SCV: Submitted on 09-10-2018 14:06:03 EDT for filing on 09-10-2018

IN THE

Supreme Court of Virginia

RECORD NO. 180179

OSWALDO ELIAS MARTINEZ,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

REPLY BRIEF OF APPELLANT

Timothy G. Clancy, Esq. (VSB 25117)
Lisa A. Mallory (VSB 41676)
CLANCY & WALTER, P.L.L.C.
544 Settlers Landing Road
Hampton, Virginia 23669
(757) 826-5000
(757) 826-5936 (Fax)
tclancy@clancywalterlaw.com
lmallory@clancywalterlaw.com

Counsel for Appellant

LANTAGNE LEGAL PRINTING 801 East Main Street Suite 100 Richmond, Virginia 23219 (804) 644-0477
A Division of Lantagne Duplicating Services

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES ii

AUTHORITIES AND ARGUMENT 1

I. This Court does have jurisdiction over this case 1

II. The trial court erred when it found that attempts to educate the Defendant in sign language constituted "medically appropriate" treatment as required by Virginia Code § 19.2-169.3(F)(iii) because sign language education is not "medical" treatment 2

III. Even assuming *arguendo* that attempts to educate the Defendant in sign language were properly considered "medical" treatment, the trial court erred when it found that further attempts to educate Defendant in sign language were medically appropriate under Virginia Code § 19.2-169.3(F) as the Defendant had been held for over ten (10) years with virtually no improvement and he had plateaued 4

CONCLUSION 4

SIGNATURE 6

CERTIFICATE 6

TABLE OF AUTHORITIES

Case Law

PAGE

Alger v. Commonwealth, 267 Va. 255, 590 S.E.2d 563 (2004) 3, 4

de Haan v. de Haan, 54 Va. App. 428, 680 S.E.2d 297 (2009) 1, 2

Statutes

Va. Code Ann. § 8.01-670 (Michie 2015) 1

Va. Code Ann. § 19.2-169.2 (Michie 2014) 2

Va. Code Ann. § 19.2-169.3 (Michie 2014) . . . . . *passim*

AUTHORITIES AND ARGUMENT

I. This Court does have jurisdiction over this case.

As the Commonwealth corrected noted in its brief, this Court must decide for itself whether it has jurisdiction. Commonwealth's Brief at 9. The trial court specifically found that the November 2, 2017 Order was appealable to this Court pursuant to Virginia Code § 8.01-670(A)(3). It is the correctness of the trial court's ruling that is to be reviewed on appeal, not the arguments made by Martinez in the trial court in support of his position.

The Commonwealth argues that the Order from which Martinez took his appeal is not a final order. "[A] final order is one which disposes of the whole subject, gives all the relief contemplated, provides with reasonable completeness for giving effect to the sentence, and leaves nothing to be done in the cause save to superintend ministerially the execution of the order." de Haan v. de Haan, 54 Va. App. 428, 680 S.E.2d 297 (2009) (internal quotation marks and citations omitted). "An interlocutory order adjudicating the principles of a cause must determine the rights of the parties and would of necessity affect the final order in the case." de Haan, 54 Va. App. at 439, 680 S.E.2d at 203 (internal quotation marks and

citations omitted). Further, "the order must be one that adjudicates the underlying cause . . . [and] must address the chief object[s] of the suit." Id. (internal quotation marks and citations omitted).

If this Court accepts Martinez's argument that the commitment proceedings pursuant to Virginia Code § 19.2-169.3(F) are an ancillary civil proceeding, then it would be a final order. It would completely dispose of the issue of a defendant's competency and his need for commitment for restoration. There would be nothing remaining to be done in the ancillary civil proceeding. Counsel would be remiss not to point out that if this Court rejects Martinez's argument and finds that no appeal lies from Virginia Code § 19.2-169.3(F), it would leave Martinez in the position of being held for perpetuity.

II. The trial court erred when it found that attempts to educate the Defendant in sign language constituted "medically appropriate" treatment as required by Virginia Code § 19.2-169.3(F)(iii) because sign language education is not "medical" treatment.

The Commonwealth's argument indicating that neither Virginia Code § 19.2-169.3(F) nor § 19.2-169.2(A) require the treatment to be medical in nature ignores Virginia Code § 19.2-169.3(F)(iii). Virginia Code § 19.2-169.3(F)(iii) requires the trial court to make a finding that the "continued

treatment to be medically appropriate." If the treatment is not contemplated to be medical in nature, it would not need to be "medically appropriate." Otherwise, the statute would have read "continued treatment to be appropriate." This Court is required to "assume that the legislature chose, with care, the words it used when it enacted the relevant statute." Alger v. Commonwealth, 267 Va. 255, 261, 590 S.E.2d 563, 566 (2004) (internal quotation marks and citation omitted).

Regarding the Commonwealth's argument concerning the contemporaneous objection about the nature of the treatment, the requirement that the continued treatment be "medically appropriate" appears only in Virginia Code § 19.2-169.3(F)(iii) which only comes into play once a capital murder defendant is deemed to be unrestorably incompetent. Additionally, counsel would remind the Court that at this point, Martinez is not receiving any sign language education at all. (J.A. 912-913). Such efforts ceased when Martinez was deemed to be unrestorable. (J.A. 912-913).

III. Even assuming *arguendo* that attempts to educate the Defendant in sign language were properly considered "medical" treatment, the trial court erred when it found that further attempts to educate Defendant in sign language were medically appropriate under Virginia Code § 19.2-169.3(F) as the Defendant had been held for over ten (10) years with virtually no improvement and he had plateaued.

The Commonwealth's argument asks that this Court read Virginia Code § 19.2-169.3(F)(iii) in a manner other than how it is drafted. The rules of statutory construction prohibit this Court from doing so. Virginia Code § 19.2-169.3(F)(iii) specifically requires a finding that the "continued treatment to be medically appropriate." The Commonwealth is asking the Court to read it as requiring that "the treatment is not medically inappropriate." As noted above, this Court is required to "assume that the legislature chose, with care, the words it used when it enacted the relevant statute." Alger, 267 Va. at 261, 590 S.E.2d at 566 (internal quotation marks and citation omitted).

CONCLUSION

For the reasons stated above, and those set forth in the Appellant's Opening Brief, the Appellant, Oswaldo Elias Martinez, asks this Honorable Court to conclude as follows:

That an appeal from a commitment order pursuant to Virginia Code §

19.2-169.3(F) is civil in nature and to sustain the jurisdiction of this Court in this case. Alternatively, if the Court finds that it does not have jurisdiction to hear this matter, to transfer this appeal to the Court of Appeals of Virginia pursuant to Virginia Code § 8.01-677.1 for further proceedings.

That the trial court erred when it found (1) that attempts to educate the Defendant in sign language constituted "medically appropriate" treatment as required by Virginia Code § 19.2-169.3(F)(iii) because education in sign language is not "medical" treatment and (2) that, even assuming *arguendo* the attempts to educate the Defendant in sign language were properly considered "medical" treatment, further attempts to educate Defendant in sign language is not medically appropriate under Virginia Code § 19.2-169.3(F) as the Defendant has been held for over ten (10) years with virtually no improvement and he has plateaued.

The Appellant respectfully requests the trial court's decision on November 2, 2017 authorizing the continued detention of Martinez to attempt restoration to competency be reversed and the indictments be dismissed.[1]

---

[1] There is an active detainer lodged against Martinez. If the indictments herein are dismissed, Martinez would be transferred to the custody of U.S. Immigration and Customs Enforcement. (J.A. 497).

Respectfully submitted,
OSWALDO ELIAS MARTINEZ

By: /s/ Lisa A. Mallory
Of Counsel

Timothy G. Clancy (V.S.B. # 25117)
Lisa A. Mallory (V.S.B. #41676)
CLANCY & WALTER, P.L.L.C.
544 Settlers Landing Road
Hampton, Virginia 23669
(757) 826-5000
(757) 826-5936 (FAX)
tclancy@clancywalterlaw.com
lmallory@clancywalterlaw.com

CERTIFICATE

I, Lisa A. Mallory, do hereby certify that Rule 5:26(e) of the Rules of the Supreme Court of Virginia has been complied with this 10th day of September, 2018 and pursuant to said Rule, a PDF version of this brief has been filed through VACES and three (3) paper copies delivered to the Clerk's Office of the Supreme Court of Virginia. Further, on this 10th day of September, 2018, an electronic version has also been delivered to opposing counsel via email to the following address:

Matthew P. Dullaghan, Esquire
Office of the Attorney General
202 North Ninth Street
Richmond, Virginia 23219
oagcriminallitigation@oag.state.va.us

/s/ Lisa A. Mallory
Lisa A. Mallory