No. 20-6294

In the
Supreme Court of the United States

Richard Sealey,
Petitioner,

v.

Benjamin Ford, Warden,
Georgia Diagnostic Prison,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Eleventh Circuit

BRIEF IN OPPOSITION

Christopher M. Carr
Attorney General
Andrew Pinson
Solicitor General
Beth A. Burton
Deputy Attorney General
Sabrina D. Graham
Senior Assistant Attorney General
Office of the Georgia
Attorney General
40 Capitol Square, SW
Atlanta, Georgia 30334
(404) 458-3239
sgraham@law.ga.gov
Counsel for Respondent

QUESTIONS PRESENTED

Did the Eleventh Circuit Court of Appeals correctly determine that the procedural-default bar applied to Sealey's claim that the trial court abused its discretion in denying his request for continuance during the sentencing phase of trial?

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The decision of the Eleventh Circuit Court of Appeals affirming the district court's denial of relief is published at 954 f.3d 1338 (11th Cir. 2020) and is included in Petitioner's Appendix at 1-62.

The order of the Eleventh Circuit Court of Appeals denying rehearing and rehearing en banc is unpublished and is included in Petitioner's Appendix at 63-64.

JURISDICTION

The Eleventh Circuit Court of Appeals entered its judgment in this case on June 9, 2020. Pet. App. at 1-62. A petition for writ of certiorari was timely filed in this Court on November 6, 2020. On December 2, 2020, Justice Thomas extended the time within which to file a brief in opposition to the petition for a writ of certiorari to and including February 12, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment of the United States Constitution provides in relevant part: In all criminal prosecutions, the accused shall enjoy the right to a … have the Assistance of Counsel for his defence.

The Eighth Amendment provides: Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Fourteenth Amendment, Section I, of the United States Constitution provides in relevant part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law … .

INTRODUCTION

After having already provided a two-day recess between the guilt phase and the sentencing phase of trial, the trial court articulated several logical reasons for denying Sealey's request to continue the sentencing phase for a day-and-a-half to allow for the arrival of his nephew to testify. D17-22:21-22. Sealey's claim that this denial was an abuse of discretion was determined to be procedurally defaulted by the state habeas court—because the claim was not raised on direct appeal. And the law does not support the removal of that default because Sealey failed to prove cause and prejudice to overcome the default.

To get around that procedural bar, Sealey asks this Court to grant certiorari to announce new laws of criminal procedure. But this Court's standard for determining whether a trial court abused its discretion in a denying a continuance is already well-settled: "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, 103 S. Ct. 1610 (1983) (quoting *Ungar v. Sarafite*, 376 U.S. 575, 589, 589, 84 S. Ct. 841 (1964)). And this Court has refused to set "mechanical tests" for determining whether the alleged abuse of discretion was harmful but instead has instructed that "[t]he answer must be found in the circumstances present in every case." *Ungar*, 376 U.S. at 589. There is no basis for revisiting this well-established precedent on certiorari review, and indeed, this Court's rules against disturbing decisions based on adequate or independent state law grounds, federalism, and retroactive application of new rules of criminal procedure preclude Sealey's request.

Putting aside Sealey's request for a change in settled law, the remainder of his arguments are nothing more than a request for error correction of the factbound decision of the court of appeals—again, not appropriate grounds for certiorari review. Moreover, the court of appeals correctly applied this Court's precedent to Sealey's underlying continuance claim. The court determined that the continuance claim would have been meritless on appeal, thereby negating Sealey's claim of ineffective assistance of appellate counsel for not raising the claim on appeal. Pet. App. at 53-54. The court properly based its decision on the relevant trial transcript and the standard announced in *Slappy*. *Id.* Next the court correctly applied the "actual prejudice" standard, not *Strickland's* prejudice standard as alleged by Sealey, and determined that he was not prejudiced by the testimony omitted due to the continuance denial. *Id.* at 54. This was entirely reasonable given the omitted testimony from Sealey's nephew provided only, at the most, a rough sketch of his view of Sealey, which did little to nothing to mitigate the "heinous" crimes Sealey committed. *Id.*

This Court should deny Sealey's request for certiorari review.

STATEMENT

A. Facts of the Crimes

On the night of January 23, 2000, Petitioner Richard Sealey, along with his girlfriend Deandrea Carter and his friend Gregory Fahie, were provided a ride to Carter's grandparents' home by Fahie's friend, Wajaka Battiste. Pet. App. at 243. Sealey, Carter, and Fahie entered the residence and Battiste remained in his car parked outside. *Id.* The following morning, John and Fannie Mae Tubner, Carter's grandparents, were found by Fannie Mae's son Eddie Williams brutally murdered in their home. D17-11:105-109.[1]

Evidence presented at trial showed that while Fahie was in the Tubners' bathroom on the night of the crime, he "heard a loud noise and then heard Carter knocking on the bathroom door and stating that Sealey was 'tripping.'" Pet. App. at 244. When Fahie "exited the bathroom" he saw "Mr. Tubner lying in a pool of blood and Sealey holding Ms. Tubner down and wielding a handgun he had taken from Mr. Tubner." *Id.* Sealey then "dragged Ms. Tubner, who had been bound with duct tape, to an upstairs bedroom" and he "instructed Fahie to search for money." *Id.* When no money was found, Sealey "instructed Carter to heat a fireplace poker with which Sealey tortured Ms. Tubner in an effort to force her to reveal where she kept her money." *Id.* Sealey told Carter to bring him a "hammer so that he could kill" the Tubners but she brought him an "ax" instead. *Id.* Sealey "struck

[1] Citations to the record refer to the Electronic Court Filing (ECF) number associated with the document followed by the appropriate ECF page number.

Ms. Tubner multiple times in the head with the ax and then went downstairs and did the same to Mr. Tubner." *Id.* After leaving, Sealey told his co-defendants that "he 'had to do it' because the victims had seen their faces and further stated that the victims deserved to die because they had mistreated Carter's mother in the past." *Id.* Sealey told Battiste that he would "out [his] lights" if he ever told anyone what he had seen. *Id.*

Fahie and Battiste testified against Sealey at trial and John Tubner's "handgun and jewelry" were found in Sealey's "motel room" along with "protein residue consistent with blood on the floor and sink of Sealey's motel bathroom." *Id.*

B. Proceedings Below

1. Trial Proceedings

Petitioner Richard Sealey was indicted in Clayton County on February 7, 2001 for: two counts of murder; fourteen counts of felony murder; two counts of possession of a firearm during the commission of a crime; and one count of possession of a firearm by a convicted felon. Pet. App. at 243.

a. Defense Investigation

John Beall and Joseph Roberto were appointed in April of 2001 to represent Sealey. D13-14:8. Both were experienced criminal attorneys and Beall had been involved in approximately thirty-three death penalty cases. D19-22:5. Trial counsel also hired two investigators (D19-22:39; D26-32:10; D23-25:59-62), a mental health expert (D19-22:63-64; D26-31:19-20; D23-25:90-100), a forensic pathologist (D19-22:46-47; D23-25:77; D26-31:30), a jury consultant (D19-22:19-20; D26-32:10), and a polygraph expert (D19-22:47-48; D23-26:13-22).

Trial counsel and their team conducted an extensive investigation for both the guilt and sentencing phases of trial. Briefly, regarding the guilt phase, the defense team investigated other possible suspects, the co-defendants, and Sealey's alleged alibi. *See, e.g.,* D19-22:40, 42, 47-48; D23-26:71, 75; D24-37:13-22, 45-65; D24-39:2-126; D24-40:1-104; D24-41:1-59. Trial counsel also secured a plea deal of life without parole and encouraged Sealey to accept the deal, but Sealey rejected the deal. D26-31:11; D19-22:35-36; D23-26:77; D26-8:108.[2]

For sentencing, trial counsel's strategy was "residual doubt" and to "humanize" Sealey to the jury. D19-22:71. Trial counsel testified that they interviewed Sealey's local acquaintances, contacted his family members, gathered historical records, and investigated Sealey's mental health. *Id.* at 39-43, 63-65, 73-74. The defense team kept detailed reports of their investigation. *See, e.g.,* D23-24:86-87; D23-25:67-68, 31-32, 50-52, 62-64, 66-77; D23-27:8-9; D23-28:2-31; D23-29:1-21; D26-8:68-91. Additionally, the trial attorney files indicated many meetings and discussions with Sealey and the billing records showed counsel met with Sealey at least twenty-seven times. D23-22:23, 39, 56, 58-59, 62, 69, 86, 89-92, 94, 96-97, 100, 103-06, 114, 118-19, 121-22; D23-26:62-63, 66, 68, 70-71, 76, 87; D26-9:8. Despite trial counsel's thorough investigation, Sealey's friends and family members, with the possible exception of his nephew Ronald Tutein, were not interested in

[2] The state habeas court rejected Sealey's claim that trial counsel were ineffective during plea negotiations. Pet. App. at 206.

testifying on his behalf.[3] Pet. App. at 188 (findings of the state habeas court on this issue).

b. Presentation at Trial and Jury Verdicts

(1) Guilt Phase

Trial counsel thoroughly cross-examined each of the State's witnesses—most importantly, Sealey's co-defendants Battiste and Fahie—to show inconsistencies between their pre-trial statements and trial testimony. D17-16:32-72; D17-17:17-80; D17-18:6-41. The defense called the victims' daughter and questioned her about her relationship with the victims and her alleged involvement in the murder. D17-18:84-97. During closing arguments, trial counsel attacked the State's evidence, pointed out the inconsistencies in the co-defendants' pre-trial statements and trial testimony, and reminded the jury that no fingerprints, no DNA, and no hair fibers were found linking Sealey to the crimes. D17-18:121-33; D17-19:1-5. On Friday, August 23, 2002, Sealey was convicted as charged in the indictment. Pet. App. at 243.

(2) Sentencing Phase

The sentencing phase of trial began the following Monday on August 26, 2002. In aggravation, the State presented evidence linking Sealey to the use of a credit card stolen from William Kerry the same day that Kerry was

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[3] Sealey argues that "counsel *inexplicably* arranged for the appearance" of only Tutein. Brief at 9 (emphasis added). However, as found by the state habeas court, trial counsel *explained* during their state habeas testimony that Tutein was the only person who agreed to testify on Sealey's behalf. *See* Pet. App. at 186-88. This is finding of fact entitled to deference under the Antiterrorism and Death Penalty Act (AEDPA).

murdered to support the accusation that Sealey murdered Kerry.[4] D17-21:10-20, 72-74, 93-95. Additionally, the State presented several witnesses to testify about Sealey's misconduct while incarcerated prior to trial and the certified copy of the indictment and conviction for the assault on a federal prison guard when he was previously incarcerated. *Id.* at 23-28, 32-35, 39-43, 46-50, 54-57, 61, 66-69; D17-35:12-15. Trial counsel cross-examined these witnesses and pointed out that on most occasions Sealey did not harm anyone. D17-21:28-30, 36, 43-44, 57-59, 69-70. Finally, the State presented Rossie Neubaum, who testified that Sealey raped her. *Id.* at 114-17. Trial counsel brought out that there was a rape kit that contained "partially intact spermatozoa," but no DNA testing was conducted, and the responding officer did not know where the rape kit was located. *Id.* at 135-37; D17-22:1-6.

The State's presentation of evidence ended at "2:55 p.m." that same day—a day-and-a-half earlier than both parties had expected. D17-22:13-15. Trial counsel explained that, because the State's case had ended earlier than anticipated, counsel needed additional time to confer with Sealey about testifying and whether to present Sealey's nephew Ronald Tutein. *Id.* at 14. Trial counsel informed the court that Tutein was still on St. Croix due to a medical appointment and could not leave until the following day—Tuesday—and would not be able to attend court until "Wednesday morning" given the flight schedule between St. Croix and Atlanta, Georgia. *Id.* Counsel explained that the defense team "had planned to use [Tutein] to inform the jury concerning Mr. Sealey's background, family life, and specific items of

[4] This crime occurred in Fulton County before Sealey murdered the Tubners in Clayton County.

mitigation, such as instructions to his family that we think might be helpful to the jury determining the appropriate sentence." *Id.* at 14-15. Counsel concluded by asking the trial court for a "continuance until Wednesday morning" in order to "confer with [his] client" and the "unavailability of a witness." *Id.* at 15.

Seeking more information, the trial court inquired about Tutein's medical issue, why Tutien could not travel that day, whether Tutien had been provided transportation and lodging to testify, and what had prevented Tutien from arriving earlier. *Id.* at 15-18. The trial court pointed out that he "[didn't] think the penalty phase ha[d] really snuck up on anybody" and "[n]ow [he was] being asked to delay the trial another day and a half for this witness that might show up. And I want to know why he wasn't here last week… ." *Id.* at 18. Trial counsel explained that

> …last week we made numerous phone calls and have been in touch. I have called [Tutien] on a number of occasions. He has not returned the call back to me. He did talk with Mr. John Ellis and he did talk with Ms. Jodi Monogue. Finally on Thursday evening he said that he would come unequivocably (sic), but that he had this medical appointment on Monday and I asked Ms. Monogue if he could come any sooner. She indicated that based on her conversation the answer was no. So notwithstanding that, we sent the ticket in anticipation that he would be put on first on Wednesday morning, which was our good faith estimate of when he would be needed.

Id. at 19.[5]

The trial court inquired if there was any other family that could testify on Sealey's behalf. Trial counsel stated that Sealey's "mother [was]

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[5] Ellis was a client liaison from the Multi-County Public Defender's Office, and Monogue was a paralegal used by the defense team. D19-22:20-22, 23, 90; D26-32:4.

incapacitated" and Sealey's sisters had informed the defense team the past Thursday that they would not testify because "in some cases they are school teachers and one of them has a sick child and …these are unfortunately things that they can't get around." *Id.* at 20-21.

The trial court granted trial counsel's request to recess until the next day so that counsel could discuss with Sealey whether he wanted to testify during the sentencing phase. *Id.* at 22. But the court would not extend the request until Wednesday:

> I'm going to deny the request for a continuance. I find that there's been ample opportunity to have this witness brought forward, that it was not brought to the Court's attention until the last break, 3:00 p.m. on Monday, no medical certificates have been presented to the Court prior to today. Prior to trial this was discussed. The defense indicated that they would be wanting to fly mitigation witnesses up. They would do so and then apply to the Court for airfare and hotel because they didn't know when the witnesses would be available and they might have to stay here for a couple of days, and it was indicated just to submit that to the Court for approval.
>
> So it's not just the problem of, just an issue of targeting it for one specific day. The defense was well aware that the exact day the witness was needed might not be able to be ascertained and they might have to get them here a couple of days ahead of time.
>
> The State has had to do that throughout the trial with its witnesses, get them ready for when it was time to call and I just do not see the need in keeping this jury that has been out on this case for over two weeks now, especially after a two-day break following the verdict, to take another day and a half break for this witness, the motion for continuance is denied.

Id. at 21-22.

The following day, Sealey chose not to testify and trial counsel submitted into evidence pictures of Sealey's home on St. Croix, letters written by Sealey, and argued residual doubt during closing. D17-23:40-41, 55-62.

The same day, August 27, 2002, the jury found that the following statutory aggravating circumstances existed:

> …that the murders were both outrageously or wantonly vile, horrible, or inhuman in that they involved the torture of the victims, depravity of mind, and the aggravated battery of the victims, that the murders were both committed for the purpose of receiving money or any other thing of monetary value, that the murder of Mr. Tubner was committed while Sealey was engaged in the capital felonies of armed robbery and aggravated battery, and that the murder of Ms. Tubner was committed while Sealey was engaged in the capital felonies of armed robbery, aggravated battery, and kidnapping with bodily injury.

Pet. App. at 243. The jury recommended a sentence of death, and the trial court sentenced Sealey to death.[6] *Id.*

2. Motion for New Trial and Direct Appeal Proceedings

Sealey filed a motion for new trial on September 24, 2002, which was denied on May 1, 2003. Pet. App. at 243. Sealey appealed his convictions and sentences to the Georgia Supreme Court. Sealey was represented on appeal by Beall, his trial counsel. *Id.* Sealey did not raise on direct appeal a challenge to the trial court's denial of his request for a continuance during the sentencing phase. Pet. App. at 240-46.

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[6] Sealey was also sentenced to three five-year prison terms, to run consecutively to the death sentences and concurrently with each other, for possession of a firearm during the commission of a crime and by a convicted felon. Pet. App. at 243. The felony murder convictions were vacated as a matter of law. *Id.*

The Georgia Supreme Court affirmed Sealey's convictions and sentences on March 1, 2004. *Id.* Sealey did not file a petition for writ of certiorari in this Court.

3. State Habeas Proceeding

Sealey filed a state habeas corpus petition in the Superior Court of Butts County, Georgia on October 14, 2004, and an amendment thereto on May 1, 2008. D18-9; D19-5 thru D19-8. In "Claim XV" of Sealey's amended state habeas petition, he raised a claim that the trial court erred in denying his request for a continuance during the sentencing phase. D19:5:37. It was a general claim, comprised of three paragraphs that alleged, without citation to law other than general state and federal constitutional amendments, that the trial court prevented him from presenting mitigating evidence. *Id.* Sealey's only argument regarding the ineffective assistance of appellate counsel was one sentence that alleged to the "extent" appellate counsel failed to raise this claim on direct appeal, counsel was "ineffective." *Id.*

(1) Tutein's Testimony

An evidentiary hearing was conducted on July 8-10, 2008. D19-19 thru D26-37. At the hearing, Tutein's affidavit, that was signed March 25, 2008, was submitted by Sealey (D19-26:89-91), along with Tutein's live testimony (D19-20:57). In his affidavit, Tutein admitted that he had knee surgery prior to Sealey's trial but denied that he had a doctor's appointment on the Monday that the sentencing phase started. D19-26:91. He explained that he had a ticket for the following day Tuesday, was packed and ready to go, but was phoned that evening by the defense team and told he "did not need to come." D19-26:91.

Tutein testified live at the evidentiary hearing that he "was scheduled to fly down, …on a Monday" and he "received a phone call if not one day maybe two days prior to me flying out" informing him that he was "no longer needed." D19-20:56-57. He was told that he "could [still] use the ticket" and he "planned to fly down" to visit other family and his "uncle in prison" but "never got a chance to." *Id.* Tutein denied having informed counsel that he had a doctor's appointment and testified he "made it clear that whenever they needed me they can call me, I'll be ready anytime." *Id.* at 57. However, Tutein did not explain why he had not come earlier to his uncle's trial. *See* D19-26:89-91; D19-20:56-58.

Tutein's live testimony regarding Sealey's background, personality, and plea for his life covered approximately six pages in length. D19-20:49-55, 58. The majority of Tutein's testimony was about favorable, anecdotal evidence regarding Sealey's mother and father. D19-20:51-53. Tutein's testimony regarding Sealey was limited to that he was "loud," "always laughing," and once, when Tutein "saw someone that [he] didn't like much," Sealey advised him that "if [the person wasn't] doing something that's threatening my life, let him be."[7] D19-20:51, 54.

(2) Beall's Testimony

Beall also testified live during the evidentiary hearing. During direct-examination, he recalled that Tutein did not arrive in time to testify but could not recall the reason.[8] D19-22:71. When shown the trial transcript

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[7] Tutein's affidavit covered the same topics and totaled three pages. D19-26:89-91.

[8] During Beall's state habeas deposition, when questioned by counsel for the Warden, he did not recall "specifically" why Tutein did not attend Sealey's

containing his request for a continuance, Beall testified that it did little to refresh his recollection but the transcript was "an accurate reflection of what happened." *Id.* Beall was cross-examined by Sealey's habeas counsel regarding the following entry in the time records by investigator Jodi Monogue stating: "Contacted family member (Ronald Tutein) re: prosecution ended one day early, not enough material to fill entire day, plane ticket bought, may come but is (sic), cannot testify as it will be too late." *Id.* at 109. Beall explained that he was not aware of what Monogue meant by the time entry, was not privy to the exact phone conversation between Monogue and Tutein, and "would not have represented to the [trial] Court, did not represent to the [trial] Court anything that I didn't think was true at the time." *Id.* at 110.

Regarding preparation for the appeal, Beall testified live that he: "Read the transcript, looked for objections, decided on how many issues to raise, whether to be a shotgun approach or to be a more targeted approach. …So, we would read the transcript and highlight anything that we thought might be win-able and then write a brief based on that." *Id.* at 79. Beall was not questioned during the state habeas evidentiary hearing or his deposition as to why the continuance claim was not raised on direct appeal. *See id.* at 3-127; D19-23:1-16; D21-8:18-90.

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trial. D21-8:55-56. Later, during questioning by Sealey's counsel, Beall stated that he did not have a "clear memory" of what happened but he recalled having a "sinking feeling" that Tutein could have done "more" to attend Sealey's trial. *Id.* at 72.

(3) Post-Hearing Briefing

The parties submitted post-hearing briefs to the state court. D27-5 thru D27-9. Despite being given the opportunity to do so, Sealey did not brief, or even mention, that the trial court erred in denying his continuance request. D27-5; D27-6; D27-9. Instead, Sealey argued in his initial post-hearing brief that trial counsel were ineffective for not securing Tutein's appearance at trial and noted that the trial court denied the request for continuance because the court was informed Tutein chose a "doctor's appointment" over testifying on Sealey's behalf. D27-5:35. Regarding the alleged ineffective assistance of appellate counsel, Sealey devoted one paragraph in his brief to a generalized argument unsupported by any citation to the record.[9] *Id.* at 90.

In response, the Warden argued that Sealey's continuance claim, like a host of other claims, was procedurally defaulted. D27-7:17. Sealey filed a reply brief generally asserting that the ineffective assistance of trial and appellate counsel served as cause to overcome any of his procedurally defaulted claims (D27-9:4-8), but he did not supply specific evidence or argument in support of this allegation. Regarding his underlying continuance claim, Sealey once again did not mention it; however, he did specifically address two other procedurally defaulted claims. *Id.* at 6-9.

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[9] Sealey argues in his brief to this Court that appellate counsel "inexplicably" and "remarkably" failed to challenge the trial court's continuance denial on appeal. Brief at 7, 11. But Sealey had the burden of proof for his appellate counsel ineffectiveness claim, thus, the lack of any explanation rests on his failure to question appellate counsel about this issue. Moreover, while Sealey raised his continuance claim in his amended state habeas petition, he "inexplicably" and "remarkably" failed to ever brief the issue to the state courts.

On July 26, 2012, the state habeas court entered an order denying relief. Pet. App. at 168. The state court denied in its entirety Sealey's claim of ineffective assistance of trial counsel. *Id.* at 176-204. Given Sealey's utter failure to even brief the claim, the state habeas court summarily dismissed as procedurally defaulted Sealey's claim that the trial court erred by refusing to grant the continuance request. *Id.* at 223.

(4) State Habeas Appeal

Sealey filed a certificate of probable cause to appeal (CPC) from the denial of habeas corpus relief in the Georgia Supreme Court on October 8, 2012. D27-16. Sealey did not raise his claim that the trial court erred in denying his request for a continuance during the sentencing phase other than to list the amended petition claim number (Claim XV) in a footnote acknowledging it was found procedurally defaulted by the state habeas court. *Id.* at 54 n.3. In his CPC brief, Sealey argued that Tutein "failed to appear" at his trial "*solely* because Trial Counsel mishandled his travel arrangements." *Id.* at 30 (emphasis added). In the section of his brief addressing procedurally defaulted claims, Sealey again generally asserted the ineffective assistance of trial and appellate counsel as cause and prejudice to overcome any default. *Id.* at 54. While Sealey addressed three specific procedurally defaulted claims, he never mentioned his continuance claim or explained how appellate counsel were ineffective for not raising this claim. *Id.* at 54-69.

The Georgia Supreme Court summarily denied Sealey's CPC application on June 17, 2013. Pet. App. at 167. Thereafter, Sealey filed a petition for writ of certiorari in this Court, which was denied on January 13, 2014.

Sealey v. Chatman, 571 U.S. 1134, 134 S. Ct. 909 (2014). Sealey did not seek review of the claim currently before this Court. D27-20.

4. Federal Habeas Proceeding

(1) District Court

Sealey filed his federal habeas petition on January 31, 2014. D1. He filed his amended petition on July 16, 2014. D40. The district court ordered an all-in-one final merits brief to address each claim and any request for discovery or an evidentiary hearing. D29. Sealey again argued that his continuance claim was not procedurally defaulted because—without any specific argument in support—appellate counsel were ineffective for failing to raise the claim on direct appeal. D47:144. Sealey did however, for the first time, address the underlying continuance claim. *Id.* at 139-44. In response, the Warden argued that Sealey's ineffective appellate counsel claim and continuance claim were unexhausted for failure to argue in both the superior court and the Georgia Supreme Court. D52:243-245.

The district court denied relief on November 9, 2017. D66. The district court dismissed as procedurally defaulted Sealey's claim that the trial court erred in denying his motion for continuance during the sentencing phase. *Id.* at 55-56. On December 7, 2017, Sealey filed a motion to alter and amend the judgment, which was denied on January 10, 2018. D68; D69. On February 8, 2018, Sealey filed a motion for COA (D70), which on June 15, 2018, was granted in part. D77:1-2.

(2) Federal Habeas Appeal

Sealey sought an expansion of his COA from the Eleventh Circuit Court of Appeals which included his claim that the trial court erred when it denied

his motion for a continuance during the sentencing phase of trial. On November 29, 2018, the court of appeals granted a COA for Sealey's continuance claim.

The court of appeals determined that Sealey's continuance claim was procedurally defaulted. First, the court recognized Sealey's claim of ineffective assistance of appellate counsel as cause to overcome the default. However, the court "conclude[d] that Sealey [could] not prove that his appellate counsel were ineffective in failing to raise the continuance claim because it lacked merit." Pet. App. at 53. Second, the court stated, as "acknowledged by Sealey" that he "must also show that the denial [of the continuance] resulted in actual prejudice." *Id.* at 54 (quotation marks omitted). Contrary to Sealey's argument in his statement of the case, the court of appeals did not use *Strickland's* prejudice test but instead the "actual prejudice" standard advocated by Sealey. The court rejected Sealey's argument of "actual prejudice," holding: "Had the trial court granted his request for a continuance to allow for Tutein's arrival, Sealey cannot show that Tutein's testimony would have changed the outcome at sentencing, given the weak nature of the testimony compared to the heinous nature of the crimes and other aggravating circumstances." *Id.* at 54. Because Sealey failed to prove cause and prejudice to overcome the default, the state court's decision rested on adequate and independent state law grounds and federal habeas relief was denied. *See id.* at 55.

REASONS FOR DENYING THE PETITION

Sealey's continuance claim does not warrant certiorari review

"This Court long has held that it will not consider an issue of federal law [] from a judgment of a state court if that judgment rests on a state-law ground that is both 'independent' of the merits of the federal claim and an 'adequate' basis for the court's decision." *Harris v. Reed*, 489 U.S. 255, 260, 109 S. Ct. 1038 (1989).

Georgia's procedural default bar is an adequate and independent state law ground. *See, e.g., Davila v. Davis*, __ U.S. __, 137 S. Ct. 2058, 2064 (2017) ("a federal court may not review federal claims that were procedurally defaulted in state court—that is, claims that the state court denied based on an adequate and independent state procedural rule."). Under Georgia law, the failure to object at trial to a perceived error or to "pursue the same on appeal" will result in the procedural default of a claim absent a showing of cause and prejudice or a miscarriage of justice. *Black v. Hardin*, 336 S.E.2d 754, 755 (1985); O.C.G.A. § 9-14-48(d). Sealey does not dispute that his continuance claim is procedurally defaulted.

"A state prisoner may overcome the prohibition on reviewing procedurally defaulted claims if he can show 'cause' to excuse his failure to comply with the state procedural rule and 'actual prejudice resulting from the alleged constitutional violation.'" *Davila*, 137 S. Ct. at 2064–65. So, Sealey asks this Court to grant certiorari review of the court of appeals' determination that he failed to establish cause and prejudice to overcome his procedurally defaulted continuance claim. But that is a request for factbound error correction that does not warrant certiorari review, and in any event, the decision below was correct. Further, where this Court's precedent is not in

his favor, Sealey asks the Court to come up with new rules of criminal procedure that should be applied to his case so that he may receive a new sentencing trial. That request, which is barred under *Teague*, also does not warrant certiorari review.

A. The court of appeals cause determination does not conflict with this Court's jurisprudence.

To show cause to overcome his procedural default, Sealey argued below that appellate counsel were ineffective for failing to raise his continuance claim on direct appeal. The court of appeals determined that the continuance claim lacked merit for appeal and held that appellate counsel were not ineffective for not raising a meritless claim:

> We conclude that Sealey cannot prove that his appellate counsel were ineffective in failing to raise the continuance claim because it lacked merit. The state trial court's decision to deny the continuance in Sealey's case cannot be considered "unreasoning" or "arbitrary" under *Morris* because the court acted within its discretion to deny the continuance. *See Van Poyck v. Fla. Dep't of Corr.*, 290 F.3d 1318, 1326 (11th Cir. 2002) ("The decision of whether to grant a continuance is reserved to the sound discretion of the trial court."). The court engaged in a colloquy with Sealey's lawyers in an effort to understand why Tutein wasn't available and stressed that they should have been prepared for their witness to testify.

Pet. App. at 53-54.

Sealey disagrees, arguing that the court of appeals' decision is contrary to this Court's precedents because mitigating evidence is "sacrosanct" and should never be precluded from presentation during the penalty phase. Pet. 34. Additionally, Sealey urges this Court to grant certiorari review to promulgate new law setting the "framework" for determining whether a denial of a continuance request during the penalty phase of a capital trial is

constitutional. *Id.* at 4, 20, 21, 25. Neither of Sealey's arguments present a ground for certiorari review.

1. The court of appeals did not incorrectly apply *Morris v. Slappy*.

Sealey first argues that the court of appeals' reliance on *Morris v. Slappy*, 461 U.S. 1, 103 S. Ct. 1610 (1983), was in error, and instead, the court of appeals should have applied this Court's precedent regarding the presentation of mitigating evidence. Sealey attempts to distinguish *Slappy* on its facts, but the court of appeals used the principle of law announced, not the facts, in relying on *Slappy*. *See* Pet. 21; Pet. App at 54. Furthermore, the mitigation cases relied upon by Sealey, although informative about the role of mitigating evidence, do not set the standard for whether a trial court may grant or deny a continuance. *See Lockett v. Ohio*, 438 U.S. 586, 597, 98 S. Ct. 2954 (1978) (holding that Ohio's statute under which a death sentence "was imposed" was unconstitutional because it "*did not permit* the sentencing judge to consider, as mitigating factors, [defendant's] character, prior record, age, lack of specific intent to cause death, and [defendant's] relatively minor part in the crime") (emphasis added); *Eddings v. Oklahoma*, 455 U.S. 104, 113, 102 S. Ct. 869 (1982) (holding a trial court erred when it "found that as a *matter of law* he was unable even to consider the [mitigating] evidence" presented at trial) (emphasis in original). While there is no doubt that mitigating evidence is important during the sentencing phase of a capital trial, there is no precedent from this Court holding it is per se prejudicial—which is the standard Sealey advocates—to deny a continuance to allow the defense to secure a witness who would have testified with respect to such evidence.

Second, Sealey argues that the court of appeals incorrectly determined that the trial court did not abuse its discretion under the standard announced in *Slappy.* As explained by the court of appeals, in *Slappy*, this Court "rejected a habeas petitioner's claim that the trial court abused its discretion and violated the petitioner's right to counsel by denying a continuance that he had requested because his appointed counsel was substituted only six days before trial." Pet. App. at 53 (citing *Slappy,* 461 U.S. at 3-4). This Court held 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." *Slappy*, 461 U.S. at 11-12 (quoting *Ungar v. Sarafite*, 376 U.S. 575, 603, 84 S. Ct. 841, 856 (1964)).

Sealey argues that the court of appeals wrongly determined that the trial court's denial was not "unreasoning" or "arbitrary." Pet. 20-21. To begin with, this request for error correction of a factbound application of this Court's precedent does not warrant review. Moreover, the court of appeals was correct. Sealey was convicted on Friday, August 23, 2002. Pet. App. at 243. The trial court held a two-day recess before beginning the sentencing phase the following Monday. D17-21:7. When the State's sentencing-phase presentation ended Monday afternoon, trial counsel asked for another recess of a day-and-a-half to confer with Sealey about testifying and for Sealey's nephew Tutein to have time to travel from St. Croix to testify. D17-22:14. The trial court reasonably asked trial counsel why Tutein was not already in attendance and trial counsel explained: that the defense thought the State's case would take another day-and-a-half; Tutein had a doctor's appointment that Monday because he had recently had knee surgery; and Tutein would

not come earlier.[10] *Id.* at 15-21. The trial court's continuance denial rested on the following sound reasons: (1) the defense had "ample opportunity to have this witness brought forward" and "it was not brought to the Court's attention until the last break" a few minutes prior; (2) "no medical certificates" were "presented to the Court" supporting Tutein's absence; (3) the "defense was well aware that the exact day the witness was needed might not be able to be ascertained and they might have to get them here a couple of days ahead of time prior to today"; and (4) the court did "not see the need in keeping this jury that has been out on this case for over two weeks now, especially after a two-day break following the verdict" for an additional day. *Id.* at 21-22. There was nothing "unreasoning and arbitrary" in the trial court's decision.

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[10] Sealey implies that trial counsel misinformed the trial court regarding Tutein's doctor's appointment, and the fault of Tutein not arriving earlier was due to trial counsel's failure to ask him to come on an earlier flight. However, this information was not before the trial court thus, it is not evidence that the trial court abused its discretion. Moreover, Tutein's testimony was used in state habeas to support Sealey's ineffective assistance of *trial counsel* claim—not his *trial court error* claim. *See* D27-5:35. Additionally, while Tutein claimed he did not have a doctor's appointment on the Monday in question and was ready, willing, and available to testify for his uncle, he did not explain why he did not come earlier to Sealey's trial. *See* D19-20:56-58; D19-26:89-91. What is more, trial counsel testified that he would not have misrepresented any facts to the trial court and had the "sinking feeling" at trial that Tutein chose to do something else instead of coming to Sealey's trial. D19-22:110; D21-8:72. Finally, also undermining Tutein's testimony that he wanted to come and testify on his uncle's behalf, is his admission in court that despite having a plane ticket and being free from work he still *chose* not to come visit his uncle after Sealey was convicted and sentenced to death. D19-20:56-57.

This Court has pointed out that "abuse-of-discretion review is employed …where a decisionmaker has 'a wide range of choice as to what he decides'" and "where the trial judge's decision is given 'an unusual amount of insulation from appellate revision' for functional reasons.'" *McLane Co. v. EEOC*, __ U.S. __, 137 S. Ct. 1159, 1169 (2017) (quoting Rosenberg, *Judicial Discretion of the Trial Court, Viewed From Above*, 22 Syracuse L. Rev. 635, 637 (1971)). This Court has determined "whether the judge exercised sound discretion--is a general [rule]" and "'[t]he more general the rule,'" "'the more leeway courts have in reaching outcomes in case-by-case determinations.'" *Renico v. Lett*, 559 U.S. 766, 778, 130 S. Ct. 1855, 1865 (2010) (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 664, 124 S. Ct. 2140 (2004)). Given the general nature of the rule of discretion, the rational reasons given by the trial court in denying the continuance, and the court of appeals' "leeway" in deciding the issue, Sealey has failed to show that the court of appeals' decision presents an issue worthy of this Court's review.

2. This Court should not grant certiorari review to create a "framework" for determining whether a trial court abused its discretion in denying a continuance at trial.

With no regard for federalism or the procedural posture of this case, Sealey contends that this Court "should grant certiorari to provide the lower courts [with] a framework for weighing when the refusal to provide a necessary continuance offends due process, particularly in the penalty phase of a capital case." Pet. 25. Due to the functional nature of the trial court's discretion and that this claim is presented under federal habeas review, not direct review, this Court should deny this request.

a. There is no split among the Sixth Circuit and Eleventh Circuit regarding the method to determine whether a trial court erred in denying a continuance request.

Sealey argues that the Sixth Circuit and Eleventh Circuit are split on the proper scheme for determining whether a state trial court abused its discretion in denying a continuance request. Relying upon *Powell v. Collins*, 332 F.3d 376, 396 (6th Cir. 2003), Sealey states that the Sixth Circuit employs a balancing test with several specific factors to determine whether a trial court erred in denying a motion for continuance, which it borrowed from *United States v. Burton*, 584 F.2d 485 (D.C. Cir. 1978).[11] But *Powell* is merely a fact-specific determination of a petitioner's claim that the trial court erred in denying his sentencing phase continuance. Moreover, *Powell* did not mandate that this test should be employed, and Sealey did not argue to the court of appeals that this test should be used in his case.[12] *See* Pet. Br. at 16, 121-26, Case No. 18-10565, dated 1/25/19; Pet. Reply at 10, 62-68, Case No. 18-10565, dated 9/14/19. Instead, as pointed out by the court of appeals, Sealey relied upon *Powell* "for the proposition that in order to succeed on this type of claim, a habeas petitioner must show that the trial court's error in denying him a continuance deprived him of a fundamentally fair trial in violation of due process, which resulted in actual prejudice." Pet. App. at 53.

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[11] Given that *Burton* concerned a continuance claim that arose in a direct appeal from a criminal trial in a federal district court, Sealey rightly does not argue that *Burton* would represent a split among the courts of appeals deciding a state law decision.

[12] In fact, neither the *Burton* case nor the *Burton* test was mentioned by Sealey to the court of appeals. *See* Pet. Br. at 16, 121-26, Case No. 18-10565, dated 1/25/19; Pet. Reply at 10, 62-68, Case No. 18-10565, dated 9/14/19.

Powell, a pre-AEDPA case, concerned Powell's *Ake*[13] request for an independent mental health expert that was denied by the trial court. The court of appeals held that the trial court erred because Powell pled "the necessary particularized facts sufficient to trigger *Ake*'s requirement of psychiatric assistance" which included "juvenile court records and psychological evaluations" that included a "full-scale IQ score [of] only 64" at age eleven. *Powell*, 332 F.3d at 392. The court of appeals also held the error was harmful during the sentencing phase. *Id.* at 395-96. The trial court had appointed a psychologist to perform a competency evaluation, whom defense counsel called as the sole witness during sentencing. *Id.* at 384. The psychologist "explained that she was not given sufficient time to conduct an appropriate investigation into Petitioner's mental makeup, to interview necessary family members and acquaintances, or to run needed diagnostic tests" and "that she was 'definitely not equipped' to conduct the necessary neuropsychological testing for this phase of Petitioner's case." *Id.* The court concluded that the error "require[d] reversal, thus mandating that Petitioner's death sentence be vacated and a new mitigation hearing conducted." *Id.* at 396.

The court of appeals next examined Powell's claim that the trial court abused its discretion in denying his request made "[a]fter the guilt phase of the trial" for "a continuance for the purpose of obtaining an additional psychiatric examination for presentation at the mitigation hearing." *Id.* at 396. Examining the specific facts of Powell's claim and using the *Burton* "factors," the court of appeals concluded that "[b]ased upon our holding that

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[13] *Ake v. Oklahoma*, 470 U.S. 68, 105 S. Ct. 1087 (1985).

the sentencing phase of petitioner's trial was fundamentally unfair" the court "agree[d]" that the "factors" weighed in Powell's favor. *Id.* at 397. Therefore, *Powell* merely represents a fact-specific analysis of an *Ake* claim coupled with a motion for continuance. Nothing in the *Powell* opinion is at odds with the Eleventh Circuit's opinion here.

Apart from the distinguishing facts, the Sixth Circuit has never held that the *Burton* test *must* be used to determine whether a state court abused its discretion in denying a continuance. Rather, the court of appeals has referred to them as "*non-dispositive* factors" in deciding whether a federal district court abused its discretion in denying a continuance. *United States v. Parker*, 403 F. App'x 24, 26 (6th Cir. 2010) (emphasis added). And, relying upon this Court's *Ungar* decision stating "'[t]here are *no mechanical tests*' to decide a "denial of a continuance,'" the Sixth Circuit stated that "[t]he *circumstances of a particular case* determine whether the denial of a continuance is so arbitrary as to violate due process." *Burton v. Renico*, 391 F.3d 764, 773 (6th Cir. 2004) (quoting *Ungar v. Sarafite*, 376 U.S. 575, 589-90) (emphasis added).

In point of fact, the Warden has found only one other case in the Sixth Circuit that considered the *Burton* factors in analyzing a state court continuance denial—*Landrum v. Mitchell*, 625 F.3d 905, 928 (6th Cir. 2010). But even there, the Sixth Circuit, in denying relief, applied the *Slappy* standard and held "the trial court's decision to deny a continuance was reasoned and not arbitrary," and the petitioner was "unable to show that he suffered actual prejudice from the trial court's decision." *Id.* at 927. Put simply, while the *Burton* factors are sometimes cited in the Sixth Circuit in reviewing a continuance claim, they are not a mandatory test.

b. Sealey's request for a *Burton* like "framework" is counter to federalism and this Court's precedent.

Sealey asks this Court to create something similar to the "*Burton* test," which he argues sets "the factors to be considered by the court in determining whether a continuance was properly denied." Pet. at 24-25 (quoting *Burton*, 584 F.2d at 490-91). However, this Court has "emphatically reaffirmed that the Constitution 'has never been thought [to] establish this Court as a rule-making organ for the promulgation of state rules of criminal procedure.'" *Smith v. Robbins*, 528 U.S. 259, 274, 120 S. Ct. 746, 758 (2000) (quoting *Spencer v. Texas*, 385 U.S. 554, 564, 87 S. Ct. 648 (1967)). And "it is more in keeping with our status as a court, and particularly with our status as a court in a federal system, to avoid imposing a single solution on the States from the top down." *Id.* at 275. This is "rooted in federalism," because while this Court "evaluate[s] state procedures one at a time" the Court "leav[es] 'the more challenging task of crafting appropriate procedures . . . to the laboratory of the States in the first instance.'" *Id.*

Additionally, as pointed out above, and as Sealey admits (Pet. 14), "[t]here are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process." *Ungar*, 376 U.S. at 589. Because "[t]he answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied." *Id.* Consequently, Sealey's request to establish a new federal "framework" for this question is contrary to this Court's precedent and does not warrant certiorari review.

c. Even if this Court were to create a "framework" its application here would be barred under *Teague v. Lane*.

Just as important, even if this Court were to craft the requested "framework" it would not be applicable to the case at bar. The "framework" Sealey seeks would announce a new rule of criminal procedure. As stated *supra*, Sealey asks this Court to create a framework delineating the specific factors to be enforced in determining a continuance claim. *See* Pet. at 24-25. While this "framework" would be used to determine a claim on appeal, it would also mean the trial court would have to apply the factors in determining a continuance request. Thus, what Sealey seeks is a new rule of criminal procedure. Yet Sealey provides no explanation why this rule would be retroactive to the state court decision.

When this Court announces a new rule of constitutional law that applies in criminal proceedings, it is analyzed under *Teague v. Lane*, 489 U.S. 288, 109 S. Ct. 1060 (1989), to determine if the rule applies retroactively to federal collateral review. *Teague* explained that only two kinds of new rules may be applied retroactively on collateral review: (1) new "substantive" rules of criminal procedure, *i.e.*, those which "place 'certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe'"; and (2) new "watershed rules of criminal procedure," *i.e.*, those which are necessary to the fundamental fairness of the criminal proceeding. *Teague*, 489 U.S. at 311-13.

"[A] case announces a new rule if the result was not dictated by precedent existing at the time the defendant's conviction became final.'" *Teague*, 489 at 301; *see also Whorton v. Bockting*, 549 U.S. 406, 416, 127 S. Ct. 1173 (2007). "And a holding is not so dictated … unless it would have been 'apparent to all reasonable jurists.'" *Chaidez v. United States*, 568 U.S.

342, 347, 133 S. Ct. 1103 (2013) (quoting *Lambrix v. Singletary*, 520 U.S. 518, 527-28, 117 S. Ct. 1517 (1997)). Sealey's "framework" would not have been "apparent to all reasonable jurists" given this Court's previous statement that "[t]here are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process." *Ungar*, 376 U.S. at 589.

Under *Teague*, a new rule is "substantive" only if it "'narrow[s] the scope of a criminal statute'" or "'place[s] particular conduct or persons ... beyond the State's power to punish.'" *Schriro v. Summerlin*, 542 U.S. 348, 351-52, 124 S. Ct. 2519 (2004). "Procedural rules, in contrast, are designed to enhance the accuracy of a conviction or sentence by regulating '*the manner of determining* the defendant's culpability.' Those rules 'merely raise the possibility that someone convicted with use of the invalidated procedure might have been acquitted otherwise.'" *Montgomery v. Louisiana*, __U.S.__, 136 S. Ct. 718, 730 (2016) (emphasis in original) (quoting *Schriro*, 542 U.S. at 353). Sealey's proposed new rule is procedural in function because it does not "affect … the conduct or persons to be punished." *Welch v. United States*, U.S. __,136 S. Ct. 1257, 1268 (2016).

For a procedural rule to be a watershed rule, it must be exceptional:

> Because of this more speculative connection to innocence, we give retroactive effect to only a small set of watershed rules of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding. *That a new procedural rule is fundamental in some abstract sense is not enough*; the rule must be one without which the likelihood of an accurate conviction is seriously diminished. This class of rules is extremely narrow, and it is unlikely that any … ha[s] yet to emerge.

Schriro, 542 U.S. at 352 (citations and quotations omitted; emphasis added). Sealey's proposed rule does not meet this standard.

Because Sealey's proposed new rule or "framework" does not fit within either of the *Teague* exceptions, it would not be retroactive on collateral review and, this Court should not grant certiorari to create a rule that is not even applicable in the case at bar.

* * *

In concluding that Sealey failed to prove cause, the court of appeals did not ignore or misapply this Court's precedent, and there is no circuit split on the proper standard for evaluating a continuance claim. Accordingly, Sealey has failed to establish that the court of appeals' determination that appellate counsel's decision not to raise this claim on direct appeal represents an issue worthy of this Court's certiorari review.

B. The court of appeals prejudice determination does not contravene this Court's precedent.

Sealey argues that the court of appeals applied the wrong *Strickland* prejudice test in determining appellate counsel's effectiveness. Further, Sealey contends that the court of appeals should not have used the *Strickland* prejudice test at all but rather a different, more lenient prejudice test that this Court should grant certiorari to promulgate. Sealey misconstrues the court of appeals' decision. The court did not specifically address whether Sealey had proven he was prejudiced by appellate counsel's performance. Rather, the court determined whether Sealey had proven "actual prejudice" for his underlying continuance claim. Pet. App. at 54. Because the court of appeals' decision on this issue is a factbound determination and does not contravene this Court's precedent, it does not warrant this Court's review.

1. The court of appeals did not apply the wrong *Strickland* prejudice test.

Sealey first argues that the court of appeals incorrectly assessed prejudice for his appellate-ineffectiveness claim because the court determined that he could not show he could succeed on his underlying continuance claim *at trial* rather than *on appeal*. But an accurate reading of the court's decision reveals that the court was deciding "actual prejudice" of the underlying continuance claim—not *Strickland* prejudice of his appellate-ineffectiveness claim. And contrary to Sealey's implications, the court of appeals never stated that "actual prejudice" for his underlying claim was synonymous with *Strickland* prejudice.

In deciding Sealey's claim, the court of appeals initially noted Sealey's arguments in support of his "continuance claim's underlying merits."[14] Pet. App. at 52. The court correctly pointed out that Sealey "relie[d] primarily on two cases"—*Slappy* and *Powell*. *Id.* at 52-53. *Slappy* was relied on "for the proposition that" the trial court's denial of a "justifiable request" could not be "unreasoning and arbitrary"; and *Powell* "for the proposition that … the trial court's error in denying him a continuance deprived him of a fundamentally fair trial in violation of due process, which resulted in actual prejudice." *Id.* (quotation marks omitted). Having accepted Sealey's admission that the continuance claim was not raised on direct appeal and was consequently procedurally defaulted, the court next turned to Sealey's argument that the ineffective assistance of appellate counsel could serve as cause to overcome

[14] In the portion of the court of appeals' opinion directly preceding the continuance claim, the court set forth the law for deciding procedurally defaulted claims and stated that "[t]o assess ineffectiveness" as cause to overcome the default of several of his claims," it would "proceed to the underlying merits of Sealey's procedurally defaulted claims." Pet. App. at 52.

the default. As explained above, the court "conclude[d] that Sealey [could not] prove that his appellate counsel were ineffective in failing to raise the continuance claim because it lacked merit." Pet. App. at 53.

In the next paragraph, the court began with the statement that "Sealey acknowledges that he 'must also show that the denial [of the continuance] resulted in actual prejudice.' Br. of Petitioner at 104–05 (citing *Powell*, 332 F.3d at 396)." Pet. App. at 54. The court of appeals also quoted the following from *Van Poyck v. Fla. Dep't of Corr.* 290 F.3d 1318, 1326 (11th Cir. 2002): "[T]o establish that a denial of a continuance was reversible error, a defendant must show that the denial caused specific substantial prejudice." Pet. App. at 54. There was no mention of *Strickland*'s prejudice test by the court. And in both *Powell* and *Van Poyck*, the continuance claim was not procedurally defaulted but before the court on the merits. Therefore, the "actual prejudice" referred to in both cases was not *Strickland* prejudice and so the premise of Sealey's argument—that the court of appeals applied *Strickland*'s prejudice standard—fails.

2. The court of appeals "actual prejudice" determination is merely a factbound application of this Court's precedent.

It bears repeating that "[t]here are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process. The answer must be found in the circumstances present in every case." *Ungar*, 376 U.S. at 589. *Id.* At its core, Sealey's argument is that prejudice should be presumed when mitigating evidence was not presented to a jury because of a denial of a continuance. But there is no precedent from this Court suggesting a presumption of prejudice standard should be applied to a continuance claim. Instead, prejudice is determined based on an examination

of all of the evidence. *See Slappy*, 461 U.S. 1, 4-9 (setting out the facts of the crime and the relevant events that occurred at Slappy's trials); *id.* at 12 (examining whether Slappy was harmed by the denial of the continuance based on the facts of the case). Therefore, Sealey's request for certiorari review is nothing more than a request for this Court to conduct a factbound error correction of the court of appeals' decision.

Even if this Court did grant certiorari review for this type of request, the court of appeals decision was correct. Having previously reviewed the facts of Sealey's crimes, the sentencing phase, and Tutein's omitted testimony, the court held: "Had the trial court granted his request for a continuance to allow for Tutein's arrival, Sealey cannot show that Tutein's testimony would have changed the outcome at sentencing, given the weak nature of the testimony compared to the heinous nature of the crimes and other aggravating circumstances." Pet. App. at 54. Sealey merely disagrees and, relying on his argument that mitigating evidence is "sacrosanct," unduly elevates Tutein's testimony. But Sealey's comparison of Tutein's omitted testimony to the facts of the crimes and the other evidence in aggravation is nearly non-existent.

These facts cannot be ignored. Sealey beat, tortured, and murdered the elderly Tubners with an ax. Additionally, the State presented evidence during the sentencing phase linking Sealey to a rape and another murder. Tutein's scant testimony about Sealey's past would neither have explained nor mitigated his crimes. Whether lenient or difficult, Sealey could not overcome any prejudice assessment.

As for Sealey's request to promulgate a new prejudice test to be applied to this case, like Sealey's request for "framework": "the Constitution 'has

never been thought [to] establish this Court as a rule-making organ for the promulgation of state rules of criminal procedure'" (*Smith v. Robbins,* 528 U.S. at 274 (quoting *Spencer v. Texas*, 385 U.S. at 564); and Sealey has not shown how this requested new rule of criminal procedure would be retroactive to the state court's decision (*see Teague v. Lane*, 489 U.S. 288).

In sum, despite Sealey's varied protestations, he is merely asking this Court to conduct error correction of a factbound prejudice determination by the court of appeals. The court of appeals did not err and there is no issue for this Court to review on certiorari.

CONCLUSION

For the reasons set out above, this Court should deny the petition.

Respectfully submitted.

/s/ *Sabrina D. Graham*

Christopher M. Carr
Attorney General
Andrew Pinson
Solicitor General
Beth A. Burton
Deputy Attorney General
Sabrina D. Graham
Senior Assistant Attorney General