asked to consider whether defense counsel established good cause under section 16-8-107(3)(b), C.R.S. (2021), for providing untimely notice of intent to introduce evidence of the defendant's mental condition. Second, we are asked to clarify our decision in *People v. Brown*, 2014 CO 25, ¶ 24, 322 P.3d 214, 221 (holding that, when assessing a defendant's motion for a continuance to change counsel, the trial court should apply an eleven-factor test to balance the defendant's Sixth Amendment right to counsel of choice against the public's interest in the efficiency and integrity of the judicial process). Specifically, we are asked to consider whether the court of appeals erred in remanding this case for further findings under *Brown* rather than conducting that balancing test itself based on the existing record.[1]

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[1] We granted certiorari to review the following issues:

1. Whether the district court abused its discretion in concluding that defense counsel lacked good cause under section 16-8-10[7], C.R.S. (2020), for his untimely notice of intent to introduce mental condition evidence[.]
2. Whether the court of appeals erred in remanding the case for further findings pursuant to *People v. Brown*, 2014 CO 25, 322 P.3d 214, rather than conducting the balancing test itself based on the existing record.

¶2 Resolving this case on the second issue, we clarify that a trial court need not make explicit findings as to each and every *Brown* factor when ruling on a defendant's motion for a continuance to change counsel. We further clarify that, where the record is adequately developed, an appellate court may review the trial court's denial of a motion to continue under the relevant *Brown* factors rather than remand the case for more express findings under *Brown*. Turning to this case, we observe that the district court erred by requiring the defendant to establish good cause before discharging his retained counsel, contrary to our decision in *Ronquillo v. People*, 2017 CO 99, ¶ 4, 404 P.3d 264, 266 (holding that the Sixth Amendment right to counsel of choice includes the right to discharge retained counsel without good cause). Proceeding to the *Brown* analysis, we review the *Brown* factors based on the record here and conclude that the district court abused its discretion in denying the defendant's motion for a continuance and, in so doing, violated his Sixth Amendment right to counsel of choice. This violation amounts to structural error; thus, the defendant's convictions cannot stand, and we remand for a new trial. Because we resolve the case on this ground, we decline to reach the issue of whether defense counsel lacked good cause under section 16-8-107(3)(b) for providing untimely notice of intent to introduce mental condition evidence, and we vacate that portion of the court of appeals' opinion. In

sum, we affirm the judgment of the court of appeals in part, albeit on different grounds.

I. Facts and Procedural History

¶3 In September 2016, a Best Buy employee found defendant Palmer Gilbert sitting in another employee's vehicle in the store's parking lot. When the employee confronted him, Gilbert got out of the car and began swinging a knife at the employee. Gilbert fled on foot, then attempted to carjack multiple people at knifepoint. On his third attempt, Gilbert stole a vehicle and, shortly thereafter, ran a red light and caused a collision. Gilbert fled the scene of the accident on foot, stole a truck from a nearby restaurant, and drove away. The stolen truck was later discovered in Cheyenne, Wyoming, where police took Gilbert into custody.

¶4 In connection with these events, the People charged Gilbert with ten counts, including aggravated robbery, second degree assault, first degree aggravated motor vehicle theft, second degree criminal trespass, careless driving, and leaving the scene of an accident. Gilbert posted bond and was released in December 2016. He immediately absconded but was apprehended and arraigned approximately one year later, on December 7, 2017.

¶5 On February 8, 2018, two months after his arraignment, Gilbert's retained defense counsel filed a notice of intent to introduce evidence of Gilbert's mental condition pursuant to section 16-8-107(3)(b) and request for a court-ordered

examination. Under that provision, such notice shall be given at arraignment except for good cause shown. As good cause for the untimely notice, defense counsel pointed to Gilbert's "absence from the jurisdiction of the court for a period of time" and counsel's uncertainty about the necessity of introducing such evidence. At a motions hearing the following day, defense counsel explained: "I believe that there might be an underlying mental illness that Mr. Gilbert is suffering from which may [implicate several affirmative defenses]. . . . [A]s soon as all that hit my brain, I thought I have got to immediately notify the district attorney and the Court."[2] Defense counsel explained that he was "attempting to follow the rules" and had "a good-faith belief . . . that the jury would be helped by the examination of [Gilbert's] mental health."

¶6 The district court denied defense counsel's request to order a mental health evaluation, stating: "No good cause has been shown to this Court why it's being brought up at this point as opposed to several months ago at the arraignment."[3]

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[2] In a subsequent, unrelated motion, defense counsel further explained that in preparing for the February 9 motions hearing, he discovered that Gilbert was "the childhood victim of pattern sexual abuse by a non-family member." As a result, defense counsel believed that Gilbert was "suffering from post-traumatic stress disorder, and/or bi-polar disorder."

[3] The court also denied the request on the independent ground that section 16-8-107(3)(b) applies only to specific intent crimes, and, according to the court,

According to the court, the request was "simply an issue of delay." The court expressed frustration toward defense counsel, stating: "You know, frankly, [defense counsel], I'm getting tired of the surprises that come in here when you're involved in cases. It's concerning to this Court as to whether or not you're really prepared for cases."[4]

¶7 At a pretrial hearing in March 2018, five days before trial was set to begin, defense counsel informed the court that Gilbert was hiring new attorneys. The court responded that it was "a little too late" and indicated it would deny any motion to continue. The next day, two new attorneys filed conditional entries of appearance and a motion to continue trial, arguing that "[i]rreconcilable differences have arisen between Gilbert and [his] current counsel" and that "Gilbert has come to believe that his attorney is not prepared for trial, has not adequately prepared a proper defense, and has not adequately investigated the

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Gilbert's "capacity to form specific intent simply is not material or relevant." Because the People charged Gilbert with second degree assault (a specific intent crime), the People concede that this aspect of the court's ruling was erroneous.

[4] On February 28, 2018, defense counsel filed a motion to substitute the district court judge, contending that the judge's anger and disparaging comments in front of Gilbert at the February 9 motions hearing had both reduced his client's confidence in defense counsel and caused counsel to "suffer[] mental distress" and to seek professional counseling. The district court denied this motion without comment.

potential for such a defense." In this motion, new counsel pointed out that, in fact, the district court had made similar observations at the February motions hearing. The People filed a written objection that briefly addressed each of the factors identified in *Brown*, ¶ 24, 322 P.3d at 221.

¶8 On March 30, 2018, the court held a hearing on the motion, at which Gilbert's new counsel was present. New counsel explained:

> [I]t is our understanding . . . [that] the relationship with [Gilbert's] current counsel is fractured. The fracturing of the relationship apparently arises from some comments that have been made in regards to his attorney's knowledge of the case and preparedness for trial. . . . [I]t's my understanding that Mr. Gilbert has essentially, similar to a divorce, irreconcilable differences with his current counsel, and I believe that will jeopardize his ability to cooperate with his counsel at trial.

¶9 In response, the People highlighted the *Brown* factors they felt were most important: (1) Gilbert's conduct, (2) the timing of Gilbert's request, (3) the prejudice to the People, and (4) the impact on the victims. The People argued that Gilbert's request for a continuance was simply a delay tactic that, along with Gilbert's earlier abscondence, reflected Gilbert's desire to evade resolution of the case and responsibility for his actions. As for prejudice, the People noted that one eyewitness had moved out of state and was no longer available for trial. The People also expressed concern about the availability of a victim who had been diagnosed with lymphoma and was undergoing chemotherapy. Finally, the People acknowledged they had not been able to contact the victims in time to get

their position on the proposed continuance but represented to the court that two victims had independently expressed "some level of frustration" about the length of time the case had taken and wanted to see the matter "expeditiously resolved."

¶10 The district court denied the motion to continue, finding that "this 11th hour attempt . . . to change attorneys is just one more attempt by Mr. Gilbert to delay this case."[5] The court observed that, if new counsel were allowed to enter the case, trial would be postponed at least six months given the amount of discovery at issue. It found that there would be substantial hardship to the People because the case involved a number of lay witnesses and that "[o]ne of those witnesses is very ill and may not be available for trial" if it were rescheduled. Finally, the court addressed Gilbert's concerns regarding defense counsel's preparedness for trial:

> [A]s it relates to the defendant's right to effective assistance of counsel, [defense counsel] sometimes is exasperating. . . . But [he] has practiced in this court on a number of occasions. Not once has he ever been involved in a case where I felt he provided ineffective assistance of counsel. I believe that to be the case in this matter too.

[5] The court cited to Gilbert's abscondence, defense counsel's request for a mental health evaluation, and defense counsel's filing of a C.A.R. 21 petition as other examples of attempted delay.

¶11 Defense counsel immediately requested a *Bergerud* hearing,[6] during which he confirmed that his relationship with Gilbert was fractured. Defense counsel detailed several recent incidents in his personal life, including a terrorist incident at his daughter's school, that had taken time away from the case and caused him to cancel appointments with Gilbert. Counsel also told the court that he had experienced "emotional distress for which [he had] sought counseling" as a result of the court's comments throughout the case, especially during the February 9 motions hearing. Defense counsel suggested that he had refrained from requesting a continuance or moving to withdraw earlier, even though he thought he may have needed to, because he did not want to upset the court. Ultimately, defense counsel explained, "the relationship is fractured. It's unrepairable. [Gilbert] doesn't have any confidence in me. . . . I don't think that he's trying to do this for purposes of delay." Counsel concluded, "I know what irreconcilable differences are, and I have them in this case. And our communication is just,

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[6] A *Bergerud* hearing is typically held when a defendant objects to *court-appointed* counsel. *See People v. Bergerud*, 223 P.3d 686, 694–95 (Colo. 2010). At such a hearing, both the attorney and the client testify regarding the "pertinent details of [the] disagreement" between them to allow the trial court to determine whether the defendant is entitled to substitute counsel. *Id.* at 694.

frankly, broke[n] down to the point of extreme distrust and I know when my duty informs me that I must withdraw."

¶12 The court denied defense counsel's request to withdraw, stating, "The bottom line isn't whether or not Mr. Gilbert and [defense counsel] like each other or whatever. It's whether or not [defense counsel] at this point in time can provide effective assistance of counsel to this defendant. And the Court finds that he can."

¶13 The matter proceeded to trial, and the jury ultimately found Gilbert guilty of seven of the ten charges. Gilbert appealed, arguing, as relevant here, that the district court abused its discretion in denying his motion to introduce mental condition evidence and violated his Sixth Amendment right to counsel of choice when it denied his requests for a continuance and for substitution of counsel.

¶14 A division of the court of appeals reversed Gilbert's convictions on two independent grounds and remanded with directions. The division first concluded that a defendant "demonstrates 'good cause' for delay under section 16-8-107(3)(b) when (1) notice was not given at the time of arraignment due to mistake, ignorance, or inadvertence; and (2) justice is best served by permitting the introduction of evidence regarding a defendant's mental condition." *People v. Gilbert*, 2020 COA 137, ¶ 25, 490 P.3d 899, 906. In so doing, the division relied on section 16-8-103(1)(a), (1.5)(a), C.R.S. (2021), which contains similar "good cause" language. *Gilbert*, ¶¶ 23–24, 490 P.3d at 906. Applying this standard, the division

held that defense counsel had established good cause for his untimely notice of intent to introduce evidence of Gilbert's mental condition and that the district court had abused its discretion in concluding otherwise. *Id.* at ¶¶ 27–32, 490 P.3d at 906–07. The division therefore reversed Gilbert's convictions except for the strict liability offense of leaving the scene of an accident, to which a mistake-of-fact defense would not apply. *Id.* at ¶ 35, 490 P.3d at 907–08. It remanded the case to the district court with instructions to order Gilbert to undergo a mental health evaluation pursuant to section 16-8-107(3)(b). *Gilbert*, ¶ 36, 490 P.3d at 908. The division directed the district court to determine whether Gilbert had admissible evidence that his mental condition at the time of the offenses could support a mistake-of-fact defense. *Id.* at ¶ 37, 490 P.3d at 908. If so, then a new trial would be required; if, not, then the judgment of conviction should be reinstated subject to a right to appeal the district court's determination. *Id.*

¶15 The division separately held that the district court erred in denying Gilbert's requests for a continuance and for substitution of counsel without making findings regarding the *Brown* factors. *Id.* at ¶ 48, 490 P.3d at 909. The division explained that the district court should have made specific findings regarding each factor under *Brown*, *id.*, and because it "failed to do so, the record . . . is inadequate to determine if the court properly exercised its discretion," *id.* at ¶ 49, 490 P.3d at 909. The division therefore reversed all of Gilbert's convictions (including the strict

liability offense of leaving the scene of an accident) on this independent ground, *id.*, and remanded with instructions that the district court "make specific findings concerning each *Brown* factor," *id.* at ¶ 50, 490 P.3d at 910. The division directed the district court to hold a new trial if, after a full evaluation of the *Brown* factors, it found that Gilbert's Sixth Amendment right to counsel of choice had been violated. *Id*.

¶16 The People petitioned for certiorari review, and we granted their petition.

II. Analysis

¶17 We first articulate the standard of review applicable to a trial court's discretionary decision to grant a motion for a continuance. We then outline the legal principles governing a defendant's request for a continuance and the Sixth Amendment right to counsel of choice, including our decision in *Brown*. In so doing, we clarify that a trial court need not make explicit findings regarding each *Brown* factor and that, where the record is sufficiently developed, an appellate court may review the trial court's denial of a motion to continue under the relevant *Brown* factors rather than remand the case for the trial court to make more specific findings under the *Brown* analysis. Reviewing the *Brown* factors based on the record here, we conclude that the district court abused its discretion in denying Gilbert's motion for a continuance and thereby violated Gilbert's Sixth Amendment right to counsel of choice.

A. Standard of Review

¶18 "A motion for a continuance falls within 'the sound discretion of the trial court.'" *Brown*, ¶ 19, 322 P.3d at 219 (quoting *People v. Hampton*, 758 P.2d 1344, 1353 (Colo. 1988)). We review a trial court's ruling on a motion for a continuance for an abuse of discretion and will reverse only if, based on the totality of the circumstances, *id.* at ¶ 20, 322 P.3d at 219, the trial court's decision "was arbitrary or unreasonable and materially prejudiced the defendant," *id.* at ¶ 19, 322 P.3d at 219 (quoting *United States v. Simpson*, 152 F.3d 1241, 1251 (10th Cir. 1998)).

B. Motion for a Continuance and a Defendant's Right to Counsel of Choice

¶19 The Sixth Amendment to the United States Constitution affords a criminal defendant the right to be represented by counsel of choice. U.S. Const. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."); *see also Powell v. Alabama*, 287 U.S. 45, 53 (1932) ("It is hardly necessary to say that the right to counsel being conceded, a defendant should be afforded a fair opportunity to secure counsel of his own choice."). "This guarantee reflects the substantial interest of a defendant in retaining the freedom to select an attorney the defendant trusts and in whom the defendant has confidence." *Rodriguez v. Dist. Ct.*, 719 P.2d 699, 705–06 (Colo. 1986). A defendant's Sixth Amendment right to be represented by counsel of choice is "entitled to great deference," *id.* at 705, because it is "central to the

adversary system and 'of substantial importance to the integrity of the judicial process,'" *Brown*, ¶ 16, 322 P.3d at 219 (quoting *Rodriguez*, 719 P.2d at 705–06). Accordingly, a trial court must "recognize a presumption in favor of a defendant's choice of retained counsel." *Ronquillo*, ¶ 17, 404 P.3d at 268.

¶20 That said, the right to counsel of choice is not absolute. "The judicial process must be, and must be perceived to be, a process that is fundamentally fair to all parties . . . ." *Rodriguez*, 719 P.2d at 706. Thus, "[i]n some circumstances, fundamental considerations other than a defendant's interest in retaining a particular attorney are deemed of controlling significance." *Id.* For instance, "a defendant may not use the right to counsel of choice to delay the trial or impede judicial efficiency." *Brown*, ¶ 17, 322 P.3d at 219.

¶21 *Brown* concerned a motion for a continuance 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. *See* ¶¶ 19–29, 322 P.3d at 219–22. 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 with the public's interest in the efficiency and integrity of the judicial process. *Id.* at ¶¶ 22–23, 322 P.3d at 219. We identified eleven factors for trial courts to consider when deciding whether to grant a continuance so that a

reviewing court may determine whether the trial court properly exercised its discretion:

> 1. the defendant's actions surrounding the request and apparent motive for making the request;
>
> 2. the availability of chosen counsel;
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> 3. the length of continuance necessary to accommodate chosen counsel;
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> 4. the potential prejudice of a delay to the prosecution beyond mere inconvenience;
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> 5. the inconvenience to witnesses;
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> 6. the age of the case, both in the judicial system and from the date of the offense;
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> 7. the number of continuances already granted in the case;
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> 8. the timing of the request to continue;
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> 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.* We also noted that "[t]he trial court should place its findings on the record; otherwise, appellate review may be impossible and remand for development of the record may be necessary." *Id.* at ¶ 26, 322 P.3d at 221. We ultimately remanded in that case for further factual findings because, "[a]lthough

the record contain[ed] some of the information for evaluating whether the trial court abused its discretion in denying the continuance, the record lack[ed] information about other factors that the court should have considered when making its decision." *Id.* at ¶ 28, 322 P.3d at 222.

¶22 We have since considered *Brown*'s application in other contexts. For example, in *Ronquillo*, we held that the Sixth Amendment right to counsel of choice includes the right to fire retained counsel without a showing of good cause, even where the defendant seeks to replace retained counsel with appointed counsel. ¶ 4, 404 P.3d at 266. There, we noted that the trial court may need to conduct a *Brown* analysis to determine "whether to allow the defendant enough time for replacement counsel to take over the case." *Id.* at ¶ 35, 404 P.3d at 270. We then explained that if the defendant is not entitled to a continuance under *Brown*, the trial court must require the defendant to choose between keeping retained counsel or waiving the right to counsel and proceeding pro se. *Id.* at ¶ 40, 404 P.3d at 271.

¶23 We also noted that the defendant's right to effective assistance of counsel may compel a continuance even where *Brown* would not. *Id.* at ¶ 35 n.2, 404 P.3d at 270 n.2. "[I]f good cause exists, such as a complete breakdown in communication or an irreconcilable conflict, then current counsel cannot effectively represent the defendant. In such a situation, the defendant would be entitled to the time reasonably necessary for replacement counsel to become

effective." *Id.* (citations omitted). In other words, we suggested that where the defendant establishes good cause, the court may be required to substitute new counsel notwithstanding the outcome of the *Brown* analysis. *Id.*; *see also People v. Arguello*, 772 P.2d 87, 94 (Colo. 1989) ("If the defendant can establish 'good cause, such as a conflict of interest, a complete breakdown of communication or an irreconcilable conflict which leads to an apparently unjust verdict,' the court is required to substitute new counsel." (quoting *McKee v. Harris*, 649 F.2d 927, 931 (2d Cir. 1981))). Under such circumstances, a continuance may be necessary, not to preserve the defendant's right to counsel of choice, but to preserve the right to effective assistance of counsel.

¶24 Two years later, in *People v. Travis*, 2019 CO 15, ¶ 14, 438 P.3d 718, 721–22, we held that *Brown* does not apply where "the defendant expresses a general interest in retaining counsel, but has not identified replacement counsel or taken any steps to retain any particular lawyer." There, the defendant sought to replace appointed counsel, but, unlike in *Brown*, had not taken concrete steps to retain new counsel. *Id.* at ¶ 6, 438 P.3d at 720.

¶25 We have not had the opportunity to address how *Brown* operates where the defendant seeks to replace retained counsel with new retained counsel who (like in *Brown* and unlike in *Travis*) is available and willing to represent the defendant. Nor have we decided whether a trial court must make specific findings regarding

each and every factor of the *Brown* balancing test or whether an appellate court may review the trial court's denial of a motion for continuance under the *Brown* factors based on the existing appellate record rather than remand the case for more specific findings under the *Brown* analysis.

¶26 We now hold that, in deciding whether to grant a continuance to enable a defendant to exercise the right to counsel of choice, a trial court need not make explicit findings as to each and every *Brown* factor. It would make little sense and waste judicial resources to require a trial court to consider and make a record of each *Brown* factor regardless of whether the factor is relevant or influences the court's decision. Indeed, although we did not address this issue directly in *Brown*, we acknowledged that "[t]here are no 'mechanical tests' for determining whether a trial court abuses its discretion by denying a continuance," *Brown*, ¶ 20, 322 P.3d at 219 (quoting *Hampton*, 758 P.2d at 1353), and we instead highlighted the "wide latitude" granted to trial courts in balancing a defendant's right to counsel of choice against the demands of judicial efficiency, *id.* (quoting *United States v. Gonzalez-Lopez*, 548 U.S. 140, 152 (2006)); *see also Ungar v. Sarafite*, 376 U.S. 575, 589 (1964) ("The answer must 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.").

¶27 We also hold that, where the record contains the relevant information, an appellate court may (but is not required to) review the trial court's ruling on the motion to continue under the *Brown* balancing test rather than remand the case for the trial court to make more express findings. *See, e.g.*, *People v. Maestas*, 199 P.3d 713, 718 (Colo. 2009) (reviewing the record to determine whether concerns regarding the administration of justice and integrity of the judicial system outweighed the defendant's right to retained counsel of choice in the context of a waiver of the defendant's right to conflict-free representation). We recognize that, "[g]iven the highly factual nature of the balancing test, the trial court is undeniably in the best position to determine whether a continuance is appropriate." *Brown*, ¶ 26, 322 P.3d at 221. However, where the record is sufficiently developed, it may be a more efficient use of judicial resources for the appellate court to analyze the trial court's ruling under the *Brown* factors rather than remand to the trial court for more express findings. This may be especially true where significant time has lapsed, or where, as here, the trial court judge has retired or is otherwise unavailable. Rather than require remand in all cases where the trial court has failed to make express findings under *Brown*, we opt to allow appellate courts discretion to conduct the balancing test based on the circumstances of the case and the development of the record.

¶28 Having clarified our decision in *Brown*, we turn now to the facts of this case.

C. Application

¶29 At the outset, we note that under our decision in *Ronquillo*, Gilbert had a right under the Sixth Amendment to discharge his retained counsel without having to establish good cause. *See Ronquillo*, ¶ 27, 404 P.3d at 270 ("A defendant who wishes to discharge retained counsel may do so without good cause . . . ."). The district court thus erred when it purported to require Gilbert to establish good cause to discharge his retained counsel and refused to allow counsel to withdraw.[7] That said, because Gilbert sought to replace defense counsel with new retained counsel, we turn to the *Brown* factors to determine whether the district court should have granted a continuance to allow new counsel to take over the case. *See id.* at ¶ 35, 404 P.3d at 270–71.

¶30 We begin with a presumption in favor of Gilbert's Sixth Amendment right to counsel of choice. *Id.* at ¶ 17, 404 P.3d at 268; *People v. Harlan*, 54 P.3d 871, 878

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[7] Moreover, although the district court found that Gilbert's retained counsel could provide effective representation, the record is rife with evidence of a conflict and breakdown in communication. As such, Gilbert arguably was entitled to a continuance, regardless of *Brown*, based on his right to effective assistance of counsel. *See Ronquillo*, ¶ 35 n.2, 404 P.3d at 270 n.2 ("[I]f good cause exists, such as a complete breakdown in communication or an irreconcilable conflict, then current counsel cannot effectively represent the defendant. In such a situation, the defendant would be entitled to the time reasonably necessary for replacement counsel to become effective." (citations omitted)). We resolve this case on other grounds, however.

(Colo. 2002); *Tyson v. Dist. Ct.*, 891 P.2d 984, 990 (Colo. 1995). Although this presumption may be overcome, we conclude that the record here does not reflect that Gilbert's Sixth Amendment right to counsel of choice was outweighed by "the demands of fairness and efficiency." *Brown*, ¶ 20, 322 P.3d at 219.

¶31 First, the district court, clearly influenced by Gilbert's past actions, including his year-long abscondence, believed that Gilbert's purpose in seeking a continuance was to further delay the proceedings. But the record belies any dilatory motive. Instead, the record reflects that the relationship between Gilbert and defense counsel had become strained; that both defense counsel's representation of Gilbert and events in counsel's personal life had negatively affected counsel's mental well-being and his ability to dedicate himself to Gilbert's case; and that Gilbert lacked confidence in defense counsel's competency, at least in part due to comments the district court made throughout the proceedings. This strained relationship was confirmed not just by Gilbert, but also by defense counsel and Gilbert's new counsel. The fact that Gilbert remained in custody and was willing to waive his speedy trial rights in order to give his newly retained counsel time to get up to speed further undermines the notion that the request for a continuance was to delay the proceedings.

¶32 Second, newly retained counsel was available and willing to participate in the proceedings. Indeed, new counsel had already filed a conditional entry of appearance and participated at the hearing on the motion for a continuance.

¶33 Third, the district court made no suggestion that new counsel could not be prepared to proceed following a continuance.

¶34 Fourth, although the case had been pending in the judicial system since September 2016, when the alleged offenses occurred and Gilbert was charged, Gilbert was not arraigned until December 2017. The case moved rather quickly through the judicial system from that point: Gilbert's request for a continuance came just months later, in March 2018.

¶35 Finally, though the case had been delayed, due in part to Gilbert's abscondence, no previous continuances had been requested by any party.

¶36 True, Gilbert requested the continuance just a week before trial. And perhaps even more concerning, a continuance may have inconvenienced the witnesses and victims—two of whom had expressed frustration with the length of time the case had already taken—and could have potentially prejudiced the prosecution. As the People explained, one of their key witnesses had received a cancer diagnosis, and though that witness was undergoing aggressive treatment, it was unclear whether he would have been able to participate if trial were delayed. But the district court could have mitigated this prejudice by preserving that

witness's testimony via deposition. *See* Crim. P. 15(a) (allowing the court to order "that the deposition of a prospective witness be taken before the court . . . if [that] prospective witness may be unable to attend a trial or hearing and it is necessary to take that person's deposition to prevent injustice"); Crim. P. 15(e) (allowing the use of such depositions at trial). While deposition testimony may not entirely eliminate the potential prejudice, and certainly is not a perfect substitute for in-person testimony, such an approach would have struck a fair balance between eliminating prejudice to the People and preserving Gilbert's constitutional right to counsel of choice.[8]

¶37 In short, applying the *Brown* factors here, we conclude that the district court abused its discretion in denying Gilbert's motion for a continuance and, in so doing, violated Gilbert's Sixth Amendment right to counsel of choice. At a minimum, once the district court denied Gilbert's motion for a continuance, Gilbert was entitled to receive an advisement of his rights under *Arguello*, 772 P.2d at 94–96, and the court should have allowed him to choose between keeping

[8] The district court made no reference to the potential impact of a continuance on the court's docket. But even if this factor weighed entirely in favor of the People, it would not, on this record and taken together with the other factors under *Brown*, outweigh Gilbert's right to counsel of choice.

retained counsel or waiving his right to counsel and proceeding pro se. *See Ronquilllo*, ¶ 40, 404 P.3d at 271.

¶38 Because the violation of a defendant's right to counsel of choice amounts to structural error, *see Gonzalez-Lopez*, 548 U.S. at 150, Gilbert's convictions cannot stand, and the case must be remanded for a new trial.

III. Conclusion

¶39 The district court abused its discretion in denying Gilbert's motion for a continuance and, in so doing, violated Gilbert's Sixth Amendment right to counsel of choice. Accordingly, Gilbert's convictions cannot stand, and the case must be remanded for a new trial. Because we resolve the case on this ground, we decline to reach the issue of whether defense counsel demonstrated good cause for his untimely notice of intent to introduce mental condition evidence under section 16-8-107(3)(b), and we vacate that portion of the court of appeals' opinion. On remand, Gilbert's new counsel may seek to introduce such evidence, and the district court may address issues of timeliness and good cause at that time. In sum, we affirm the judgment of the court of appeals in part, albeit on different grounds.