In The

Supreme Court of Virginia

RECORD NO. 180191

MIGUEL ANTONIO REYES,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

BRIEF OF APPELLANT

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ASSIGNMENT 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.

Preserved in the trial court by counsel's written motion requesting a continuance pursuant to Virginia Code § 19.2-159.1, filed July 14, 2016, Appendix (hereinafter "App.") at 41-47; by counsel's oral request to continue the case at the sentencing hearing, App. at 50-55; and by the trial court's ruling denying the continuance, App. at 55.

Preserved in the Court of Appeals by the Opening Brief, p. 1; by the Reply Brief, p. 5-15; and by the Court of Appeals Opinion, Reyes v. Commonwealth, 68 Va. App. 379, 808 S.E.2d 838 (2018), App. at 146-56.

NATURE OF THE CASE AND MATERIAL PROCEEDINGS BELOW

This case is before the Court upon an appeal by Miguel Antonio Reyes (hereinafter "Mr. Reyes") from his conviction for one count of robbery in violation of Virginia Code § 18.2-58 in the Circuit Court of Fairfax County. The final Sentencing Order was entered on July 21, 2016. App. at 91-93.

On February 23, 2016, Mr. Reyes entered a plea of Guilty pursuant to North Carolina v. Alford before the Honorable Judge John M. Tran of the Fairfax County Circuit Court. App. at 21. The sentencing was scheduled for May 13, 2016, but was continued at the request of appointed counsel, Roger Nord. App. at 21, 31. On July 15, 2016, Mr. Reyes appeared for sentencing. At that time, Charles Swedish requested a continuance under Virginia Code § 19.2-159.1 in order to note his appearance as newly retained counsel. App. at 41-47, 50-56. Judge Tran denied the continuance request and the case proceeded to sentencing with Mr. Nord as counsel for Mr. Reyes. App. at 55-56. The final Sentencing Order imposed a sentence of 45 years with all but 18 years suspended, conditioned upon successful completion of 3 years of active probation. App. at 91-93.

On September 20, 2016, Judge Tran denied Mr. Reyes' "Motion to Reconsider, Motion to Withdraw Alford Plea and to Set a Trial Date" filed by Mr. Nord. Mr. Nord refiled a "Supplemental Motion to Reconsider, To Withdraw Alford Plea and To Set a Trial Date" on October 4, 2016. App. at 105. On October 7, 2016, the Office of the Public Defender was appointed to assist Mr. Reyes in post-trial motions and/or appeal. App. at 126. On November 18, 2016, counsel filed a Motion for Leave to Pursue a Delayed Appeal under Virginia Code § 19.2-321.1. The Court of Appeals granted the motion on December 6, 2016 and ordered that the Circuit Court of Fairfax County appoint counsel to Mr. Reyes for the appeal. App. at 144. On December 16, 2016, the Office of the Public Defender was appointed to represent Mr. Reyes. App. at 145.

Counsel timely filed a Notice of Appeal on December 21, 2016. The Court of Appeals granted the Petition for Appeal in a *per curiam* order on June 26, 2017. On January 9, 2018, the Court of Appeals affirmed the trial court in a published opinion. App. at 146-56. Mr. Reyes timely filed his Notice of Appeal in the Court of Appeals on February 2, 2018 and filed a Petition for Appeal to this Honorable Court on February 2, 2018. App. at 157-58. On September 18, 2018, this Honorable Court granted the Petition

for Appeal following a writ panel argument on August 29, 2018. App. at 159-160.

STATEMENT OF FACTS

On February 23, 2016, Miguel Antonio Reyes appeared before the Honorable John M. Tran in the Circuit Court of Fairfax County. Mr. Reyes was present with his court-appointed counsel, Roger Nord. App. at 6. Mr. Reyes was arraigned on one count of robbery in violation of Virginia Code § 18.2-58 and he entered a plea of Guilty pursuant to North Carolina v. Alford. App. at 3, 6-7, 19-20. The trial court then proceeded with a plea colloquy. App. at 8-10. The Commonwealth proffered the evidence that would have been presented at trial. App. at 11-12.

On June 27, 2015, Fairfax County police responded to the home of M.V.G. for a report of a robbery. App. at 11. M.V.G. told police that she heard a knock on the door of her apartment. App. at 11. When she opened the door, two men entered the apartment and pointed a gun to her head. App. at 11. One pushed her to the ground and demanded money. App. at 11. M.V.G. gave them $650. App. at 11. Before the suspects left, they took her cell phone and threatened her not to tell anyone. App. at 11. M.V.G. identified Mr. Reyes from a photograph line-up. App. at 11.

The trial court then proceeded with the remaining questions from the colloquy and found Mr. Reyes guilty of robbery. App. at 12-16, 21. The trial court continued the matter to May 13, 2016 for sentencing and ordered a pre-sentence investigation report. App. at 17, 21. The trial court also revoked Mr. Reyes' bond. App. at 17, 21.

On May 13, 2016, Mr. Nord appeared before Judge Tran and requested a continuance of the sentencing hearing to determine if Mr. Reyes qualified for the Youthful Offender Program with the Department of Corrections. App. at 25-26. The Commonwealth objected in part because the complainant, M.V.G., was present to testify. App. at 26. Over the Commonwealth's objection, the trial court continued the matter to July 15, 2016 for the evaluation to be completed. App. at 26-28, 31. Based on the Commonwealth's request, the trial court asked defense counsel to notify the court and Commonwealth if there would be another continuance request. App. at 28. On May 31, 2016, the probation office notified the trial court that Mr. Reyes was assessed and deemed eligible though not suitable for the Youthful Offender Program. App. at 38-40.

On July 14, 2016, Charles Swedish filed a letter and accompanying Motion to Substitute as Counsel and Motion to Continue, explaining that Mr. Reyes had undergone a change of circumstances as to his finances

and retained Mr. Swedish to represent him. App. at 41-47. Accordingly, Mr. Reyes requested a continuance pursuant to Virginia Code § 19.2-159.1. App. at 43-44. Mr. Swedish also notified the Commonwealth that he was requesting a continuance. App. at 43. On July 15, 2016, Mr. Reyes appeared before Judge Tran for sentencing. App. at 50. Mr. Swedish was present to substitute as counsel and request a continuance. App. at 50.

Mr. Swedish informed the trial court that he was contacted by a family member of Mr. Reyes to take over the case. App. at 51. Mr. Swedish argued that under Virginia Code § 19.2-159.1 the trial court "shall grant a reasonable continuance" when there has been a change of financial circumstances to allow new counsel to prepare. App. at 51-52. Mr. Swedish explained that he "wouldn't be doing Mr. Reyes justice at all if I were to step in merely to do the sentencing today. So I'm making a motion to continue based upon the Code section that I cited." App. at 51.

Mr. Swedish further informed the trial court that there had been attorney-client discussions about filing a motion to withdraw Mr. Reyes' Alford plea. App. at 51 (SWEDISH: "Mr. Miguel Reyes entered an Alford plea. It has also been discussed he might want to withdraw that plea—"). The trial court immediately interrupted: "That's so unlikely as to make it

insufficient to continue the matter." App. at 51. Mr. Swedish repeated that "…there is a possibility he might seek to withdraw his plea." App. at 52.

The trial court focused on the language of Virginia Code § 19.2-159.1 that permits a reasonable continuance due to change of circumstances in order for counsel "to prepare for trial." App. at 52 (THE COURT: "This is to prepare for trial. That's what 19.2-159.1 means. Right, Mr. Swedish? It says trial."). Mr. Swedish suggested the statute is broader and includes not only entry of a plea, but also a motion to withdraw a plea. App. at 52. The trial court stated its concerns with granting a continuance: "But that's the reason I'm concerned about granting a continuance in this. It's just going to delay matters. Because it's one thing to delay for the Court to address something. I just don't find any reasonable cause at this time having gone through what we've gone through for the withdrawal of a plea." App. at 52. The trial court also stated that a second continuance would be a "burden on the victims." App. at 53.

Mr. Swedish, referring to Mr. Reyes as "my client", also explained that Mr. Reyes was incarcerated and would remain incarcerated during the pendency of the continuance. App. at 52. Mr. Swedish requested a brief continuance to the next available sentencing date in August. App. at 53.

The trial court then inquired as to when Mr. Reyes' family contacted Mr. Swedish about retaining his services. App. at 53. Mr. Swedish responded that the family contacted him three weeks prior but only paid the retainer recently. App. at 54. Mr. Swedish explained that the continuance motion was "filed immediately." App. at 54.

The trial court denied the continuance, stating that Mr. Swedish could simply file a motion to reconsider before Mr. Reyes was transferred to the Department of Corrections. App. at 54. Though Mr. Swedish agreed that he could do so, he stated the burden is higher after sentencing. App. at 54.

With the request for continuance denied, Mr. Swedish declined to enter his appearance at that time. App. at 55-56. Though the Sentencing Order states that the court granted his substitution of counsel and then withdrew him as counsel, App. at 91, from the written pleadings and argument of counsel it is evident that Swedish requested a substitution of counsel *only if* a reasonable continuance was granted, App. at 51. At no point did the trial court expressly grant the substitution request. App. at 50-56. Instead, Swedish withdrew the motion after the continuance motion was denied. App. at 55-56. The trial court then proceeded to sentencing with Mr. Nord as counsel for Mr. Reyes. App. at 56.

The Commonwealth called M.V.G. to testify as to how her life has been impacted since the offense. App. at 59-61. She was then questioned by Mr. Nord, App. at 62-68, followed by a brief re-direct examination by the Commonwealth, App. at 68. The defense then submitted a letter from Heidi Zapata as evidence. App. at 69.

The trial court then proceeded to hear argument as to the appropriate sentence. The Commonwealth argued that Mr. Reyes was not an appropriate candidate for the Youthful Offender Program for several reasons, including Mr. Reyes' infractions while incarcerated in the jail. App. at 70-74. Mr. Nord argued that Mr. Reyes should be ordered into the Youthful Offender Program given his age and the opportunity to receive rehabilitative services. App. at 79-80. However, the trial court declined to order Mr. Reyes into the program. Instead, the trial court imposed a sentence of 45 years and suspended all but 18 years, conditioned upon 3 years of active probation. App. at 82-83, 91-93.

On August 9, 2016, Mr. Nord filed a "Motion To Reconsider, To Withdraw Alford Plea and To Set a Trial Date." App. at 94-98. In that motion, Mr. Nord conceded that he had neglected to consult with Mr. Swedish as to whether or not Mr. Swedish was still retained. App. at 95-96. The motion, which was devoid of any legal argument or analysis as to

why Mr. Reyes should be permitted to withdraw his plea, was denied by Judge Tran on September 20, 2016. App. at 105.

Mr. Nord subsequently filed a "Supplemental Motion to Reconsider, To Withdraw Alford Plea and to Set a Trial Date" on October 4, 2016. App. at 106-112. In the motion, Mr. Nord stated that "Counsel is a court-appointed sole practitioner, who does not have the benefit of a paid investigator to find [the alibi witnesses]." App. at 108. Though Mr. Nord could have requested the court to authorize expert funds for an investigator, Mr. Nord failed to do so at any point during his representation of Mr. Reyes.

Mr. Nord also stated that he had located an alibi witness whose affidavit was attached to the motion. App. at 108, 110-112. Mr. Nord explained that two other alibi witnesses needed to be interviewed. App. at 108. On October 7, 2016, Mr. Nord appeared before Judge Tran. The trial court admitted that "your latest motion raises some concerns with the Court." App. at 118. At this hearing, Mr. Nord acknowledged that his investigation was inadequate and prevented him from pursuing a vigorous defense for Mr. Reyes. App. at 118-119. Mr. Nord explained "Well, [Mr. Reyes] told me that he was other places, but I could not verify with anyone else and that led us to make this considered [Alford] plea. He always

maintained his innocence, but I could not trace any other witnesses and as I pointed out I do not have a staff investigator…." App. at 118. In explaining his failings as court-appointed counsel, Mr. Nord conceded that his representation may qualify as ineffective assistance of counsel. App. at 118-119 (COURT: "Because Mr. Nord, will there be a habeas coming down the road?" NORD: "I do not know that, Your Honor. I think that there are some grounds that may justify such an action."). Based on these representations, the trial court granted Mr. Nord's request to appoint the Public Defender's Office. App. at 119, 126.

ARGUMENT

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.

1. *Standard of Review*

A question of statutory interpretation is a question of law that is reviewed *de novo* on appeal. Farrakhan v. Commonwealth, 273 Va. 177, 181, 639 S.E.2d 227, 229 (2007).

2. *Argument*

The Court of Appeals erred in concluding Mr. Reyes was required to demonstrate exceptional circumstances to warrant a continuance under Code § 19.2-159.1. A violation of the statute is a statutory issue requiring a reviewing court to look no further than the plain meaning of the statute. Boynton v. Kilgore, 271 Va. 220, 227, 623 S.E.2d 922, 926 (2006). Only if those words are ambiguous does a reviewing court rely on the rules of statutory construction. Id.

However, the Court of Appeals did not conduct a plain language analysis. A plain language analysis dictated the Court of Appeals to find that the trial court erred in denying the continuance. 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. See VA. CODE ANN. § 19.2-159.1(B) (2018). Instead, the Court of Appeals imposed a constitutional analysis in contradiction to the express statutory language of the General Assembly.

a. The Court of Appeals Incorrectly Applied a Constitutional Analysis when Determining if the Trial Court Erred in Denying the Continuance

Prior to Reyes v. Commonwealth, only a limited number of appellate cases discussed and/or briefly alluded to Virginia Code § 19.2-159.1. In

Reyes, the Court of Appeals erroneously concluded that an appellant must demonstrate exceptional circumstances to justify a last minute request for continuance, a standard previously only applied in Sixth Amendment right to counsel cases. App. at 150. Therefore, Reyes is the first Virginia appellate decision that explicitly applied a Sixth Amendment analysis when determining whether there has been a statutory violation of § 19.2-159.1[1]. Instead, the Court of Appeals should have conducted a statutory analysis by examining the plain language of § 19.2-159.1 to determine whether the trial court violated the mandatory directive of the statute when it denied the continuance.

The Court of Appeals cited to Shifflett v. Commonwealth in support of its holding that an appellant must demonstrate exceptional circumstances to "work a delay by the last minute change of counsel." App. at 152.

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[1] See e.g. Brown v. Commonwealth, 288 Va. 439, 764 S.E.2d 58 (2014) (analyzing whether a Sixth Amendment violation occurred and noting that the defendant requested a continuance to retain counsel on the day of trial without proffering that his financial status had changed, so § 19.2-159.1 was not applicable and only briefly alluded to in a footnote); London v. Commonwealth, 49 Va. App. 230, 638 S.E.2d 721 (2006) (discussing whether a Sixth Amendment violation and/or statutory violation occurred, but the Court of Appeals did not analyze whether the request was "last minute"); Armstead v. Commonwealth, Record No. 2251-96-1, 1997 Va. App. LEXIS 638 (Sept. 23, 1997) (appellant arguing the denial of his continuance motion constituted both a statutory and constitutional violation, but the opinion did not distinguish between the statutory versus constitutional analysis).

However, Shifflett did not involve the application of § 19.2-159.1. Instead, the defendant in Shifflett requested a continuance because he wanted to retain his own attorney and needed additional time to prepare his defense. Shifflett v. Commonwealth, 218 Va. 25, 30, 235 S.E.2d 316, 320 (1977). He could not argue a violation of § 19.2-159.1 occurred because he had not retained counsel. In Shifflett, this Court relied on United States v. Grow and United States v. Mitchell for that legal proposition, but once again, neither case involved the precise question before this Court – whether the denial of a continuance under Virginia Code § 19.2-159.1 involves application of Sixth Amendment legal principles.

For that reason, the Court of Appeals' reliance on Brailey v. Commonwealth and Johnson v. Commonwealth is similarly misplaced. App. at 152-53. Neither Brailey nor Johnson dealt with violation of § 19.2-159.1. To the contrary, both involved alleged violations of the Sixth Amendment. See Brailey, 55 Va. App. 435, 443, 686 S.E.2d 546, 550 (2009); Johnson, 51 Va. App. 369, 373, 657 S.E.2d 812, 813-14 (2008).

Code § 19.2-159.1 is a statute titled "Interrogation by court; filing; change in circumstances; investigation by attorney for Commonwealth." The statute is located in Article 3 titled "Appointment of Attorney for Accused." The statute is located between § 19.2-159, which sets out

guidelines for determining indigency, and § 19.2-160, which sets out the procedure for waiver of counsel.

While the primary purpose of the statute reflects the Commonwealth's interest in not using state funds to pay for a court appointed attorney when a defendant can afford counsel, the practical effect of the statute is to also require a defendant who is no longer indigent to proceed with an attorney of his choosing.

This Court is further guided by the principle that an appellate court cannot interpret a statute to contain a requirement not stated in the statute. See David v. David, 287 Va. 231, 754 S.E.2d 285 (2014). In David, the Court of Appeals erroneously interpreted Code § 20-107.3(A)(3)(a) to place a burden on the non-owning spouse which was not included in the language of the statute. Id. at 240, 754 S.E.2d at 290. This Court reasoned "Courts must not construe the plain language of a statute in a way that adds a requirement that the General Assembly did not expressly include in the statute." Id. The Court further stated "The Court presumes that the legislature has purposefully chosen the precise statutory language, 'and we are bound by those words when we apply the statute.'" Id. at 240, 754 S.E.2d at 290-91 (citation omitted).

In concluding that Mr. Reyes must demonstrate exceptional circumstances, the Court of Appeals interpreted the statute to contain a requirement not listed in the statute. Like David, where the Court of Appeals read into the statute a burden on the non-owning spouse, the Court of Appeals read into the statute a burden on Mr. Reyes to demonstrate exceptional circumstances. However, appellate courts are bound by the precise statutory language purposefully chosen by the legislature. The precise statutory language of Code § 19.2-159.1 plainly required a continuance once certain requirements were met. The use of "shall" meant the trial court had no discretion to deny the continuance once Mr. Reyes retained counsel and was no longer indigent. Nowhere in the statute does it state that Mr. Reyes must demonstrate exceptional circumstances.

The legislature is presumed to know the law when enacting legislation. See Charles v. Commonwealth, 270 Va. 14, 19, 613 S.E.2d 432, 434 (2005). If the legislature intended a defendant to demonstrate exceptional circumstances for a last minute request, it knew how to achieve this result through amendment to the statute. However, since 1977, when Shifflett was published, the legislature has made no amendments to § 19.2-159.1 to include such language.

b. Because Mr. Reyes Satisfied the Requirements in the Statute, He Was Entitled to a Mandatory Continuance

The Court of Appeals erroneously applied a Sixth Amendment analysis when the issue presented involved interpretation of the plain meaning of § 19.2-159.1. When the proper analysis is applied, the plain language of § 19.2-159.1 dictates that a continuance "shall" be granted because Mr. Reyes was no longer indigent and obtained private counsel.

Before a defendant is entitled to a continuance under Code § 19.2-159.1, certain requirements must be met. Code § 19.2-159.1(B) states:

> B. The statement and oath of the defendant 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.

The statute states that if a change of circumstances occurs "so that [the defendant] is no longer indigent", the defendant "shall thereupon obtain private counsel" and "shall forthwith advise the court of the change of circumstances." VA. CODE ANN. § 19.2-159.1(B) (2018). If a defendant is no longer indigent, has obtained private counsel, and "forthwith" advised the

court, then "The court *shall* grant reasonable continuance to allow counsel to be obtained and to prepare for trial." Id. (emphasis added).[2]

Mr. Reyes satisfied the requirements under the statute to avail himself of the mandatory continuance. He strictly complied with his duty under the statute to "obtain private counsel" once funds became available through his family's contributions. Pursuant to the statute, Mr. Reyes was prohibited from proceeding with court-appointed counsel when he no longer qualified as indigent. See id. ("..the defendant *shall thereupon* obtain private counsel…") (emphasis added). Swedish also strictly complied with his requirement to "forthwith advise the court" that he had been retained because his client's financial circumstances had changed. Id.; App. at 41-47, 54. It was the trial court that ignored its statutory obligation to grant a continuance once Mr. Reyes and Swedish complied with their duties under the statute. Therefore, the denial of the continuance request is inconsistent with the requirements of Code § 19.2-159.1(B).

The plain language of Virginia Code § 19.2-159.1 required that the trial court "shall" grant a reasonable continuance once certain statutory

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[2] In the Court of Appeals, the parties disputed whether "trial" as used in § 19.2-159.1 included sentencing proceedings. The defense argued that "trial" encompassed arraignment through sentencing while the Commonwealth argued that "trial" referred only to proceedings when guilt or innocence is determined. The Court of Appeals assumed without deciding that "trial" applied to sentencing proceedings. App. at 151, fn. 5.

requirements were met. It was not necessary to determine whether Mr. Reyes made this request "last minute" because the statute does not contain any limiting language or additional requirements about when the statute is applicable. To the contrary, Virginia Code § 19.2-162, which is located in the same Article as § 19.2-159.1, states: "Courts before which criminal proceedings are pending *shall* afford such continuances and take other such action as is necessary *to comply with the provisions of this chapter*." VA. CODE ANN. § 19.2-162 (2018) (emphasis added). Because Mr. Reyes complied with his requirements under Code § 19.2-159.1, the trial court was required to grant a continuance. Accordingly, the Court of Appeals erred in interpreting § 19.2-159.1 to require Mr. Reyes to demonstrate exceptional circumstances.

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.

1. *Standard of Review*

When a defendant challenges the denial of a continuance motion, the appellate court requires a showing of abuse of discretion and prejudice. Brailey v. Commonwealth, 55 Va. App. 435, 444, 686 S.E.2d 546, 550 (2009). A defendant's right to be represented by counsel of his own choosing is a "qualified right which is limited by a 'countervailing state

interest…in proceeding with prosecutions on an orderly and expeditious basis.'" Id. (quoting Bolden v. Commonwealth, 11 Va. App. 187, 190, 397 S.E.2d 534, 536 (1990)).

When a defendant seeks a last minute change of counsel, "exceptional circumstances" must exist. Id. "'[O]nly an unreasoning and arbitrary 'insistence upon expeditiousness in the face of a justifiable request for delay' violates the right to the assistance of counsel.'" Johnson v. Commonwealth, 51 Va. App. 369, 374, 657 S.E.2d 812, 814 (2008) (quoting Paris v. Commonwealth, 9 Va. App. 454, 460, 389 S.E.2d 718, 722 (1990)). No showing of prejudice is required, however, if a defendant is erroneously denied the right to counsel. Brailey, 55 Va. App. at 444, 686 S.E.2d at 550.

2. *Argument*

Mr. Reyes requested a continuance of the sentencing hearing in order for newly retained counsel to investigate and determine whether to file a motion to withdraw the Alford plea or, in the alternative, to prepare for sentencing. App. at 51-54. The Court of Appeals erred in concluding that no exceptional circumstances warranted a last minute continuance request.

The Court of Appeals distinguished London v. Commonwealth after concluding the present case involved a last minute request for continuance

where there had been one prior continuance. App. at 154-55; see London, 49 Va. App. 230, 638 S.E.2d 721 (2006). While the Court of Appeals viewed the lack of prior continuances in London as further evidence that the trial court abused its discretion, the fact that Mr. Reyes had only one prior continuance to be evaluated for the Youthful Offender Program, App. at 25-27, 31, does not distinguish this case from London. London does not stand for the bright line rule that an abuse of discretion occurs only if the case has not been previously continued. The lack of prior continuances was merely one of several factors in the Court's analysis. The London Court plainly held that the denial of the continuance request, under facts similar to the present case, was "inconsistent with the requirements of Code § 19.2-159.1(B)." Id. at 237, 638 S.E.2d at 724.

Just as in London, where newly retained counsel requested additional time to prepare for trial, Swedish was similarly seeking a continuance to prepare for the sentencing hearing. App. at 51-55. He complied with his duty under § 19.2-159.1 to "forthwith" advise the trial court and did not unnecessarily delay in notifying the trial court of his request. App. at 54. Swedish immediately notified the trial court once the family retained his services. App. at 54. He filed a continuance motion on July 14, 2016 and

explained that Mr. Reyes had undergone a change of circumstances and retained counsel. App. at 41-47.

Unlike London, where retained counsel requested a continuance 16 days before the trial date, Swedish was not able to give more than one day's notice of his request to continue. See London, 49 Va. App. at 233, 638 S.E.2d at 722. However, when asked by the trial court on July 15, 2016, Swedish reiterated that he was only retained "quite recently" and the continuance motion was "filed immediately." App. at 54. A month-long continuance to August was also "reasonable." Swedish was not requesting a continuance of several months or an indefinite continuance. Instead, Swedish only asked for a brief continuance of four weeks to the trial court's next sentencing date. App. at 53.

Like London, where retained counsel informed the trial court that he had received new information pertinent to the mental health evaluation, Swedish also stated a specific reason necessitating the continuance. See London, 49 Va. App. at 233, 638 S.E.2d at 722. First, Swedish explained that "At this late date I wouldn't be doing Mr. Reyes any justice at all if I were to step in merely to do the sentencing today." App. at 51. Swedish then stated that there was a possibility that Mr. Reyes intended to file a motion to withdraw his guilty plea. App. at 51 (SWEDISH: "Mr. Miguel

Reyes entered an Alford plea. It has also been discussed he might want to withdraw that plea—"). Though the trial court interrupted Swedish and interjected an inappropriate advisory opinion (COURT: "That's so unlikely as to make it insufficient cause to continue the matter"), App. at 51, Swedish repeated that "…there is a possibility he might seek to withdraw his plea." App. at 52.

Here, the trial court denied the continuance after concluding it would simply delay matters and be an inconvenience to the Commonwealth's witness. App. at 52-53, 55. However, the London Court rejected this rationale when the Commonwealth had multiple trial witnesses scheduled to testify who were out-of-state and required to travel great distances. Accordingly, the trial court's reason for denying Mr. Reyes a continuance is similarly unpersuasive given that the Commonwealth had only one witness present for Mr. Reyes' sentencing, a witness who was a local resident of Fairfax County. App. at 3, 11-12.

The Court of Appeals relied primarily on Johnson v. Commonwealth and Brailey v. Commonwealth to bolster its argument that no exceptional

circumstances warranted the continuance[3]. In Johnson and Brailey, several factual circumstances, including witness inconvenience and danger to the community, guided whether exceptional circumstances existed to justify a last minute continuance. See Johnson v. Commonwealth, 51 Va. App. 369, 657 S.E.2d 812 (2008); Brailey v. Commonwealth, 55 Va. App. 435, 686 S.E.2d 546 (2009).

In Johnson, the Court of Appeals found that the defendant's right to counsel under the Sixth Amendment was limited by the government's countervailing state interest and no "exceptional circumstance" justified a last minute continuance. Johnson, 51 Va. App. at 374-75, 657 S.E.2d at 814. The Court pointed to the week-long failure to advise the trial court of the retainer of counsel until the morning of trial, that the defendant's case had been continued five times previously, that witnesses were present to testify, and both the defense and Commonwealth were ready to proceed. Id. at 376-77, 657 S.E.2d at 815. One year later, the Court of Appeals similarly found no exceptional circumstances warranted a last minute continuance request in Brailey where the defendant and counsel did "not

[3] Both Johnson and Brailey involved a Sixth Amendment right to counsel challenge. In Johnson, the majority determined that appellant's challenge under § 19.2-159.1 was barred. 51 Va. App. at 383-84; 657 S.E.2d at 818. Similarly, Brailey did not involve a challenge to § 19.2-159.1.

see eye to eye" and the Commonwealth had 14 witnesses present to testify the morning of trial. Brailey, 55 Va. App. at 442, 686 S.E.2d at 549.

Several factors distinguish this case from Brailey and Johnson. First, the Commonwealth had only one witness present to testify for purposes of sentencing. The only claimed countervailing state interest is one witness, a resident of the jurisdiction, who had been subject to only one prior continuance. App. at 3, 11-12, 59. Defense counsel also notified the Commonwealth that there would be a continuance request the day prior, so the Commonwealth was on notice of the request. App. at 43. This minor inconvenience does not rise to the level of a countervailing state interest found in Brailey, where there were 14 witnesses subpoenaed to testify, or Johnson, where the witnesses had been subjected to five prior continuances. Unlike Johnson, Swedish did not unnecessarily delay in notifying the trial court that he had been retained.

Second, the witnesses in Brailey and Johnson were fact witnesses who were subpoenaed to testify for trial where the Commonwealth had the burden of establishing guilt beyond a reasonable doubt. It follows that those witnesses would be requested to testify from memory about their prior involvement in the case. The Commonwealth could argue that a continuance may result in the fading recollection of one or more witnesses.

Here, the one witness present testified only about the impact of the offense, thereby significantly diminishing the Commonwealth's countervailing state interest. App. at 60 ([PROSECUTOR: "Can you tell the judge how your life has been impacted since the robbery o[n] June 27, 2015?").

The Commonwealth also cannot argue that a continuance posed a danger to the community because the record shows that Mr. Reyes would have remained incarcerated had his continuance request been granted. App. at 21, 31, 52. The Commonwealth cannot point to any other countervailing state interest justifying the infringement on Mr. Reyes' constitutional right to counsel and statutory right to a continuance. This was not a "deliberate, willful attempt to obstruct this trial" like the Court of Appeals reviewed in Paris v. Commonwealth, 9 Va. App. 454, 461, 389 S.E.2d 718, 722 (1990). Therefore, the Commonwealth's argument that countervailing state interests justified denial of the continuance is unpersuasive.

Moreover, exceptional circumstances warranted a continuance of the sentencing hearing. Unlike Feigley v. Commonwealth, where the "only reason" for the continuance was a "basic feeling" that court appointed counsel would not represent him as well as private counsel, Mr. Reyes appeared with private counsel and expressed concern over his court-

appointed counsel's handling of the case. See Feigley, 16 Va. App. 717, 721, 432 S.E.2d 520, 523 (1993). Mr. Reyes also notified the trial court that there had been attorney-client discussions about withdrawing his guilty pleas. App. at 51-52.

The Court of Appeals concluded Mr. Reyes "provided no reasoning or support for this *possible* action." App. at 154. However, Mr. Reyes was not required to proffer reasoning or support for this action. Any proffer would intrude upon privileged and confidential communication between an attorney and client. The Court of Appeals also reasoned that both the Commonwealth and appointed counsel were prepared to proceed. App. at 154. The Court did not consider the concessions by appointed counsel at a subsequent hearing where he conceded he was ineffective. App. at 154, fn. 6. However, those later concessions demonstrate that Nord was not prepared for the sentencing hearing. He could not have been and was not an effective advocate for Mr. Reyes, particularly given Mr. Reyes' request that Swedish represent him.

Moreover, the fact that Mr. Reyes was no longer indigent and did not qualify for court-appointed counsel was another example of an exceptional circumstance. While the Sixth Amendment case law is not isolated to situations where a defendant is seeking a change in retained counsel,

Virginia has a specific statute that prohibits a defendant from proceeding with court appointed counsel when he is no longer indigent.

Therefore, the statute mandates that court appointed counsel be withdrawn and relieved of his duties when a defendant is no longer indigent. The statute does not impose any time constraints or limitations on when the mandatory language becomes effective.[4] In the specific circumstance where an indigent defendant retains counsel, Virginia has mandated that the trial court shall grant a reasonable continuance. For that reason, the statute qualifies as the exceptional circumstance justifying the continuance.[5]

The Court of Appeals concluded there was no error in denying the continuance, so the Court did not address whether Mr. Reyes was prejudiced by the denial. App. at 154, fn. 6. In the event this Court concludes the denial of the continuance did not constitute a clear error under the Sixth Amendment, Mr. Reyes must demonstrate prejudice.

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[4] As indicated above, the Commonwealth and defense disputed the word "trial" as used in § 19.2-159.1. The Court of Appeals assumed without deciding that "trial" applied to sentencing proceedings. App. at 151, fn. 5.

[5] The Court of Appeals concluded that the Sixth Amendment violation (Assignment of Error II) was not preserved and did not reach the merits of the case. App. at 155. Yet, the Court applied a Sixth Amendment analysis when resolving a purely statutory question in Assignment of Error I.

Denial of a continuance for an attorney of choice has "consequences that are necessarily unquantifiable and indeterminate" because "[i]t is impossible to know what different choices the rejected counsel would have made, and then to quantify the impact of those different choices on the outcome of the proceedings." London v. Commonwealth, 49 Va. App. 230, 238, 638 S.E.2d 721, 725 (2006) (quoting United States v. Gonzalez-Lopez, 126 S. Ct. 2557, 2564-65 (2006)). The Court of Appeals has found that a defendant must establish prejudice by affirmative proof, which may include evidence that the court-appointed attorney "conducted an inadequate investigation, was unprepared for trial, or failed to pursue a vigorous defense." Feigley v. Commonwealth, 16 Va. App. 717, 721, 432 S.E.2d 520, 523 (1993).

Not only did Mr. Reyes proceed to sentencing without the attorney of his choosing, but Roger Nord, his court-appointed attorney, conceded that his representation may qualify as ineffective assistance of counsel. App. at 118-119 (COURT: "Because Mr. Nord, will there be a habeas coming down the road?" NORD: "I do not know that, Your Honor. I think that there are some grounds that may justify such an action."); see also Mills v. Commonwealth, 24 Va. App. 95, 101, 480 S.E.2d 746, 749 (1997) (noting that while a claim of ineffective assistance of counsel cannot be considered

on direct appeal, the evidence regarding counsel's failure to prepare for trial or communicate with his client contributed to the Court's conclusion that the trial court abused its discretion in denying the continuance request). Furthermore, Nord admitted that his investigation was inadequate, preventing him from pursuing a vigorous defense. App. at 118 (NORD: "Well, he told me that he was other places, but I could not verify with anyone else and that led us to make this considered [Alford] plea. He always maintained his innocence, but I could not trace any other witnesses and as I pointed out I do not have a staff investigator…"); App. at 108 ("4. … Counsel is a court-appointed sole practitioner, who does not have the benefit of a paid investigator to find [the alibi witnesses]."). Therefore, Mr. Reyes has established evidence of prejudice consistent with Feigley.

In addition, the denial of the continuance request prevented Mr. Reyes 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. See Young v. Commonwealth, Record No. 0149-13-4, 2014 Va. App. LEXIS 15, *14-15 (Jan. 21, 2014) (unpublished) ("Code § 19.2-296 places particular significance on the timing of a motion to withdraw a plea of guilty or *nolo contendere*.").

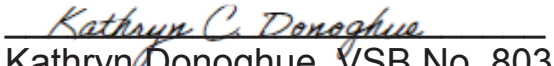
Therefore, the Court of Appeals erred in concluding Mr. Reyes demonstrated no exceptional circumstances to warrant the continuance. The denial of the continuance constituted an abuse of discretion and resulted in irreparable prejudice to Mr. Reyes.

CONCLUSION

WHEREFORE, Mr. Reyes respectfully requests this Honorable Court to reverse his conviction and remand the case for a new sentencing proceeding.

Respectfully submitted,

MIGUEL ANTONIO REYES
By Counsel



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CERTIFICATE

I, Kathryn Donoghue, pursuant to Rules 5:6, 5:26(h), and 5:27 certify that:

(a) The name and temporary address of Appellant are:

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(b) The Appellee is the Commonwealth of Virginia.

(c) The name, Virginia State Bar (VSB) number, mailing address, telephone number, facsimile number, and email address of counsel for the Appellant are:

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(e) On October 26, 2018, electronic copies of the Brief of Appellant and Appendix were filed, via VACES, and three paper copies of the Opening Brief of Appellant and three paper copies of the Appendix were hand-filed with the Clerk of this Court. On this same day, October 26, 2018, an electronic copy of the Opening Brief of the Appellant was served, via email, and electronic copies on CD of the Opening Brief of Appellant and Appendix were served, via UPS Ground Transportation, upon Christopher P. Schandevel, Assistant Attorney General, Office of the Attorney General, 202 North Ninth Street, Richmond, Virginia 23219, cschandevel@oag.state.va.us.

(f) This Opening Brief for the Appellant, not including the cover page, table of contents, table of authorities, and certificate, contains 7,004 words in accordance with Rule 5:26(b).

(g) Counsel for Appellant has been appointed in this case.

(h) Appellant respectfully requests the opportunity to state orally to this Court, in person and by counsel, the reasons why relief should be granted.

Kathryn C. Donoghue

Kathryn Donoghue
Counsel for Appellant