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**Brass (Dequincy) v. State, 138 Nev. Adv. Op. 23 (Apr. 07, 2022)**

Molly Marias

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CRIMINAL LAW: THE SIXTH AMENDMENT AND MOTIONS TO SUBSTITUTE  
RETAINED COUNSEL

**SUMMARY**

The Nevada Supreme Court considered whether a district court’s denial of a defendant’s motion to substitute retained counsel violated the defendant’s Sixth Amendment right to effective assistance of counsel. In evaluating a motion to substitute retained counsel, courts must consider whether (1) granting the motion would significantly prejudice the defendant, or (2) the motion was untimely and would result in an unreasonable disruption of the orderly processes of justice.

In this matter, the Court found that the district court abused its discretion and made a structural error when it denied the defendant’s motion to substitute retained counsel. The Court therefore reversed the district court’s judgment of conviction and remanded the case for a new trial. In its reasoning, the Court concluded (1) that the defendant’s motion was timely under the circumstances because the defendant filed the motion shortly after learning the full extent of his retained counsel’s inadequate preparation, and (2) the defendant’s right to retained counsel outweighed the potentially disruptive effects of a further trial continuance.

**FACTS AND PROCEDURAL HISTORY**

In September 2017, the State of Nevada (“the State”) charged appellant DeQuincy Brass (“Brass”) with five counts of lewdness with a child under the age of fourteen; ten counts of sexual assault of a minor under the age of fourteen; one count of child abuse, neglect, or endangerment; three counts of first-degree kidnapping of a minor; two counts of preventing or dissuading a witness or victim from reporting a crime or commencing prosecution; and one count of battery with the intent to commit sexual assault of a victim under the age of sixteen. These charges stemmed from Brass’ alleged conduct with his partner’s children between May 2015 and February 2017.

After determining that Brass was indigent, the justice court appointed an attorney from the Clark County Public Defender’s office to represent him. However, in the interim, Brass’ family retained Mitchell Posin (“Posin”), and the justice court substituted Posin as Brass’ counsel in January 2018. On February 14, 2018, Brass pleaded not guilty, and the district court set the initial trial for April 30, 2018. Brass requested two continuances at subsequent status checks, citing a need for more preparation time. The court granted both continuances and rescheduled the trial for November 13, 2018. At the November 8, 2018, calendar call, the State announced it was ready for

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<sup>1</sup> By Molly Marias.

trial, but Brass requested a third continuance. At this point, Posin stated he did not feel he would be able to provide Brass adequate assistance of counsel because the State had recently made available new discovery that Posin had not had a chance to thoroughly review. The district court rescheduled the trial for May 13, 2019.

At a May 7, 2019, calendar call, Posin requested to continue the calendar call until May 9, 2019, so that he would have a chance to resolve a subpoena issue with his investigator. The State expressed confusion, as Posin had not noticed any witnesses, to which Posin responded that the initial investigator—who was employed by Investigator Robert Lawson (“Lawson”)—had unexpectedly quit and left the defense in a logistical bind. The State opposed the continuance on the grounds that the State was ready to proceed and had already noticed their witnesses on four separate occasions. The district court denied the continuance, reasoning that Brass’ case had been pending for over a year and had already received several continuances at Brass’ request.

On the first day of trial, Brass renewed his motion for a continuance, asserting that the State had recently provided new discovery that warranted further investigation. The State contended that the new discovery did not prejudice Brass because the information contained in the discovery had been available to Posin since the preliminary hearing two years prior. At this point, Brass expressed to the district court that he had not spoken with Posin since December 2018, did not believe Posin was prepared to represent him, and had not discussed the case with Posin in any detail. On the representation issue, the State argued that Posin was Brass’ retained counsel and had been on this case since the first hearing, and that Brass had not offered specific examples that warranted another continuance. The district court continued the hearing so that Lawson could address the court, and in doing so Lawson expressed concerns regarding Posin’s lack of communication. The State objected to another continuance, this time specifically citing trauma to the minor-aged victims, but the court ultimately continued the trial a fourth time and set the new trial date for February 24, 2020.

At the August and October 2019 status checks, the State alerted the court that Posin had not provided any information related to the investigation that formed the basis for the fourth continuance. Moreover, Lawson stated that while he had spoken with Posin about the investigation, he had yet to meet with Brass. Posin, on his part, opined that he was ready for trial. During the two December 2019 status checks, the State again expressed concerns that Posin had produced no discoverable material, despite the fact that Brass stated he wanted an investigation into his phone. Posin maintained that he had “made inquiries” into various phone experts but had not yet retained one at the time of the status check. Posin also established that he had met with Lawson and Brass to review transcripts for the February 2020 trial. At the January 2020 status check, Posin reiterated that he would be ready for trial.

At a February 20, 2020, calendar call, Posin explained to the court that Brass had alerted him that morning that Brass had mailed a motion to have the court appoint substitute counsel. The district court had not received the mailed motion but nonetheless conducted a sealed hearing pursuant to *Young v. State* outside the State's presence.<sup>2</sup> In this hearing, Brass maintained that Posin had done nothing to prepare for trial, and that Lawson had privately informed Brass the week prior that he had been unable to contact Posin to discuss the case or issue subpoenas. Brass was unable to proffer any suggested witnesses beyond his brother, but Brass claimed that Lawson informed him that there were additional individuals who needed to be subpoenaed that Posin had failed to contact. Though Brass stated he met with Posin a month prior to trial, he contended that the meeting lasted only five minutes, and the two did not discuss the case in detail.

For his part, Posin countered that he had extensively reviewed documents and met with investigators in preparation for trial. Posin also maintained he did not believe the witnesses Brass wanted to testify should be called, as he planned to cross-examine only the State's witnesses. After calling the State back to the hearing, the State objected to the continuance on the grounds that the continued delays were stressful to the victims, and that the motion was untimely. The State additionally argued that Brass failed to demonstrate why the court should appoint new counsel on the first day of trial, after having retained and utilized Posin's services for over two years. The district court denied Brass' motion to substitute appointed counsel, concluding that the motion was untimely and that another continuance would be highly prejudicial to the State.

On the first day of trial, the district court held a second *Young* hearing to consider Brass' renewed oral motion to substitute counsel. Posin conceded at this hearing that his initial strategy to rely solely on cross-examining the State's witnesses was likely inadequate. Lawson likewise voiced concerns to the court regarding Posin's failure to follow-up on investigative leads, particularly as Lawson had apparently informed Posin of myriad exculpatory developments that suggested Brass had not committed the crimes. Additionally, Lawson disclosed that Posin had yet to speak with Brass about Brass potentially testifying, and that Brass had disclosed to Lawson his dissatisfaction with Posin on several occasions. Ultimately, regarding Posin's representation, Lawson concluded by stating he could not let the court "believe for one minute that [Brass] [was] getting any kind of a defense, let alone a bad defense."

In response to Lawson's statements, Posin countered that he had reviewed the State's evidence, prepared opening statements and cross-examinations, and discussed his defense strategy with Lawson. However, Posin acknowledged that his preparation was insufficient, and that he had recently become "more and more convinced" that his initial strategy to rely solely on cross-examining the State's witnesses was inadequate. Tellingly, when the district court asked Posin if it should refer Posin to the State Bar for potential discipline, Posin reneged on his former concession and affirmed he would still be able to provide competent representation at trial.

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<sup>2</sup> *Young v. State*, 120 Nev. 963, 102 P.3d 572 (2004).

Once admitted into the hearing, the State again opposed Brass' motion, highlighting that at no point during the multiple status checks since the fourth continuance had Brass or Lawson raised any diligence or competency issues with respect to Posin's representation. The court agreed with the State and denied Brass' motion for being untimely and unduly prejudicial to the State and its witnesses. The court also concluded that the issue between Brass and Posin was strategic in nature and did not warrant substituting appointed counsel. At trial, the jury convicted Brass of 20 of the 22 counts, and the court sentenced Brass to an aggregate term of 115 years to life. Brass appealed.

## **DISCUSSION**

On appeal, Brass argued that the district court's denial of his motion to substitute counsel violated his Sixth Amendment rights, and that the motion was timely. In reviewing the district court's decision for abuse of discretion—i.e., analyzing whether the district court failed to give due consideration to the issues at hand—the Supreme Court of Nevada agreed with Brass and remanded his case for a new trial.<sup>3</sup>

The Sixth Amendment right to counsel protects two distinct rights: (1) the right to effective assistance of counsel and (2) the right of non-indigent defendants to be represented by the counsel of their choosing.<sup>4</sup> While related, the two rights implicate different tests. Specifically, when defendants seek to substitute court-appointed counsel with different court-appointed counsel, the *Young* test applies, and courts must analyze: (1) the extent of the conflict with counsel, (2) the adequacy of the district court's inquiry into the conflict, and (3) the motion's timeliness.<sup>5</sup> In contrast, when defendants wish to substitute retained counsel for either court-appointed counsel or different retained counsel, the *Patterson* test applies, which requires courts to ask whether (1) granting the motion would significantly prejudice the defendant, or (2) the motion is untimely and would result in an unreasonable disruption of the orderly processes of justice.<sup>6</sup> The *Young* test requires a defendant to show inadequate representation or an irreconcilable conflict with counsel in order for the court to grant their motion, while the *Patterson* test merely requires the court to balance the defendant's right to counsel of choice against the needs of fairness and the court's calendar.<sup>7</sup> Properly applied, the *Patterson* test requires no inquiry into the defendant's reasons for wishing to discharge their retained attorney.<sup>8</sup>

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<sup>3</sup> See *Patterson v. State*, 129 Nev. 168, 298 P.3d 433, 438–39 (2013).

<sup>4</sup> *Id.* at 175, 298 P.3d at 438 (citing *United States v. Rivera-Corona*, 618 F.3d 976, 979 (9th Cir. 2010)).

<sup>5</sup> *Young*, 120 Nev. at 968, 102 P.3d at 576 (quoting *United States v. Moore*, 159 F.3d 1154, 1158–59 (9th Cir. 1998)).

<sup>6</sup> *Patterson*, 129 Nev. at 176, 298 P.3d at 438 (quoting *People v. Lara*, 103 Cal. Rptr. 2d 201, 211–12 (Ct. App. 2001)).

<sup>7</sup> *Id.* at 175, 298 P.3d at 438 (quoting *United States v. Gonzalez-Lopez*, 548 U.S. 140, 152 (2006)).

<sup>8</sup> See *People v. Ortiz*, 800 P.2d 547, 553 (Cal. 1990).

Brass' motion sought to substitute privately retained counsel with court-appointed counsel, so the district court's focus should have been on the right to counsel of one's choice, as opposed to the right to effective assistance of counsel. Although the district court erroneously relied on the *Young*, rather than *Patterson*, factors in denying Brass' motion, the Court was still able to analyze the district court's decision for abuse of discretion under the appropriate *Patterson* test because the court's findings of fact and conclusions of law addressed the relevant *Patterson* factors.<sup>9</sup> Neither party argued that granting Brass' motion would cause him significant prejudice, so the Court analyzed only the motion's timeliness and whether the motion's disruptive effects were outweighed by Brass' right to counsel of choice.

Whether a motion is timely depends upon the facts of that particular case.<sup>10</sup> Though Brass first moved to substitute retained counsel a mere four days before the trial was set to begin, he mailed the motion almost immediately after Lawson informed him that Posin was not prepared for trial. Additionally, at each prior status check, Posin assured the court that he was diligently preparing for trial, and Brass was entitled to rely on Posin's in-court representations.<sup>11</sup> Brass thus raised concerns regarding Posin's preparation at the first opportunity after discovering those circumstances, which supports his motion's timeliness.

Additionally, though demonstrating inadequate representation or the existence of an irreconcilable conflict is not determinative in retained counsel substitution cases, courts may consider these factors in a timeliness analysis.<sup>12</sup> At the hearing on Brass' renewed motion, Posin conceded that his initial trial strategy and preparation was insufficient, particularly in light of Lawson's potentially exculpatory leads, and Lawson—an experienced, court-appointed investigator—disclosed that it seemed Posin had “literally no knowledge of [the] case.” With Posin's severely inadequate preparation in mind, the Court opined that Brass' motion was timely, concluding that this case was not one in which Brass arbitrarily and inappropriately attempted to discharge his retained counsel on the first day of trial.<sup>13</sup>

The Court recognized that granting Brass' motion would have disrupted the orderly processes of justice, particularly for the State's witnesses and young victims, but concluded that the disruption was not unreasonable under the totality of the circumstances. “Few derelictions by

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<sup>9</sup> See *Lara*, 103 Cal. Rptr. 2d at 214.

<sup>10</sup> *People v. Maciel*, 304 P.3d 983, 1010 (Cal. 2013); see also *Patterson*, 129 Nev. at 176, 298 P.3d at 438 (analyzing whether the motion to substitute retained counsel was timely “under the circumstances of the particular case” (internal quotation marks omitted)).

<sup>11</sup> Cf. *Oak Grove Inv'rs v. Bell & Gossett Co.*, 99 Nev. 616, 622, 668 P.2d 1075, 1078–79 (1983) (“...a client has the right to rely on the attorney's expertise...”), overruled on other grounds by *Calloway v. City of Reno*, 116 Nev. 250, 264, 993 P.2d 1259, 1268 (2000).

<sup>12</sup> See *Maciel*, 304 P.3d at 1010–11.

<sup>13</sup> Cf. *People v. Keshishian*, 75 Cal. Rptr. 3d 539, 542 (Ct. App. 2008).

counsel are more significant than inadequate preparation for trial,” and Brass faced going to trial with admittedly unprepared counsel in a twenty-two count felony case.<sup>14</sup>

Accordingly, while the district court was properly concerned about the prejudice associated with granting Brass’ motion, the court abused its discretion in denying the motion under the particular circumstances of Brass’ case. Brass’ motion was timely, and any disruption to the orderly processes of justice was reasonable. The district court’s error was structural, so the Court reversed Brass’ judgment of conviction and remanded the case for a new trial.<sup>15</sup> The Court also referred Posin to the State Bar of Nevada for disciplinary investigations pursuant to SCR 104(1)(a).

## **CONCLUSION**

The Sixth Amendment right to counsel includes the right of non-indigent defendants to retain the counsel of their choosing. When defendants seek to substitute retained counsel, courts must evaluate whether the motion is timely and whether the defendant’s right to counsel of choice outweighs the court’s interest in the efficient administration of justice.

Here, Brass’ motion was timely under the circumstances because Posin continuously represented to Brass and the court that he was prepared for trial, Posin’s failure to subpoena records and witnesses was not strategy-based, and Brass promptly moved the court to substitute counsel as soon as he knew the full extent of Posin’s inadequate preparation. Brass’ right to counsel of choice outweighs a further trial continuance’s potential prejudicial and disruptive effects. The record reflects that Posin took no steps to investigate potentially exculpatory evidence, and Brass raised these issues almost immediately after learning of them. The Court reversed the district court’s judgment of conviction and remanded for a new trial because the district court’s erroneous denial of Brass’ motion to substitute counsel constituted structural error.

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<sup>14</sup> Cf. *Moore v. United States*, 432 F.2d 730, 735 (3d Cir. 1970).

<sup>15</sup> *Gonzalez-Lopez*, 548 U.S. at 150; *Patterson*, 129 Nev. at 177–78, 298 P.3d at 439.