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IN THE

SUPREME COURT OF VIRGINIA

RECORD NO. 180191

MIGUEL ANTONIO REYES,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

BRIEF FOR THE COMMONWEALTH

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BRIEF FOR THE COMMONWEALTH

The decision whether to grant a continuance is within the sound discretion of the trial court. That decision will not be reversed unless the trial court abused its discretion and the complaining party was prejudiced as a result. In this appeal, Miguel Antonio Reyes argues that he was statutorily entitled to a second, last-minute continuance of his sentencing hearing when his family attempted to hire new counsel to represent him. The trial court allowed new counsel to make an appearance and to represent Reyes alongside appointed counsel, but the court refused to continue the sentencing hearing a second time.

This appeal first asks whether Reyes waived any argument that he was entitled to a second continuance when new counsel told the trial court that it "would be fine" if he were permitted to file a motion to reconsider after the sentencing hearing instead. This appeal also asks whether the trial court abused its discretion by denying the continuance motion, and whether Reyes was prejudiced as a result.

STATEMENT OF THE CASE

After accepting his *Alford*[1] plea, the Fairfax County Circuit Court convicted Reyes of robbery. (App. 3, 16, 19-21.) Reyes later moved to continue sentencing, and the trial court granted the motion. (App. 24-28, 31.) When Reyes moved to continue sentencing a second time, the trial court denied the motion and sentenced Reyes to an active sentence of 18 years' imprisonment. (App. 44, 50, 91.)

Reyes appealed to the Court of Appeals of Virginia, raising two assignments of error. In a published opinion, the Court of Appeals affirmed. *Reyes v. Commonwealth*, 68 Va. App. 379, 391, 808 S.E.2d 838, 843-44 (2018). Reyes now appeals to this Court from that decision.

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[1] *North Carolina v. Alford*, 400 U.S. 25 (1970).

ASSIGNMENTS OF ERROR

I. The Court of Appeals erred by holding that the trial court did not abuse its discretion when it denied Mr. Reyes' Motion to Continue.

A. The Court of Appeals erred by finding that Mr. Reyes was required to show exceptional circumstances to warrant the continuance.

B. Even if there is a requirement for Mr. Reyes to show exceptional circumstances, the Court of Appeals erred by finding that Mr. Reyes did not present such exceptional circumstances.

STATEMENT OF FACTS[2]

On June 27, 2015, Fairfax County police officers responded to a robbery call at the home of M.V.G.[3] (App. 11.) M.V.G. told the officers that she had been at home in her apartment with her five-year-old son—who had been asleep at the time—when she had heard a knock at the door. (App. 11.)

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[2] When Reyes entered his *Alford* plea, he stipulated that the Commonwealth's case against him included the following evidence. (App. 9-12.)

[3] Like Reyes and the Court of Appeals, the Commonwealth uses the victim's initials in an effort to better protect her privacy.

When M.V.G. opened the door, two men walked in, and one of them put a gun to her head. (App. 11.) Next, one of the intruders told her to give them money and pushed her on the floor. (*Id.*) M.V.G. gave the men $650 in cash, and they stole her cell phone from her bed. (*Id.*) Before the men left, one of them told M.V.G. that if she told anyone, he "knew where she lived." (*Id.*) Both men fled. (*Id.*) M.V.G. gave the officers descriptions of the two men and later identified Reyes in a photo line-up as one of the intruders. (*Id.*)

MATERIAL PROCEEDINGS BELOW

Due to Reyes's indigent status, Roger Nord was appointed to represent him at the trial level. (App. 1-2, 41, 46, 51, 92.) Almost three months after Reyes had entered his *Alford* plea, the parties appeared for sentencing. (App. 5, 22, 24-25.) At the hearing, Nord made an oral motion for a continuance so Reyes could be evaluated for admission into the Youthful Offender Program. (App. 24-26, 31.) The Commonwealth objected because the victim was present to testify, Reyes was not a good candidate for the program, and Reyes's motion to continue the case should have been filed "far before 10:30 on the date of sentencing."

(App. 26.) Over the Commonwealth's objection, the trial court granted Reyes a two-month continuance "to allow Counsel an opportunity to represent his client." (App. 26-27, 31.)

Next, the Commonwealth asked the trial court to instruct defense counsel to inform the Commonwealth if an issue arose before the next scheduled sentencing hearing so that the victim would not have to come to court unnecessarily, and the trial court responded, "Absolutely." (App. 28.) The trial court told defense counsel to "please make sure that is done, if you can." (*Id.*) And defense counsel agreed to inform the Commonwealth if there was going to be another request to continue the sentencing hearing. (*Id.*)

After the Youthful Offender Program administrators determined that Reyes was eligible but "not suitable" for the program due to his gang membership and disciplinary infractions incurred while he was incarcerated, Reyes's family contacted a new attorney about representing Reyes in these proceedings. (App. 38-42, 51, 53-54, 91.) Accordingly, on the day before the new sentencing date, Charles J. Swedish, filed a motion to substitute as counsel along with a motion for

a "reasonable continuance pursuant to Section 19.2-159.1 [of the] Code of Virginia." (App. 41-47, 50, 91.)

The next day the parties appeared again for sentencing, and the trial court heard argument on the motions to substitute counsel and to continue the hearing. (App. 50-55, 91.) The victim and the victim's mother were present, as was Reyes's appointed counsel Roger Nord. (App. 48, 50.) Swedish informed the trial court that one of Reyes's family members had asked him to "take over Mr. Reyes's case," but that he "wouldn't be doing Mr. Reyes any justice at all if [he] were to step in merely to do the sentencing today." (App. 51.) Swedish also argued that Reyes was entitled to a continuance under Code § 19.2-159.1 due to Reyes's "change of financial circumstances." (App. 51.) Swedish added that Reyes had entered an *Alford* plea and that "[i]t ha[d] also been discussed [that] he might want to withdraw that plea." (App. 51.)

In response to Swedish's proffer that Reyes might want to withdraw his plea, the trial court stated, "That's so unlikely as to make it insufficient cause to continue the matter." (App. 51.) The trial court also noted that Code § 19.2-159.1 provides for a continuance for new

counsel "to prepare for trial," and that "the legislators know what trial means." (App. 52.)

When Swedish reiterated that there was a "possibility [Reyes] might seek to withdraw his plea," the trial court observed that a continuance was "just going to delay matters" because there was no "reasonable cause" to justify "the withdrawal of a plea." (App. 52.) Moreover, the trial court added that it already had continued the sentencing hearing once before and that any additional continuance would be "a burden on the victims." (App. 53.) In response, Swedish answered, "I understand, Your Honor. That's why I didn't try to force the issue but I brought it to the attention of the Court." (App. 53.)

Next, the trial court asked Swedish how much time he needed, and Swedish suggested continuing the case to the "next sentencing date in August." (App. 53.) Swedish told the trial court that Reyes's family had spoken to him about representing Reyes three weeks earlier, but that they had not paid him "until quite recently." (App. 54.)[4]

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[4] Nord later informed the trial court that Reyes's family had "retained" Swedish "<u>one day</u> before the July sentencing date," but that the family had never paid Swedish's full retainer. (App. 95.)

Rather than continue the hearing a second time, the trial court asked Swedish, "Why don't I just allow you to file a motion to reconsider before he is sentenced with the Department of Corrections?" (App. 54.) Swedish replied, "That would be fine. The burden is [a] little bit higher after sentencing." (App. 54.) But Swedish "appreciate[d]" the trial court "leaving that option open." (App. 54.) Swedish concluded, "If that's the case and we go forward today then Mr. Nord will be doing the sentencing and whatever happens, happens subsequent to today." (App. 55.)

Ultimately, the trial court denied Reyes's motion to continue in light of the Commonwealth's objection to a second continuance. (App. 55.) But the trial court told Swedish that the court would "certainly allow" him to represent Reyes "along with Mr. Nord." (App. 55.) Swedish declined the invitation, stating that he had to be in another jurisdiction later that day and that Nord was "quite prepared for the sentencing." (App. 55.) The trial court reiterated that Swedish could "enter [his] appearance in the case" and that the court "would never prevent that from occurring." (App. 55.) But Swedish stated that he

was "withdrawing" his motion to substitute as counsel "for the moment," which the trial court allowed. (App. 55-56, 91.)

The parties then proceeded with the sentencing hearing with Nord still representing Reyes. (App. 56.) After hearing testimony from the victim and argument from Nord and the Commonwealth, the trial court imposed an active sentence of 18 years' incarceration—one year below the midpoint in the sentencing guidelines—which the court acknowledged was "a low sentence in [the] Court's mind for a home robbery."[5] (App. 33, 73, 82.) After announcing Reyes's sentence, the trial court told Nord that he and Swedish could "get[] together and send[] the Court more information on the Youthful Offender Program, as well as [Reyes's] request to withdraw his guilty plea." (App. 83.)

Six days later, the trial court entered a final sentencing order stating that, during the sentencing hearing, the court had granted Nord's motion to withdraw as counsel and Swedish's motion to substitute as counsel, had denied Reyes's motion to continue, and then

[5] The Commonwealth had asked for a sentence of 22 years, which would have been at the high end of the guidelines. (App. 33, 73.)

had granted Swedish's motion to withdraw his substitution motion, and had appointed Nord to represent Reyes going forward. (App. 91.)

Nord subsequently filed a "Motion to Reconsider, to Withdraw *Alford* Plea and to Set a Trial Date."[6] (App. 94-98.) The trial court denied the motion to reconsider and held that the other motions were moot. (App. 105.) Nord next filed a "Supplemental Motion to Reconsider, to Withdraw *Alford* Plea and to Set a Trial Date." (App. 106-12.) The trial court declined to rule on the motion, finding that it no longer had jurisdiction to grant Reyes the relief he requested. (App. 114, 117, 121.)

Reyes appealed to the Court of Appeals of Virginia, arguing in his two assignments of error that the trial court had erred in denying his second continuance motion in violation of Virginia Code § 19.2-159.1 and in violation of Reyes's Sixth Amendment right to counsel.

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[6] Nord explained in the motion that Swedish had left him a recorded phone message stating that he "would not continue with the case, since [Reyes's] family did not pay him the full retainer." (App. 95.) Until hearing the phone message, Nord had assumed that Swedish would be handling the case going forward. (App. 95-96.)

The Court of Appeals affirmed in a published opinion. *Reyes*, 68 Va. App. at 391, 808 S.E.2d at 843-44. The Court of Appeals held that, because Reyes had filed his motion for a second continuance "at the last minute, [he] was required to show exceptional circumstances to warrant the continuance." *Id.* at 388, 808 S.E.2d at 842. And Reyes had "failed to present any exceptional circumstances to the trial court." *Id.* at 388-89, 808 S.E.2d at 842.

While Reyes's counsel had "informed the court of [Reyes's] changed financial circumstances," the Court of Appeals held that "this alone was insufficient to require the court to grant the continuance." *Id.* at 389, 808 S.E. at 842-43. Reyes's counsel had failed to proffer any "reasoning or support" for the possibility that Reyes "*may* want to withdraw his guilty plea," Reyes had "previously been granted a last-minute continuance," the victim was "yet again present and ready to testify, which forced her to once again relieve the trauma of the events that victimized her," and "both the Commonwealth and [Reyes's] appointed counsel were prepared to proceed." *Id.* (emphasis in original). "Under these circumstances," the Court of Appeals held that the trial

court had not "abused its discretion when it [had] denied [Reyes's] motion to continue." *Id.* at 389, 808 S.E.2d at 843.

The Court of Appeals further held that Reyes had failed to preserve his argument that the trial court had violated his Sixth Amendment right to be represented by counsel. *Id.* at 390, 808 S.E.2d at 843. Accordingly, the Court of Appeals chose "not [to] reach this assignment of error." *Id.* (citing Rule 5A:18).

Reyes filed a petition for appeal in this Court, and the Court granted him review of his first two-part assignment of error challenging the Court of Appeals' holding that the trial court did not abuse its discretion when it denied Reyes's second continuance motion. (App. 159, 161.) The Court refused Reyes's petition for appeal as to his second assignment of error. (App. 159.) In his refused assignment of error, Reyes had argued that the Court of Appeals erred by failing to engage in an ends of justice analysis concerning his unpreserved argument that the trial court violated his Sixth Amendment right to counsel. (Pet. at 7.) Accordingly, that issue is not before the Court in this appeal.

STANDARD OF REVIEW

In this appeal, Reyes challenges the trial court's denial of his motion for a second continuance. "[T]he standard of review governing this issue is well-settled in Virginia." *Ortiz v. Commonwealth*, 276 Va. 705, 722, 667 S.E.2d 751, 762 (2008). "The decision to grant a motion for a continuance is within the sound discretion of the [trial] court and must be considered in view of the circumstances unique to each case." *Id.* (quoting *Haugen v. Shenandoah Valley Dep't of Social Servs.*, 274 Va. 27, 34, 645 S.E.2d 261, 265 (2007)).

This Court has identified "three principal ways" in which a trial court can abuse its discretion:

> when a relevant factor that should have been given significant weight is not considered; when an irrelevant or improper factor is considered and given significant weight; and when all proper factors, and no improper ones, are considered, but the court, in weighing those factors, commits a clear error of judgment.

Lawlor v. Commonwealth, 285 Va. 187, 213, 738 S.E.2d 847, 861 (2013) (quoting *Landrum v. Chippenham & Johnston-Willis Hosps., Inc.*, 282 Va. 346, 352, 717 S.E.2d 134, 137 (2011)).

Importantly, "[a] trial court's ruling on a motion for a continuance will be reversed on appeal only if it is plainly erroneous and upon a showing of abuse of discretion and resulting prejudice to the movant." *Butler v. Commonwealth*, 264 Va. 614, 621, 570 S.E.2d 813, 817 (2002) (internal quotation marks omitted). "Abuse of discretion and prejudice to the complaining party are essential to reversal." *Id.* (internal quotation marks omitted).

Finally, issues of statutory interpretation present "question[s] of law reviewed de novo on appeal." *Grimes v. Commonwealth*, 288 Va. 314, 318, 764 S.E.2d 262, 264 (2014). Even still, "while [this Court's] abuse of discretion standard of review necessarily must include a review of any legal conclusions made concomitant with a lower court's exercise of discretion, that does not mean abuse of discretion review is partially de novo." *Lawlor*, 285 Va. at 213, 738 S.E.2d at 861.

ARGUMENT

I. Reyes waived any argument that he was entitled to a continuance when his counsel agreed that he could file a motion to reconsider instead.

In his two-part assignment of error, Reyes argues that the Court of Appeals erred when it held that the trial court did not abuse its discretion when it denied Reyes's motion to continue the sentencing hearing. (Opening Br. at 1.) At the trial level, though, when the trial court expressed concern that a second continuance would place a "burden on the victims," Swedish told the court that he was not trying "to force the issue," and that he merely wanted to bring it "to the attention of the Court." (App. 53.)

Moreover, after Swedish explained why he was requesting a second last-minute continuance, the trial court asked, "Why don't I just allow you to file a motion to reconsider before he is sentenced with the Department of Corrections?"[7] (App. 54.) In response, Swedish answered, "That would be fine." (*Id.*)

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[7] Although the trial court stated that counsel could file the motion to reconsider before Reyes was "sentenced with the Department of Corrections," it is clear from the record that the trial court was referencing its statutory authority to "suspend or otherwise modify the

Swedish added that he believed "[t]he burden is a little bit higher after sentencing," but he told the trial court that he "appreciate[d] [the trial court] leaving that option open." (App. 54.) "If that's the case and we go forward today," Swedish concluded, "then Mr. Nord will be doing the sentencing and whatever happens, happens subsequent to today." (App. 54-55.)

Given the context in which this conversation occurred, it is clear that the trial court was proposing that Swedish file a motion to reconsider as an alternative to continuing the sentencing hearing. That explains why Swedish responded by mentioning the fact that the burden would be "a little bit higher *after* sentencing." (App. 54) (emphasis added). And it explains why Swedish understood the court to be suggesting that sentencing would "go forward today . . . and whatever happens, happens subsequent to today." (App. 55.) By telling the trial court that filing a motion to reconsider would be a "fine" alternative to continuing the sentencing hearing, Swedish waived any

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unserved portion" of a defendant's sentence before the defendant has been "*transferred* to a receiving unit of the Department [of Corrections]." Va. Code § 19.2-303 (emphasis added).

argument that the trial court erred by refusing to grant his continuance motion. *See* Rule 5:25.

This Court applied Rule 5:25 in a similar context in *Buchanan v. Commonwealth*, 238 Va. 389, 416, 384 S.E.2d 757, 773 (1989). There, the defendant argued that "the trial court [had] erred by not allowing his court-appointed psychiatrist to visit the scene of the crime with [him] and [his] counsel." *Id.* "However, at trial, when the trial court ruled that [the defendant] could visit the scene with defense counsel," defense counsel agreed, stating, "If [the psychiatrist] can't go, then he can wait for us and when we come back he can talk to Mr. Buchanan and talk to us. *That would be fine*." *Id.* (emphasis added). Relying on Rule 5:25, this Court dispensed with the defendant's argument that the trial court had erred. *Id.*[8]

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[8] *See also Dickenson v. Commonwealth*, Record No. 1095-02-1, 2003 Va. App. LEXIS 228, at *9 (Apr. 15, 2003) (citing Rule 5A:18 and refusing to address the defendant's argument that "it was constitutionally insufficient to proceed to trial without an expert analysis of [another man's] handwriting" where defense counsel had taken the position in the trial court that it would be "sufficient" for the expert to examine only the defendant's handwriting and the handwriting on certain checks).

The same reasoning applies here. Even though Swedish initially argued that Reyes was entitled to a continuance under Code § 19.2-159.1, Swedish waived that argument when he agreed that it "would be fine" if he were allowed to file a motion to reconsider instead. (App. 54.) Thus, this Court should affirm without reaching the merits of Reyes's two-part assignment of error. *Buchanan*, 238 Va. at 416, 384 S.E.2d at 773.

II. Even if the issue has not been waived, the trial court did not abuse its discretion, and Reyes has not shown that he suffered any prejudice.

A. The trial court did not abuse its discretion by denying Reyes's motion for a second last-minute continuance.

1. The trial court reasonably could have concluded that a continuance would not have been "reasonable" under the circumstances.

Reyes argues that "the trial court erred in denying the continuance [request]" because "Code § 19.2-159.1 requires the trial court to grant a reasonable continuance once a defendant is no longer indigent and has retained counsel." (Opening Br. at 12.) But Reyes misinterprets the statute's directive.

Virginia Code § 19.2-159.1(B) provides, in full,

> The statement and oath of the defendant [regarding his indigency] shall be filed with the papers in the case, and shall follow and be in effect at all stages of the proceedings against him without further oath. In the event the defendant undergoes a change of circumstances so that he is no longer indigent, the defendant shall thereupon obtain private counsel and shall forthwith advise the court of the change of circumstances. The court shall grant reasonable continuance to allow counsel to be obtained and to prepare for trial. When private counsel has been retained, appointed counsel shall forthwith be relieved of further responsibility and compensated for his services, pro rata, pursuant to § 19.2-163.

Va. Code § 19.2-159.1(B).

Importantly, Code § 19.2-159.1(B) instructs trial courts to grant a continuance to a defendant who experiences a change in financial circumstances only if the continuance is "reasonable." Va. Code § 19.2-159.1(B). "The legislature is presumed to know what it intends to do and can do." *Miller v. Commonwealth*, 172 Va. 639, 649, 2 S.E.2d 343, 348 (1939). And by qualifying the word "continuance" with the

word "reasonable," the General Assembly limited the class of cases in which a defendant will be entitled to a continuance under the statute.[9]

"Interpretation of the statute by comparison to other, similar statutes supports this result." *Schwartz v. Schwartz*, 46 Va. App. 145, 157, 616 S.E.2d 59, 66 (2005). If the General Assembly had intended to require a continuance in every case, but merely had intended to require that the continuance be reasonable *in length*, it could have said so.

Indeed, other statutes demonstrate that the General Assembly knows how to mandate that a continuance be granted in certain circumstances with the only limitation being that the continuance must be reasonable in length.[10] For example, Code § 19.2-231 provides that a defendant "shall be *entitled*, upon request, to a continuance of the case *for a reasonable time*," in any case where an amendment to an indictment, information, or presentment "operates as a surprise to the

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[9] *See Parker v. Commonwealth*, 24 Va. App. 681, 688, 485 S.E.2d 150, 153 (1997) (stating that, "[b]y qualifying the word fear with the word 'reasonable,'" in the statute under consideration, "the General Assembly intended to limit the [statute's] reach").

[10] *See Hitt Constr. v. Pratt*, 53 Va. App. 422, 429-30, 672 S.E.2d 904, 907 (2009) ("When construing statutes, it is presumed that the absence of language . . . in a body of legislation is purposeful, if potentially equally relevant language is included in a similar body of legislation.").

accused." Va. Code § 19.2-231 (emphasis added).[11] Likewise, Code § 56-124 provides that, in certain circumstances in an action initiated under Code § 56-123, a party "shall have a *right* to a continuance *for a reasonable time*." Va. Code § 56-124 (emphasis added).

Code § 19.2-159.1(B), on the other hand, requires that the continuance itself be reasonable: "The court shall grant *reasonable continuance* to allow counsel to be obtained and to prepare for trial." Va. Code § 19.2-159.1(B) (emphasis added). "It must be presumed that the legislature acted deliberately in using different language in similar statutes, and that judgment should be respected by the courts." *Brown v. Commonwealth*, 284 Va. 538, 545, 733 S.E.2d 638, 641 (2012).

That conclusion is particularly true here given the fact that the General Assembly inserted the phrase "a continuance of the case for a reasonable time" into Code § 19.2-231 in 1975,[12] the very same year the

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[11] *See also Willis v. Commonwealth*, 10 Va. App. 430, 438, 393 S.E.2d 405, 409 (1990) (stating that "Code § 19.2-231 mandates that when an amendment operates as a surprise to the accused he shall be entitled, upon request, to a continuance of the case for a reasonable time").

[12] Before 1975, Code § 19.2-231's predecessor statutes provided that a defendant who was surprised by an amendment to an indictment "shall

General Assembly enacted Code § 19.2-159.1's predecessor and the "reasonable continuance" language at issue here. *See* 1975 Va. Acts ch. 495, at 891; Va. Acts. ch. 580, at 1217.

Accordingly, the two phrases must have different meanings. And in order to resolve this case, this Court must determine whether the trial court reasonably could have concluded that a continuance *of any length* would not have been reasonable under the circumstances.[13]

"In ordinary use and common acceptation, the word 'reasonable' means fair; just; ordinary or usual; not immoderate or excessive; not capricious or arbitrary. It means what is just, fair and suitable under the circumstances." *Sydnor Pump & Well Co. v. Taylor*, 201 Va. 311, 317-18, 110 S.E.2d 525, 530 (1959); *see also Miller v. Commonwealth*, 64 Va. App. 527, 541-542, 769 S.E.2d 706 (2015) (quoting the same

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be entitled, upon request, to a continuance of the case" or "cause." *See* Va. Code §§ 19.1-175 (1960); 19.1-176 (1960); 19.1-177 (1960).

[13] This view comports with the "well-settled" rule in Virginia that the "decision to grant a motion for a continuance is within the sound discretion of the [trial] court and must be considered in view of the circumstances unique to each case." *Ortiz*, 276 Va. at 722, 667 S.E.2d at 762 (quoting *Haugen*, 274 Va. at 34, 645 S.E.2d at 265).

definition and noting that the reasonableness determination is a "question of fact" for the factfinder).

Reyes's sentencing hearing already had been continued once before on Reyes's motion when Reyes—through Swedish—moved to continue it a second time. (App. 24-27, 31.) The first time the parties appeared for sentencing, Nord had orally requested a continuance so that Reyes could be evaluated for admission into the Youthful Offender Program. (App. 24-26, 31.) The trial court had granted the motion, but also had instructed Nord to inform the Commonwealth if an issue arose before the new sentencing date so the victim would not have to come to court if the hearing was going to be continued again. (App. 28.)

Notwithstanding the trial court's instructions, Reyes's family waited until the day before the new sentencing hearing to attempt to hire Swedish.[14] (App. 54, 95.) As a result, Swedish filed his motion to continue the hearing a second time the day before the hearing was to be

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[14] Because Reyes's arguments otherwise are without merit, the Commonwealth assumes without conceding that Reyes's family's professed willingness to pay to retain new counsel constitutes "a change of circumstances so that [Reyes himself was] no longer indigent." Va. Code § 19.2-159.1(B).

held. (App. 41-47, 50, 91.) Due to the late notice, the victim again appeared to testify. (App. 50.)

In the Sixth Amendment context, the United States Supreme Court has recognized that "broad discretion must be granted trial courts on matters of continuances; only an unreasoning and arbitrary insistence upon expeditiousness in the face of a justifiable request for delay violates the right to the assistance of counsel." *Morris v. Slappy*, 461 U.S. 1, 11-12 (1983) (internal quotation marks omitted). And "[i]n order to work a delay by the last minute change of counsel," this Court has held that "exceptional circumstances must exist." *Shifflett v. Commonwealth*, 218 Va. 25, 30, 235 S.E.2d 316, 320 (1977).

These principles should apply with equal force in determining whether a defendant's continuance request is "reasonable" under Code § 19.2-159.1(B). The timeliness of the request is certainly a factor that should be considered in determining whether it would be "just, fair and suitable" to grant a continuance "under the circumstances." *Sydnor*, 201 Va. at 317-18, 110 S.E.2d at 530. And the defendant should be given the opportunity to demonstrate that granting the continuance

would be reasonable due to "exceptional circumstances." *Shifflett*, 218 Va. at 30, 235 S.E.2d at 320.[15]

In this case, the record establishes that the trial court did not deny Reyes's last-minute motion for a second continuance based on an "unreasoning and arbitrary insistence upon expeditiousness in the face of a justifiable delay." *Morris*, 461 U.S. at 11-12. On the contrary, the trial court already had granted one last-minute continuance request. (App. 26-27.) And Reyes had failed to heed the trial court's instruction to give the Commonwealth reasonable notice before moving to continue the sentencing hearing a second time. (App. 28.) As a result, the victim of a violent crime appeared in court ready to testify on the new sentencing date. (App. 50.) And the trial court reasonably was

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[15] Even assuming this Court concludes that a defendant should not be required to prove "exceptional circumstances" to justify a last-minute continuance under Code § 19.2-159.1, for the reasons that follow this Court still should affirm because a continuance would not have been "reasonable" under the circumstances. This Court can affirm when "the record supports the right reason" justifying the trial court's decision regardless of "whether or not that ground was relied upon, rejected, or even considered by the [trial court] or the Court of Appeals." *Perry v. Commonwealth*, 280 Va. 572, 580-81, 701 S.E.2d 431, 436-37 (2010) (internal quotation marks omitted).

concerned about forcing her to come to court for a third time in the absence of some justifiable reason for the delay. (App. 55.)

Reyes also failed to demonstrate any "exceptional circumstances" justifying his second continuance request. *Shifflett*, 218 Va. at 30, 235 S.E.2d at 320. Swedish conceded that Nord was "quite prepared for the sentencing." (App. 55.) And Swedish primarily asked for a continuance because it had "been discussed [that Reyes] might want to withdraw [his *Alford*] plea." (App. 51.) But that was merely "a possibility." (App. 52.) Swedish did not suggest any basis for withdrawing Reyes's plea, even after the trial court observed that it did not "find any reasonable cause . . . for the withdrawal of a plea." (App. 52.) Nor did Swedish proffer any reasons why Reyes should be allowed to controvert the sworn statements he made during his plea colloquy about the voluntariness of his *Alford* plea and his satisfaction with appointed-counsel's services.[16] (App. 9-16.)

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[16] *See Fields v. Attorney General of State of Md.*, 956 F.2d 1290, 1299 (4th Cir. 1992) (holding that the petitioner had "present[ed] no evidence that suggests his representations during his plea were untruthful or involuntary, and he [was] therefore rightly bound by his sworn statements"). In the plea colloquy, Reyes also vouched for the accuracy

In light of these facts, the Court of Appeals correctly compared this case to two of its prior cases in which it had affirmed trial court rulings denying last-minute continuance requests. *Reyes*, 68 Va. App. at 387-89, 808 S.E.2d at 842-43 (citing *Brailey v. Commonwealth*, 55 Va. App. 435, 686 S.E.2d 546 (2009), and *Johnson v. Commonwealth*, 51 Va. App. 369, 657 S.E.2d 812 (2008)). In both *Brailey* and *Johnson*, the defendants "had previously been granted a last-minute continuance." *Reyes*, 68 Va. App. at 389, 808 S.E.2d at 843. The defendants requested continuances on the day of trial in order to retain new counsel and to allow new counsel time to prepare. *Id.* at 387-88, 808 S.E.2d at 842.[17] Witnesses were present and ready to testify. *Id.* at 388, 808 S.E.2d at 842. And the defendants' original attorneys were present and prepared to proceed. *Id.*

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of the statements contained in his written plea form. (App. 14, 19-20.) By signing the form, Reyes "admit[ted] that the evidence against [him] is overwhelming and substantially negates any claim of innocence [he] may have." (App. 19.)

[17] In *Johnson*, new counsel appeared in court and asked to be substituted and for a continuance, whereas in *Brailey* new counsel apparently had not yet been retained. *Reyes*, 68 Va. App. at 387-88, 808 S.E.2d at 842.

Similarly here, Reyes previously had been granted a last-minute continuance, he waited until the day before his second sentencing date to move to continue the hearing again, he proffered no explanation for why he thought he should be allowed to withdraw his guilty plea, the Commonwealth's witness was present and ready to testify, and appointed counsel was prepared for sentencing.[18] (App. 28, 50-52, 55.) Under these circumstances, the trial court reasonably could have concluded that a second last-minute continuance would not have been "reasonable." *See* Va. Code § 19.2-159.1. Accordingly, the Court of Appeals correctly held that the trial court did not abuse its discretion, and this Court should affirm.

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[18] These facts also demonstrate why *London v. Commonwealth*, 49 Va. App. 230, 638 S.E.2d 721 (2006), is distinguishable. In that case, unlike here, the defendant had "continuously insisted that [new counsel] would represent him at trial, [the defendant's] family had actually retained [new counsel] sixteen days prior to the scheduled trial date," new counsel had notified the trial court of his retention "four days later," and "no prior continuances had been granted at [the defendant's] request." *Id.* at 239, 638 S.E.2d at 72.

2. A continuance would not have allowed new counsel to "prepare for trial" because Reyes already had entered an *Alford* plea, and the statute did not entitle Reyes to a continuance for new counsel to prepare for sentencing.

Code § 19.2-159.1 instructs that, when a defendant "undergoes a change of circumstances so that he is no longer indigent," the trial court "shall grant [a] reasonable continuance to allow [new] counsel to be obtained and *to prepare for trial*." Va. Code § 19.2-159.1(B) (emphasis added). In *London*, the Court of Appeals applied Code § 19.2-159.1(B) and held that "the circumstances required substitution of counsel retained in advance of the trial date, and a continuance *of the trial date* for a reasonable period of time to permit counsel to prepare." 49 Va. App. at 239, 638 S.E.2d at 725 (emphasis added). But no Virginia appellate court has ever held that Code § 19.2-159.1(B) requires a continuance *of the sentencing date* so that new counsel can prepare for sentencing and any other post-trial proceedings.[19] Moreover, basic principles of statutory construction foreclose that interpretation.

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[19] Affirming on other grounds, the Court of Appeals "assume[d] without deciding that 'trial' within Code § 19.2-159.1 applies to sentencing proceedings." *Reyes*, 68 Va. App. at 386 n.5, 808 S.E.2d at 841 n.5.

Virginia's appellate courts "construe statutes to 'ascertain and give effect to the intention' of the General Assembly." *Farhoumand v. Commonwealth*, 288 Va. 338, 343, 764 S.E.2d 95, 98 (2014) (quoting *Rutter v. Oakwood Living Ctrs. of Va., Inc.*, 282 Va. 4, 9, 710 S.E.2d 460, 462 (2011)). And "[b]ecause the General Assembly's intent 'is usually self-evident from the statutory language,'" Virginia courts usually must "apply the plain meaning of the words used in the statute." *Id.* (quoting *Rutter*, 282 Va. at 9, 710 S.E.2d at 462).

Ordinarily, when a word "is not defined" in a statute, this Court gives the word "its ordinary meaning, considering the context in which it is used." *Jones v. Commonwealth*, 276 Va. 121, 125, 661 S.E.2d 412, 414 (2008) (internal quotation marks omitted). Importantly, "[t]he context may be examined by considering the other language used in the statute." *Id.* (internal quotation marks omitted).

The word "trial" is commonly defined in broad terms that apply equally in criminal and civil contexts,[20] and therefore dictionary

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[20] *See* WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 1259 (1990) (defining "trial" as, among other things, "the formal examination before a competent tribunal of the matter in issue in a civil or criminal cause

definitions can prove unhelpful in defining the word in the context of a specific statute. *See, e.g.*, *Butts v. Commonwealth*, 145 Va. 800, 808, 133 S.E. 764, 766 (1926) (noting in a statutory speedy trial case that "[m]any cases have been cited defining the word 'trial,' but they throw little light on the meaning of the word as used in the section quoted").

Sometimes "trial" is defined broadly to "include[] all proceedings from time when issue is joined, or, more usually, when parties are called to try their case in court, to time of its final determination." BLACK'S LAW DICTIONARY 1675 (4th ed. 1968). But "in its strict definition, the word 'trial' in criminal procedure means the proceedings in open court after the pleadings are finished and the prosecution is otherwise ready, down to and including the rendition of the verdict." *Id.*

In this case, the trial court interpreted the word "trial" in Code § 19.2-159.1 narrowly, noting that "the legislators know what trial

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in order to determine such issue"); WEBSTER'S NEW TWENTIETH CENTURY DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 1948 (2d ed. 1961) (defining trial as, among other things, "a formal examination of the facts of a case by a court of law to decide the validity of a charge or claim"); BLACK'S LAW DICTIONARY 1675 (4th ed. 1968) (defining "trial" as a "judicial examination, in accordance with law of the land, of a cause, either civil or criminal, of the issues between the parties, whether of law or fact, before a court that has jurisdiction over it").

means." (App. 52.) In the Court of Appeals, though, Reyes urged the Court to adopt a broad definition, arguing that "trial" should be read to "encompass[] a defendant's representation from arraignment through sentencing." (CAV Opening Br. at 22.)

To support his preferred reading, Reyes noted that the same subsection "also states that the 'statement and oath' of the defendant's financial status 'shall be filed with the papers in the case' and 'shall follow and be in effect at *all stages of the proceedings against him* without further oath.'" (CAV Opening Br. at 22) (quoting Va. Code § 19.2-159.1(B)). Reyes argued that "all stages of the proceedings" must include all stages from the first appearance through sentencing, and therefore that the word "trial" must be equally all-encompassing. (CAV Opening Br. at 22-23.)

But the opposite is true. "When interpreting and applying a statute, [courts] assume that the General Assembly chose, with care, the words it used in enacting the statute." *City of Richmond v. Va. Elec. & Power Co.*, 292 Va. 70, 75, 787 S.E.2d 161, 163 (2016) (quoting *Kiser v. A.W. Chesterton Co.*, 285 Va. 12, 19 n.2, 736 S.E.2d 910, 915 n.2

(2013)). "Moreover, when the General Assembly has used specific language in one instance, but omits that language or uses different language when addressing a similar subject elsewhere in the Code," courts "must presume that the difference in the choice of language was intentional." *Zinone v. Lee's Crossing Homeowners Ass'n*, 282 Va. 330, 337, 714 S.E.2d 922, 925 (2011). Accordingly, "[w]hen the General Assembly uses two different terms, it is presumed the terms are to mean two different things." *Brown*, 284 Va. at 545, 733 S.E.2d at 64.

In Code § 19.2-159.1, the General Assembly used the phrase "all stages of the proceedings" in the first sentence of subsection (B). But the General Assembly used the phrase "to prepare for trial" in the third sentence in the same subsection. Va. Code § 19.2-159.1(B). This Court therefore "must presume that the difference in the choice of language was intentional." *Zinone*, 282 Va. at 337, 714 S.E.2d at 925.[21] And the

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[21] This conclusion is bolstered by the General Assembly's use of similarly broad language in other nearby code sections. *See* Va. Code §§ 19.2-158 (stating that "[n]o *hearing on the charges against the accused* shall be had until [certain] conditions have been complied with") (emphasis added); 19.2-159 (stating that counsel shall be appointed "to represent the accused *in the proceeding against him, including an appeal*, if any") (emphasis added).

word "trial" therefore must mean something different from "all stages of the proceedings."[22]

Properly understood, then, Code § 19.2-159.1 did not require the trial court to grant Reyes a reasonable continuance so that new counsel could prepare for *sentencing* or so that counsel could prepare for any other post-trial proceedings. It only required a reasonable continuance if necessary for new counsel to prepare for "trial," and Reyes already had waived his right to have a trial by the time new counsel had been selected. Accordingly, for this additional reason the trial court did not abuse its discretion by denying Reyes's last-minute motion to continue the sentencing hearing for a second time, and this Court should affirm.

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[22] Reyes's reliance on the broad definition Virginia courts have ascribed to the word "trial" in Code § 19.2-259 also fails. (CAV Opening Br. at 23-24.) That code section provides that a "person tried for [a] felony shall be personally present during the trial." Va. Code § 19.2-259. But the General Assembly's codification of that provision "was merely declaratory of a principle of the common law." *Noell v. Commonwealth*, 135 Va. 600, 608, 115 S.E. 679, 681 (1923). This also explains why Virginia courts have adopted an equally broad definition for the word "trial" in Code § 19.2-165. *See Brittingham v. Commonwealth*, 10 Va. App. 530, 533, 394 S.E.2d 336, 338-39 (1990) (tying a defendant's statutory right to have a court reporter present to record the "incidents of trial" to the defendant's right to be present at all stages of the proceedings when anything is to be done that could affect his interest). No such common law principles are at stake here.

3. The rule of lenity does not apply.

In the Court of Appeals, Reyes argued, "If the Court finds that the term 'trial' was ambiguous, the rule of lenity would apply, requiring this Court to resolve the meaning of the term in the defendant's favor." (CAV Reply Br. at 8.) But the rule of lenity does not "automatically permit[] a defendant to win." *Muscarello v. United States*, 524 U.S. 125, 139 (1998). And the "simple existence of some statutory ambiguity . . . is not sufficient to warrant application of [the] rule, for most statutes are ambiguous to some degree." *Id.* at 138.

On the contrary, the rule of lenity is a tool of last resort: it "applies only if, 'after seizing everything from which aid can be derived,'" the reviewing court "can make 'no more than a guess as to what [the legislature] intended.'" *United States v. Wells*, 519 U.S. 482, 499 (1997) (quoting *Reno v. Koray*, 515 U.S. 50, 65 (1995)).[23] "To invoke the rule,"

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[23] *See also* Caleb Nelson, STATUTORY INTERPRETATION 109 (2011) (stating that the rule of lenity "tells courts that when they encounter vagueness or ambiguity in a 'penal' statute (or a 'penal' provision in a statute that contains both penal and nonpenal provisions), *and when they cannot resolve the indeterminacy by applying various other interpretive tools*, they should adopt the least harsh of the permissible interpretations"). This is due to the "widespread agreement that the rule of lenity is *not* a tool for identifying what members of the enacting

the reviewing court "must conclude that there is a 'grievous ambiguity or uncertainty in the statute.'" *Muscarello*, 524 U.S. at 138-39 (quoting *Staples v. United States*, 511 U.S. 600, 619, n.17 (1994)) (internal quotation marks omitted).

No such "grievous ambiguity or uncertainty" exists here. Because the General Assembly used the phrase "reasonable continuance" rather than a phrase like "a continuance for a reasonable time," this Court can conclude that the continuance itself has to be reasonable. Merely requesting a continuance of reasonable length does not entitle a defendant to a continuance under Code § 19.2-159.1(B). Similarly, this Court can conclude that the word "trial" in Code § 19.2-159.1(B) must mean something different from "all stages of the proceedings" because the General Assembly used both phrases in the same statute. And this Court "must presume that the difference in the choice of language was intentional." *Zinone*, 282 Va. at 337, 714 S.E.2d at 925.

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legislature probably intended penal statutes to mean." *Id.* at 110. Instead, the rule merely "tells courts how to *respond to* indeterminacy that remains after they have used their ordinary interpretive techniques." *Id.*

Moreover, the rule of lenity does not apply for the additional reason that the rule only applies to *penal* statutes. *See Anglin v. Joyner*, 181 Va. 660, 663-66, 26 S.E.2d 58, 59-60 (1943) (rejecting the appellant's argument that a statute "should be strictly construed in his favor" in a case where the statute was "in no sense penal").[24] Code § 19.2-159.1(B) is a *procedural* statute governing cases where a defendant's financial circumstances change so that he is no longer indigent.[25] Accordingly, Reyes's invocation of the rule of lenity does not

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[24] This Court also has applied the rule to non-penal statutes implicating substantial liberty interests. *See Miles v. Commonwealth*, 272 Va. 302, 307, 634 S.E.2d 330, 333 (2006) (applying the "rule of lenity normally applicable to penal statutes to the [Sexually Violent Predators] Act" because "proceedings under the Act may result in a defendant's involuntary confinement," and therefore there was a "substantial liberty interest at stake"). In that case, the statute at issue controlled which prisoners would be subjected to further proceedings "to determine whether they should be civilly committed as sexually violent predators." *Id.* at 307, 634 S.E.2d at 333-34. The mere decision whether to grant a continuance does not implicate such substantial liberty interests.

[25] *Cf. Coffman v. Commonwealth*, 67 Va. App. 163, 170 n.6, 795 S.E.2d 178, 181 n.6 (2017) (refusing to apply the rule of lenity to a statute that "implicates no liberty interest and does not impose a punishment or sanction; it simply sets out the procedure for the collection of evidence"); *Kirby v. Commonwealth*, 63 Va. App. 665, 672 n.6, 762 S.E.2d 414, 417 n.6 (2014) (refusing to apply the rule of lenity to a non-penal venue statute that "simply prescribes Chesterfield County's jurisdiction

entitle him to a continuance that would not have been "reasonable" or necessary for counsel "to prepare for trial." Va. Code § 19.2-159.1(B).[26]

B. Even assuming the trial court abused its discretion, this Court still should affirm because Reyes did not suffer any prejudice.

1. Despite the statute's use of the word "shall," Reyes still is required to prove prejudice.

This Court has long held that, when reviewing a trial court's decision whether to grant a continuance, "[a]buse of discretion *and* prejudice to the complaining party are essential to reversal." *Parsons v. Commonwealth*, 154 Va. 832, 839, 152 S.E. 547, 550 (1930) (emphasis added) (quoting 2 MICHIE'S DIG. VA. & W. VA. REP., p. 855).

"In the traditional lexicon of the law, the existence of a right is the first, necessary step—not the final, sufficient step—toward obtaining a remedy." *Rickman v. Commonwealth*, 294 Va. 531, 536, 808 S.E.2d 395,

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involving criminal cases as extending one mile into the City of Richmond from its border with Chesterfield County").

[26] *See also Fitzgerald v. Loudoun Cty. Sheriff's Office*, 289 Va. 499, 508 n.3, 771 S.E.2d 858, 862 n.3 (2015) (noting that the "rule of lenity serves only to resolve genuine ambiguities and does not abrogate the well recognized canon that a statute . . . should be read and applied so as to accord with the purpose intended and attain the objects desired if that may be accomplished without doing harm to its language").

397 (2017). "Under Virginia law, 'the use of the term 'shall' in a statute is generally construed as directory rather than mandatory,' and, consequently, no specific, exclusive remedy applies unless 'the statute manifests a contrary intent.'" *Id.* at 538, 808 S.E.2d at 398 (quoting *Hood v. Commonwealth*, 280 Va. 526, 541, 701 S.E.2d 421, 429-30 (2010)).

Like other directory statutes containing the word "shall," Code § 19.2-159.1(B) "contains no prohibitory or limiting language that prevents a [case] from proceeding" when the trial court fails to comply with the statute's terms, "[n]or is there any language that renders the result . . . in that situation invalid." *Butler v. Commonwealth*, 264 Va. 614, 619-20, 570 S.E.2d 813, 816 (2002). "Absent such language," this Court should "hold that the provisions . . . at issue in this case are directory rather than mandatory." *Id.* at 620, 570 S.E.2d at 816.

"Thus, a failure to comply with those provisions is not a per se basis for reversing a trial court's judgment . . . ." *Id.* And Reyes should be required to "demonstrate[] that he suffered [some] specific prejudice that constituted a denial of due process as a result of the circuit court's

refusal to grant his motion for a continuance" before he can obtain relief. *Id.* at 620, 570 S.E.2d at 816-17.[27]

2. The trial court did not prevent Reyes from being represented by the counsel of his choice.

"When dealing with a statute whose terms are directory, 'any determination whether a [party] has suffered prejudice constituting a denial of due process must be made on a case-by-case basis.'" *Id.* at 620, 570 S.E.2d at 817 (quoting *Jamborsky v. Baskins*, 247 Va. 506, 511, 442 S.E.2d 636, 639 (1994)). In this appeal, Reyes mostly argues that he was prejudiced because he was denied his "attorney of choice." (Opening Br. at 29-30.) But Reyes cannot prevail on that basis for two reasons.

First, Reyes waived any Sixth Amendment right-to-counsel argument when he failed to raise that issue at the trial level. *Reyes*, 68 Va. App. at 390, 808 S.E.2d at 843. As a result, the Court of Appeals chose "not [to] reach this assignment of error." *Id.* (citing Rule 5A:18).

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[27] "[H]aving held that the trial court did not abuse its discretion in denying the continuance," the Court of Appeals did "not reach the issue of whether [Reyes] was prejudiced by the denial." *Reyes*, 68 Va. App. at 389 n.6, 808 S.E.2d at 84 n.6.

And this Court refused to grant Reyes review of that decision. (App. 159, 161.) Accordingly, that issue is not before the Court in this appeal. *See Hodges v. Commonwealth*, 272 Va. 418, 426 n.4, 634 S.E.2d 680, 684 n.4 (2006) (declining to reach certain issues because the Court "did not grant [the appellant's] petition for appeal regarding them").

Second, the record establishes that the trial court permitted Swedish to represent Reyes at sentencing "along with Mr. Nord," and that the trial court further permitted Swedish to make an appearance in the case and to file any post-trial motions he deemed appropriate.[28] (App. 54-55, 83.) Swedish declined the first invitation because he had to be in court in another jurisdiction and because Nord was "quite prepared for the sentencing." (App. 55.) Swedish also never made an appearance in the case to file any post-trial motions, and Nord later explained that this was because Reyes's family never paid Swedish his full retainer. (App. 95.) Given Swedish's decision not to represent

[28] Moreover, the sentencing order indicates that, during the hearing, the court granted Nord's motion to withdraw as counsel, granted Swedish's motion to substitute as counsel, denied Reyes's motion to continue, granted Swedish's motion to withdraw his substitution motion, and then appointed Nord to represent Reyes going forward. (App. 91.)

Reyes—despite the trial court's express invitation—Reyes cannot complain that the trial court deprived him of his right to be represented by the counsel of his choice.[29]

3. Reyes was not otherwise prejudiced by the trial court's refusal to grant a second continuance.

The only question that remains is whether Reyes has demonstrated some other form of prejudice caused by the trial court's refusal to continue the sentencing hearing for a second time. Reyes has not made that necessary showing, nor can he.

First, Reyes has not even argued that the trial court's refusal to grant his second continuance request deprived him of the effective assistance of counsel at sentencing. When Swedish asked the trial court for a continuance, he acknowledged that Nord was "quite prepared" for sentencing. (App. 55.) And the record proves that he was:

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[29] *See Cremeans v. Commonwealth*, 104 Va. 860, 863-64, 52 S.E. 362, 363 (1905) (holding that the defendant "was not, and could not have been, prejudicially affected by" the trial court's decision denying him a continuance to locate missing witnesses given that "no such persons lived in either county, or could be found there," and finding that it would have been "a vain thing" to reverse and remand for a new trial "on account of the absence of imaginary witnesses").

Nord persuaded the trial court to "give [Reyes] the benefit of the doubt of not having [a] felony arson [conviction] on his record," resulting in an active sentence one year below the midpoint of the sentencing guidelines.[30] (App. 33, 73, 82.) In announcing the sentence, the trial court conceded that it was "a low sentence in [the] Court's mind for a home robbery." (App. 83.)

Second, Reyes has not demonstrated that the denied continuance hampered his ability to file certain post-trial motions. Importantly, "the prejudice allegedly resulting from the denial of a continuance cannot be based upon mere speculation." *Cardwell v. Commonwealth*, 248 Va. 501, 509, 450 S.E.2d 146, 151 (1994). On appeal, Reyes speculates that Nord's representation "may qualify as ineffective assistance of counsel." (Opening Br. at 29.) He further argues that "Nord admitted his investigation was inadequate, preventing him from pursuing a vigorous defense." (Opening Br. at 30.) But Reyes already had entered an *Alford*

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[30] *See Thomas v. Commonwealth*, 244 Va. 1, 13, 419 S.E.2d 606, 612-13 (1992) (holding that the defendant had not demonstrated prejudice where new counsel had informed the trial court that he could fully represent the defendant, and where "[n]othing appears of record to indicate that [counsel] was unprepared for trial or that [the defendant] was prejudiced in any way by the denial of the motion for continuance").

plea by the time he moved to continue the sentencing hearing for a second time, and he has not demonstrated that a further delay would have allowed him to gather additional evidence and to devise additional arguments to support a successful motion to withdraw that plea.

Ultimately, Reyes did file two unsuccessful motions to withdraw his *Alford* plea. (App. 94-98, 105-12, 114, 117, 121.) And he argues that "the denial of the continuance request prevented [him] from arguing a motion to withdraw his plea pre-sentencing when the legal standard was more liberal and did not require a showing of manifest injustice." (Opening Br. at 30.) But even under the "more liberal" standard, at the very least Reyes still would have had to show that his plea was entered "inadvisedly," that he had a "reasonable defense" to the charge, and that the Commonwealth would not have been prejudiced if he had been allowed to withdraw his plea.[31]

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[31] *See Small v. Commonwealth*, 292 Va. 292, 298-99, 788 S.E.2d 702, 705 (2016); *Justus v. Commonwealth*, 274 Va. 143, 154, 645 S.E.2d 284, 289 (2007); *Parris v. Commonwealth*, 189 Va. 321, 325, 52 S.E.2d 872, 874 (1949); *Pritchett v. Commonwealth*, 61 Va. App. 777, 788-90, 739 S.E.2d 922, 928 (2013).

Reyes has not demonstrated that he could have made any of these required showings. In his first motion to withdraw his *Alford* plea, Reyes merely asserted, through counsel, that he "desire[d] to stand trial whatever the consequences may be," and that he "maintain[ed] that he is innocent." (App. 96.) He did not assert that he had entered his plea "inadvisedly," nor did he proffer a "reasonable defense" to the charge.

In his subsequently-filed supplemental motion to withdraw his *Alford* plea, Reyes informed the trial court, through counsel, that counsel had been "able to finally locate an alibi witness and possibly two additional alibi witnesses who will testify as to [Reyes's] whereabouts at the time and place of the offense." (App. 107.) Continuing, Reyes claimed that he had "entered an *Alford* plea, primarily because he was unable to locate the witnesses to corroborate his alibi defense." (App. 108.)

Importantly, though, Reyes never suggested that his *Alford* plea had been "entered by mistake or under a misconception of the nature of the charge; through a misunderstanding as to its effect; through fear, fraud, or official misrepresentation; [that it had been] made

involuntarily for any reason; or even [that it had been] entered inadvisedly." *Parris*, 189 Va. at 325, 52 S.E.2d at 874. Nor has he made any such assertions in this appeal.

Instead, Reyes premised his supplemental motion to withdraw his *Alford* plea entirely on his desire to present his purported alibi defense at trial. (App. 107-08.) But that was not enough. "To the extent [Reyes] argues that the existence of any defense, without more, requires a trial court to vacate a guilty plea, *Parris* refutes such a contention." *Pritchett*, 61 Va. App. at 787, 739 S.E.2d at 927. "The guilty plea must also be entered into 'inadvisedly' *i.e.* there must be a reason to set aside the guilty plea beyond the mere existence of a defense." *Id.* at 78-88, 739 S.E.2d at 927 (quoting *Justus*, 274 Va. at 154, 645 S.E.2d at 289).

"Were withdrawal automatic in every case where the defendant decided to alter his tactics and present his theory of the case to the jury, the guilty plea would become a mere gesture, a temporary and meaningless formality reversible at the defendant's whim." *United States v. Barker*, 514 F.2d 208, 221 (D.C. Cir. 1975) (quoted with approval in *United States v. Hyde*, 520 U.S. 670, 677 (1997)). "The

object of the *Parris* standard is to allow a defendant to withdraw his guilty plea in situations where the defendant would not have pled guilty but for some external circumstance such as coercion, or poor or erroneous advice from counsel." *Pritchett*, 61 Va. App. at 788, 739 S.E.2d at 928. "The Supreme Court in *Parris* did not, however, set about to enable gamesmanship or mere regret." *Id.*

Moreover, Reyes's alleged alibi had obvious problems. Reyes attached a handwritten statement from one of the alleged "alibi witnesses" to his supplemental motion. (App. 110-12.) But that alleged witness—who was incarcerated at the time he drafted the statement—only purports to vouch for Reyes's arrival at a party in Springfield, Virginia, at approximately 9:30 p.m. on June 27, 2015. (App. 110.) The Commonwealth's proffered evidence did not state what time the robbery had occurred. (App. 11-12.) In fact, the record indicates that the offense likely occurred a day earlier, on June 26, 2017, and that the victim waited until the next day to call the police. (App. 11, 176.)

Reyes also never proffered any affidavits from the other two alleged alibi witnesses. *See Justis v. Young*, 202 Va. 631, 632, 119

S.E.2d 255, 256-57 (1961) ("[O]n appeal the judgment of the lower court is presumed to be correct and the burden is on the appellant to present to [the Court] a sufficient record from which [the Court] can determine whether the lower court has erred in the respect complained of."). And by signing the written plea form and vouching for its accuracy during the plea colloquy, Reyes conceded "that the evidence against [him] is overwhelming and substantially negates any claim of innocence [he] may have." (App. 14, 19.)

Accordingly, Reyes has not established that he would have been permitted to withdraw his *Alford* plea had the trial court granted his last-minute request to continue the sentencing hearing a second time. Considering what little he has proffered to support such a motion, Reyes would not have been entitled to withdraw his plea even under the "more liberal" standard. Reyes can speculate that the trial court might have exercised its discretion to allow him to withdraw his plea if he had moved to withdraw it before sentencing. But "mere speculation" is not enough to prove prejudice. *Cardwell*, 248 Va. at 509, 450 S.E.2d at 151.

CONCLUSION

This Court should affirm the judgment of the Circuit Court of the County of Fairfax convicting Miguel Antonio Reyes of robbery and sentencing him to an active sentence of 18 years' imprisonment.

Respectfully submitted,

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CERTIFICATE OF TRANSMISSION AND SERVICE

On November 20, 2018, an electronic version of this brief was filed electronically with this Court, and the required copies were subsequently hand-delivered to the clerk's office in compliance with Rule 5:26(e). A copy was emailed to Kathryn C. Donoghue, Office of the Public Defender, counsel for the appellant, at kdonoghue@fai.idc.virginia.gov. In accordance with Rule 5:26(h), the undersigned certifies that the brief, excluding the cover page, table of contents, table of authorities, and certificate contains 10,003 words and is within the page limit allowed under Rule 5:26(b).

The Commonwealth desires to present oral argument in this case.

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Courtesy copies: The Honorable Raymond F. Morrogh
The Honorable John M. Tran