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IN THE

# Supreme Court of Virginia

**RECORD NO. 180179**

OSWALDO ELIAS MARTINEZ,

*Appellant,*

v.

COMMONWEALTH OF VIRGINIA,

*Appellee.*

## OPENING BRIEF OF APPELLANT

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## STATEMENT OF THE CASE

I. Material Proceedings Below.

On May 19, 2005 the Appellant, OSWALDO ELIAS MARTINEZ (hereinafter "Martinez" or "Defendant"), was directly indicted by the Grand Jury in and for the City of Williamsburg/James City County on five (5) separate indictments. These indictments charged Martinez with the following crimes committed on or about January 2, 2005: Capital Murder - Rape in violation of Virginia Code §18.2-31, Capital Murder - Robbery in violation of Virginia Code §18.2-31, Robbery in violation of Virginia Code §18.2-58, Rape in violation of Virginia Code §18.2-61 and Forcible Sodomy in violation of Virginia Code §18.2-67.1.

Prior to the above-described indictments being issued, Martinez had been arrested on February 18, 2005 upon arrest warrants issued for the same crimes. It was apparent at the outset that the Defendant, who is a deaf-mute from El Salvador, had obvious language deficiencies and his ability to communicate was severely compromised. Accordingly, defense counsel moved for a forensic evaluation soon after his arrest. On April 5, 2005, forensic psychologists at Gallaudet University were appointed by the Williamsburg/James City County Juvenile and Domestic Relations District

Court to evaluate Defendant's competency to stand trial. On May 18, 2005, a report was issued by Dr. Corbett of Gallaudet University, finding the Defendant incompetent to stand trial "due to severe deficits in expressive and receptive language."

On June 9, 2005, after the indictments had been issued, the Williamsburg/James City County Circuit Court ("Circuit Court") entered an Order referring Martinez to the Commissioner of the Department of Mental Health, Mental Retardation and Substance Abuse Services for another evaluation of his competency to stand trial. On July 13, 2005 Dr. Barbara Haskins issued a report finding Martinez not competent to stand trial. Since that date and time, biannual evaluations have been performed upon Defendant. For the next eight (8) years at each 6-month review hearing, the Circuit Court found that Martinez was incompetent to stand trial, that he could be treated to restore his competency in the foreseeable future and directing his continued hospitalization to attempt to restore his competency.

On June 19, 2013, the Circuit Court entered an Order dismissing all non-capital charges pursuant to Virginia Code § 19.2-169.3(D), leaving Martinez

with two (2) counts of capital murder pending.[1] On September 19, 2013, the Circuit Court entered an Order finding Martinez incompetent to stand trial and likely to remain so for the foreseeable future. The same Order also referred the matter to the Virginia Attorney General's Office to determine whether Martinez should be civilly committed as a sexually violent predator, pursuant to Virginia Code, § 37.2-900. By letter dated April 21, 2014, the Attorney General's Office declined to file a Petition for Civil Commitment, and this matter was referred back to the Circuit Court. By Amended Order, dated December 13, 2014, the Circuit Court found Martinez was ineligible for commitment pursuant to Article 5 (§37.2-814 et seq.) of Chapter 8 of Title 37.2 (involuntary commitment of a person with a psychiatric condition), and certification pursuant to §37.2-806 (judicial certification of eligibility for admission of persons with intellectual disability). Because Martinez is an incompetent defendant charged with capital murder Virginia Code § 19.2-169.3(F) became applicable to the case. At each six-month review hearing from September 19, 2013 to November 2, 2017 the Circuit Court found that (i) Martinez remains incompetent to stand trial (ii) continued treatment is

[1] The Commonwealth agreed not to seek the death penalty if Martinez is convicted of capital murder. (J.A. 88).

medically appropriate, and (iii) Martinez presents a danger to himself or others and ordered Martinez detained for additional treatment to restore him to competency.

On May 26, 2015, defense counsel filed a Memorandum of Law regarding Virginia Code § 19.2-169.3(F)(iii) in which it was argued (1) the treatment Martinez was receiving was not medical in nature and (2) that even if the treatment was considered medical in nature it was not medically appropriate under Virginia Code § 19.2-169.3(F). Defense counsel also filed an initial Motion to Dismiss on April 29, 2016. Following consideration of evidence presented at hearings on November 3, 2014, May 26, 2015, April 12, 2016 and April 29, 2016 as well as the foregoing pleadings, the Honorable William H. Shaw, Judge Designate, denied the Motion by letter opinion dated May 17, 2016 and Order entered July 16, 2016. On November 4, 2016 defense counsel filed a Second Motion to Dismiss with a Memorandum in Support thereof arguing that Virginia Code § 19.2-169.3(F) was unconstitutional as it violated Martinez's rights to Due Process, Equal Protection and a Speedy Trial. The Circuit Court issued a letter opinion on March 24, 2017 denying the Second Motion to Dismiss. On April 17, 2017, defense counsel filed a Motion and Memorandum to Reconsider the Denial

of the Defendant's Second Motion to Dismiss arguing that Virginia Code § 19.2-169.3(F) violates the Equal Protection Clause of the Fourteenth Amendment because it does not contain the right for a defendant, such as Martinez, who has been found incompetent to stand trial to seek direct appellate review of the trial court's decision. The Circuit Court issued a letter opinion dated August 23, 2017 denying Defendant's Motion for Reconsideration and specifically finding that Martinez could note an appeal pursuant to Virginia Code § 8.01-670(A)(3). The Order memorializing the August 23, 2017 letter opinion was entered on November 2, 2017.

The Circuit Court also conducted the required six-month review hearing on November 2, 2017 and again found that Martinez met the criteria of Virginia Code § 19.2-169.3(F) for continued treatment and ordered Martinez detained for additional treatment to restore him to competency. Consistent with the Circuit Court's August 23, 2017 letter opinion finding that an appeal could be noted pursuant to Virginia Code § 8.01-670(A)(3), Martinez timely noted an appeal from this November 2, 2017 Order.

## II. Statement of Facts.

On January 3, 2005 the body of Brittany Binger was discovered in James City County, Virginia. (J.A. 707-708). After investigation by the James

City County Police Department, Martinez was arrested on February 18, 2005. (J.A. 733). Upon his arrest, it was learned Martinez was a deaf/mute from El Salvador. (J.A. 721-722). Based upon obvious language challenges, counsel for Defendant requested a forensic evaluation of Defendant. On April 5, 2005, Dr. Carolyn Corbett, a psychologist at Gallaudet University specializing in the forensic assessment of deaf persons, was appointed by the Williamsburg/James City County Juvenile and Domestic Relations District Court to evaluate Martinez's competency to stand trial and make recommendations for treatment if the Defendant was deemed incompetent. (J.A. 1-2).

Dr. Corbett's evaluation found Martinez "not competent for trial because he cannot be made to understand the nature of the charges against him" or assist his lawyer in his defense. (J.A. 14-15). The evaluation concluded that Martinez was "incompetent to stand trial due to severe deficits in expressive and receptive language." (J.A. 15). Dr. Corbett recommended Martinez be referred to a "program that can provide him with total immersion in American Sign Language and build on his currently severely limited manual communication skills." (J.A. 15). She also recommended that Martinez be reevaluated in two years to determine if he had made sufficient improvements

in language functioning so as to be found competent to stand trial. (J.A. 15).

On May 19, 2005, Martinez was directly indicted by a Grand Jury sitting in Williamsburg/James City County in connection with Brittany Binger's death. (J.A. 3-4). Thereafter, on June 9, 2005 the Circuit Court entered an Order referring Martinez to the Commissioner of the Department of Mental Health, Mental Retardation and Substance Abuse Services for another evaluation of his competency to stand trial. (J.A. 16).

Martinez's second evaluation for competency to stand trial was performed by Dr. Barbara Haskins, who is proficient in American Sign Language and works with deaf patients at Western State Hospital, and included an assessment of Martinez's hearing. (J.A. 17-18). Like Dr. Corbett, Dr. Haskins also found Martinez not competent to stand trial because he was not able to adequately and reliably assist in his own defense." (J.A. 28). The audiological findings confirmed that Martinez suffered "severe to profound sensorineural hearing loss in the right ear and profound sensorineural loss in the left ear." (J.A. 24).

As the case proceeded, it was determined that Dr. Corbett at Gallaudet University would be an expert for the defense, and Dr. Haskins of Western State Hospital would be an expert for the Commonwealth. (J.A. 21). Both

Drs. Corbett and Haskins recommended Martinez be held at the Mental Health Center for the Deaf at Western State Hospital[2] because it was the only state setting to offer the "forensic and linguistic elements which are required" to attempt to restore him to competency. (J.A. 15, 28). In this facility, Martinez would be exposed to American Sign Language on a daily basis. (J.A. 15). American Sign Language is a formal language. (J.A. 615-617). It has rules of grammar, syntax and vocabulary. (J.A. 615-617). It requires use of facial expressions. (J.A. 616-617). The location on the body where certain signs are made has meaning and is used to communicate different things. (J.A. 615-617). An extremely important part of American Sign Language is the use of time. (J.A. 624). There are actions to express what time period the "speaker" is talking about. (J.A. 624).

Both Drs. Corbett and Haskins agreed that it was possible that Martinez might not ever make significant gains. (J.A. 15, 31). As Dr. Haskins noted "[a] major obstacle to successful restoration is whether or not the language deprived deaf person's brain can operationalize enough 'software' to program the linguistic information he is now receiving." (J.A. 31). She

[2] Western State Hospital is a minimum security facility that in 2005 had a unit devoted to deaf patients. (J.A. 521).

explained that "[e]xperts opine there may well be a 'window' for this to occur." (J.A. 31). She further reported that "[i]ndividuals who are not exposed to meaningful language systems until adulthood . . . may **never** learn the rules of grammar which allow them to express ideas in a way any observer can find comprehensible." (J.A. 31) (emphasis added). Dr. Haskins further noted that "[a]t this time it is impossible to say how much his language and knowledge repertoires can be expanded." (J.A. 28).

Following Dr. Haskins' initial evaluation, the Circuit Court found Martinez incompetent to stand trial and found that Martinez required inpatient treatment at a hospital to be designated by the Commissioner of the Department of Mental Health, Mental Retardation and Substance Abuse Services. (J.A. 30). Over the next seven (7) years, Martinez would be the subject of an additional fourteen (14) evaluations detailing the restorative efforts he had undergone since the last evaluation, his current level of function, the evaluator's opinion that he was incompetent to stand trial and recommendations for treatment. (J.A. 31-35, 38-43, 46-52, 76-81, 84-85B, 89-91, 112-115; J.A. 56-70, 94-111, 130-141; J.A. 118-125, 144-154, 916-923, 157-169). None of these evaluations ever mentioned that Martinez was diagnosed with a major mental illness or intellectual disability or that medication, other than antidepressants,

was being administered to treat him. (J.A. 31-35, 38-43, 46-52, 76-81, 84-85B, 89-91, 112-115; J.A. 56-70, 94-111, 130-141; J.A. 118-125, 916-923, 144-154, 157-169). Instead, they discussed only his deafness, lack of reliable formal language system, sign language abilities as well as efforts to educate him and recommendations for additional education in sign language and language building. (J.A. 31-35, 38-43, 46-52, 76-81, 84-85B, 89-91, 112-115; J.A. 56-70, 94-111, 130-141; J.A. 118-125, 916-923, 144-154, 157-169). Consistent with the evaluations, the Circuit Court entered an Order after each six-month review hearing confirming Martinez's incompetency to stand trial, finding he could be treated to restore his competency in the foreseeable future and directing his continued hospitalization to attempt to restore his competency. (J.A. 36-37, 44-45, 53-54, 71-72, 82-83, 86-87, 92-93, 116-117, 126-127, 128-129, 142).

Consistent with the evaluators' recommendations, Martinez was initially placed at Western State Hospital, arriving on October 18, 2005. (J.A. 31, 39). Martinez remained there for approximately two years during which time the staff from the deaf unit at Western State Hospital[3] regularly met with him in an

[3] There is no longer a deaf unit at Western State Hospital. (J.A. 607-609, 741).

attempt to educate him in sign language and to teach him legal concepts. (J.A. 31-32, 38-39, 46-49). Both staff and contract interpreters worked with Martinez daily for multiple hours a day. (J.A. 33, 38-39). This enabled Martinez to make some language-related gains. (J.A. 32, 39-40, 42, 48).

On August 24, 2007, Martinez left Western State Hospital and was transferred to the Virginia Peninsula Regional Jail where he was continuously held until April 2, 2009. (J.A. 540, 542, 566). This was a result of Dr. Haskins' finding that Martinez had "achieved maximum benefit from the language immersion program at [Western State Hospital]" and recommended he be sent to Central State Hospital or a local jail. (J.A. 51).

Martinez underwent a second evaluation by Dr. Corbett during his detention at the Virginia Peninsula Regional Jail. (J.A. 55-57). Dr. Corbett found that Martinez's cognitive functioning was in the "Deficient range, indicating significant and severe cognitive deficits." (J.A. 63). Martinez was noted to use "American Sign Language only 25% of the time and visual-gestural communication 75% of the time." (J.A. 64). Dr. Corbett explained that "[w]hen using visual-gestural communication (gesture and pantomime), speculation on the part of the listener was required, and thus, there was a

very high margin for misunderstanding of Mr. Martinez's communication." (J.A. 64). She further noted that "Mr. Martinez's ability to misunderstand others is also high." (J.A. 64). In her summary of findings, Dr. Corbett noted that Martinez's language skills indicated his "receptive sign language vocabulary is consistent with an individual who is 4 years, 8 months old." (J.A. 67-68). Her report also noted that Martinez was the only deaf resident at the Virginia Peninsula Regional Jail and that his "sign language training would deteriorate" from a lack of use if he was to continue to be isolated from other deaf people. (J.A. 68).

Consistent with the foregoing, after making the necessary findings for additional restorative efforts, the Circuit Court entered an Order on June 16, 2008 requiring Martinez to be returned to a hospital designated by the Commissioner of the Mental Health, Mental Retardation and Substance Abuse Services. (J.A. 71-72). Due to security concerns related to housing a capital murder defendant at the less-secure facility at Western State Hospital, it was subsequently determined by the Commissioner to house Martinez at Central State Hospital. (J.A. 567, 740-741, 924A). Martinez was transferred to Central State Hospital on or about April 3, 2009. (J.A. 73-75).

Once Martinez was housed at Central State Hospital efforts to

restore him to competency by enhancing his communication skills resumed; however, these efforts were less concentrated than they had been at Western State Hospital and were for fewer number of hours. (J.A. 84-85, 90). Central State Hospital retained two interpreters to teach American Sign Language to both Martinez and the staff at the hospital. (J.A. 558-562). However, neither one of the interpreters spent significant time with Martinez. One was available only on weekends and focused on teaching the Central State Hospital staff how to communicate with Martinez. (J.A. 558-560). The other one was working only twenty (20) hours per week, and she was not spending "a lot of time doing one to one teaching with Martinez." (J.A. 77).

In 2011, after approximately five (5) years of treatment, Martinez was still using "American Sign Language only 25% of the time, and visual-gestural communication 75% of the time." (J.A. 106). He still had "extremely limited communication skills" and would not be able to assist his attorney in his defense. (J.A. 109). Dr. Corbett found that "[a]fter five years, Mr. Martinez has made some gains in acquiring individual signs but minimal gains in learning to understand and use ASL grammar and syntax; therefore, it is the examiner's opinion that he has no language foundation on which to build these skills." (J.A. 111). Accordingly, she opined that Martinez "has reached

his maximum level of sign language skill development." (J.A. 111). Finally, she opined that "even with continued instruction, he would not be able to obtain the level of language competency needed for competency to stand trial." (J.A. 111). Dr. Corbett's January 31, 2013 evaluation reached identical conclusions. (J.A. 136, 139-141). Dr. Corbett explained that part of the reason Martinez will, in her opinion, **never** be competent to stand trial is because he does not have a first language. (J.A. 636-637). She explained that even as an adult a person can learn American Sign Language, although not fluently, if he/she has a first language. (J.A. 636). This is because the person has an understanding of grammar and rules which he/she can then use to apply with American Sign Language. (J.A. 636). She confirmed that in this case, the actions with Martinez are not really an attempt to restore him; rather, they are trying to create something that never existed. (J.A. 644). Despite Dr. Corbett's reports and testimony, the Circuit Court entered an Order on February 12, 2013 finding that Martinez was incompetent to stand trial, finding continued treatment medically appropriate and directing that he undergo further treatment in an attempt to restore him to competency. (J.A. 142).

Pursuant to Virginia Code § 19.2-169.3(D), an Order was entered on

June 19, 2013 dismissing the charges of robbery, rape and forcible sodomy as Martinez had been arrested in 2005 and more than five (5) years had lapsed without him being restored to competency. (J.A. 155).

Finally, on July 17, 2013, the evaluators at Central State Hospital agreed with Dr. Corbett and found Martinez to be unrestorably incompetent. (J.A. 169). The evaluators noted that despite all the sign language training Martinez had undergone over the past eight years, he "continues to exhibit difficulty in effectively communicating even with considerable prompting by his interpreter." (J.A. 165). The evaluators specifically noted that it appeared to them that Martinez's "language acquisition has plateaued, with minimal improvements made in his ability to convey competency related materials since at least July 2012." (J.A. 165). The evaluators also noted that Martinez "lacks an adequate understanding of basic legal information despite years of restoration. His understanding is superficial at best and lacks the depth of understanding necessary for a Capital Murder case." (J.A. 167). The evaluators concluded that "over the course of several years of attempted restoration and communication education, his progress has been minimal and appears to have plateaued." (J.A. 169). They opined that "[b]ecause of the lack of significant progress . . . it is not likely that he will be gain [sic] the

requisite communication skills to be considered competent to stand trial and plead in the foreseeable future." (J.A. 169).

An evidentiary hearing was held on September 19, 2013 which confirmed the findings of the July 17, 2013 report. (J.A. 172-174). Thereafter, the Circuit Court entered an Order finding that Martinez was incompetent to stand trial and was likely to remain incompetent for the foreseeable future. (J.A. 170-171). Once these findings were made, the Circuit Court then began evaluating the four disposition options pursuant to Virginia Code § 19.2-169.3(A). Accordingly, the Circuit Court referred the matter to the Virginia Attorney General's Office to determine whether they would pursue a civil commitment of Martinez as a sexually violent predator under § 37.2-900 et seq. (J.A. 170-171). By letter dated April 21, 2014, the Attorney General's Office declined to file a petition for civil commitment of Martinez and referred the matter back to the Circuit Court. (J.A. 172). The Circuit Court, next considered commitment pursuant to Article 5 (§ 37.2-814 et seq.) of Chapter 8 of Title 37.2 (involuntary commitment of a person with a psychiatric condition), and certification pursuant to § 37.2-806 (judicial certification of eligibility for admission of persons with intellectual disability). By Amended Order dated December 13, 2014, the Circuit Court found that

Martinez was ineligible for both of those disposition options. (J.A. 172-173). This left release as the only other option under Virginia Code § 19.2-169.3(A). However, since Martinez is charged with capital murder, the Court was required to consider Virginia Code § 19.2-169.3(F).

Following the Circuit Court's finding that Martinez was unrestorably incompetent to stand trial, Martinez has been the subject of at least six (6) reports to the Court. (J.A. 175-178, 244-245, 925-926, 256-257, 928-929, 496-497). Each of these evaluations indicated that Martinez continued to demonstrate communication deficits that render him not competent to stand trial. (J.A. 175-178, 244-245, 925-926, 256-257, 928-929, 496-497). As with all of the evaluations prior to September 19, 2013, none of the evaluation reports reflect that he carries a diagnosis of a major mental illness or intellectual disability. (J.A. 175-178, 244-245, 925-926, 256-257, 928-929, 496-497). To the contrary, Martinez was noted to remain psychiatrically stable which is consistent with the fact that his attending psychiatrist did not prescribe any psychiatric medications for Martinez. (J.A. 175-178, 244-245, 925-926, 256-257, 928-929, 496-497). In fact, the only medication that was

ever noted to be administered to Martinez was Mirtazapine (Remeron)[4] which is an antidepressant medication and helps with anxiety, insomnia and dwelling types of thoughts. (J.A. 925-926). His primary diagnosis was an antisocial personality disorder and intellectual disability, mild. (J.A. 925-926).

Following the finding that Martinez was unrestorable, efforts at providing additional sign language education to Martinez ceased. (J.A. 912-913). Only one professional sign language interpreter worked with Martinez, and he communicated with Martinez from one to three hours per month solely to facilitate communications between Martinez and the staff at Central State Hospital. (J.A. 912-913). The interpreter did nothing to teach American Sign Language to Martinez. (J.A. 912-913).

## QUESTION DIRECTED BY THE COURT

I. Does the Court have jurisdiction over this case?

## ASSIGNMENTS OF ERROR

I. 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)

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[4] Martinez was also prescribed aripiprirazole (Abilify), an antipsychotic medication, to help with racing thoughts, depressive mood and dwelling ideas for approximately one month following a suicide attempt. (J.A. 926).

because sign language education is not "medical" treatment. (J.A. 179-209, 246-249, 250-251, 252-253, 254-255).

II. 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. (J.A. 179-209, 246-249, 250-251, 252-253, 254-255).

## AUTHORITIES AND ARGUMENT

I. This Court does have jurisdiction over this case.

A. Standard of Review.

"Subject matter jurisdiction 'is the authority granted through constitution or statute to adjudicate a class of cases or controversies.'" Gray v. Binder, 294 Va. 268, __, 805 S.E.2d 768, 771 (2017) (quoting Morrison v. Bestler, 239 Va. 166, 169, 387 S.E.2d 753, 755 (1990)); see also Porter v. Commonwealth, 276 Va. 203, 228, 661 S.E.2d 415, 426 (2008), cert. denied, 556 U.S. 1189 (2009). "A challenge to subject matter jurisdiction presents a question of law that [is] reviewed de novo." Gray, 294 at __, 805 S.E.2d at 771. A court always has jurisdiction to determine whether it has subject matter jurisdiction; however, a judgment on the merits made without subject matter jurisdiction is null and void. Morrison, 239 Va. at 169, 387 S.E.2d at

755-56 (citation omitted). "[T]he lack of subject matter jurisdiction can be raised at any time in the proceedings, even for the first time on appeal by the court sua sponte." Morrison, 239 Va. at 169, 387 S.E.2d at 756.

B. Argument.

In this case, the Defendant is currently being detained pursuant to Virginia Code § 19.2-169.3(F). Virginia Code § 19.2-169.3(F) does not contain the right for a defendant, such as Martinez, who has been found incompetent to stand trial to seek direct appellate review of the trial court's decision. The issues therefore become the following: (1) does appellate review for detention under Virginia Code § 19.2-169.3(F) exist at all and (2) if it does, is the appeal civil in nature so that jurisdiction lies with the Virginia Supreme or is it criminal in nature such that the appeal would lie with the Court of Appeals of Virginia. Defendant Martinez filed a Motion and Memorandum to Reconsider the Denial of the Defendant's Second Motion to Dismiss alleging the legislature's failure to include a right of appeal in Virginia Code § 19.2-169.3(F) violates the Equal Protection Clause of the Fourteenth Amendment. (J.A. 463-468). In overruling the Defendant's Motion, the trial court ruled that the commitment order herein is appealable to the Virginia Supreme Court pursuant to Virginia Code § 8.01-670(A)(3). (J.A. 502-503).

Paragraph 2 of Article VI, Section 1, of the Constitution of Virginia provides as follows:

> The Supreme Court shall, by virtue of this Constitution, have original jurisdiction in cases of habeas corpus, mandamus, and prohibition; to consider claims of actual innocence presented by convicted felons in such cases and in such manner as may be provided by the General Assembly; in matters of judicial censure, retirement, and removal under Section 10 of this Article, and to answer questions of state law certified by a court of the United States or the highest appellate court of any other state. All other jurisdiction of the Supreme Court shall be appellate. Subject to such reasonable rules as may be prescribed as to the course of appeals and other procedural matters, the Supreme Court shall, by virtue of this Constitution, have appellate jurisdiction in cases involving the constitutionality of a law under this Constitution or the Constitution of the United States and in cases involving the life or liberty of any person.

Va. Constitution Art. 6 § 1 (2002). Additionally, paragraph 4 of Article VI, Section 1, of the Constitution of Virginia provides that "[s]ubject to the foregoing limitations, the General Assembly shall have the power to determine the original and appellate jurisdiction of the courts of the Commonwealth." Va. Constitution Art. 6 § 1 (2002).

Virginia Code § 8.01-670 sets forth this Court's subject matter jurisdiction in civil appeals. At issue herein is Virginia Code § 8.01-670(A)(3) which provides "[e]xcept as provided by § 17.1.405, any person may present

a petition for appeal to the Supreme Court if he believes himself aggrieved: By a final judgment in any other civil case." Virginia Code § 17.1-406 sets forth the Court of Appeal's subject matter jurisdiction in criminal cases. "The Court of Appeals of Virginia is a court of limited jurisdiction." Lewis v. Lewis, 271 Va. 520, 524, 628 S.E.2d 314, 316 (2006). "Unless a statute confers subject matter jurisdiction to that court over a class of appeals, the Court of Appeals is without authority to review an appeal." Id. at 316-17, 628 S.E.2d at 316.

In Commonwealth v. Southerly, 262 Va. 294, 551 S.E.2d 650 (2001) and Green v. Commonwealth, 263 Va. 191, 557 S.E.2d 230 (2002) this Court differentiated between appeals that are criminal in nature and ones that are civil in nature. In doing so, the Court stated, "[n]aturally, if the underlying charge is civil in nature, the appeal is also civil in nature. This is not to say that if the underlying charge is criminal in nature, the appeal is automatically criminal in nature." Southerly, 262 Va. at 298-99, 551 S.E.2d at 652. This Court held that

> [r]ather, it is the nature of the method employed to seek relief from a criminal conviction and the circumstances under which the method is employed that determine whether an appeal is civil or criminal in nature. If the method consists of an appeal from the conviction itself or from action on motions filed and disposed of while the trial court retains jurisdiction over the case, the appeal

is criminal in nature.

Id.

Virginia Code § 17.1-406(A) provides that "[a]ny aggrieved party may present a petition for appeal to the Court of Appeals from (i) any final conviction in a circuit court of a traffic infraction or a crime, except where a sentence of death has been imposed." This Court ruled that the foregoing language was "restrictive" and limited the "Court of Appeals' appellate jurisdiction to appeals from final criminal convictions and from action on motions filed and disposed of while the trial court retains jurisdiction over the case." Southerly, 262 Va. at 299, 551 S.E.2d at 652; see also Green, 263 Va. at 194, 557 S.E.2d at 232. In so holding the Southerly Court reasoned that cases that meet the foregoing criteria were "purely criminal in nature" and were a continuation of the criminal prosecution. Southerly, at 298-299, 551 S.E.2d at 653.

Accordingly, the Southerly Court found that a motion to vacate attacking criminal convictions based on the circuit court's jurisdiction that was filed seven years after the convictions when the circuit court no longer had jurisdiction over the case was civil in nature. Southerly, 262 Va. at 299, 551 S.E.2d at 653. Similarly, in Green, this Court found that while a probation

revocation hearing was not a stage of a criminal prosecution, it was nonetheless a criminal proceeding which vested jurisdiction with the Court of Appeals when the proceeding was brought in compliance with Virginia Code § 19.2-306. Green, 263 Va. at 195-96, 557 S.E.2d at 233.

Finally, in Daily Press, Inc. v. Commonwealth, 285 Va. 447, 739 S.E.2d 636 (2013), this Court accepted an appeal transferred from the Court of Appeals pursuant to Virginia Code § 8.01-677.1 after the Court of Appeals held that a trial court's decision to seal a portion of the court's file from public inspection was civil in nature despite the fact that the underlying case was criminal in nature. In its opinion, the Court of Appeals held that the circuit court's decision to seal a portion of the court file "was neither a continuation of the criminal prosecution of [the defendant], nor a process that was purely criminal in nature." Daily Press, Inc. v. Commonwealth, 60 Va. App. 213, 222, 725 S.E.2d 737, 741 (2012).

It is the Defendant's position that the trial court's finding that he is incompetent to stand trial and the Order to continue to hold him for additional "medical treatment" pursuant to Virginia Code § 19.2-169.3(F) is civil in nature despite the fact that the underlying matter is a criminal case. Defendant would submit that the process involved is not a continuation of the criminal

prosecution nor is it purely criminal in nature. To the contrary, the issues involved in commitment pursuant to Virginia Code § 19.2-169.3(F) do not directly relate to the typical stages of a criminal prosecution in circuit court - indictment, arraignment, trial and sentencing. Instead, the issue is an ancillary one - whether the defendant is competent to stand trial.

Further, it is the Defendant's position that the hearing held pursuant to Virginia Code § 19.2-169.3(F) and the findings arising therefrom are not purely criminal in nature. To the contrary, it is akin to a civil trial within the criminal case. If it appears that the Defendant will need to be hospitalized, the trial court is required to conduct a hearing. Virginia Code § 19.2-169.1(E). "[T]he party alleging that the defendant is incompetent shall bear the burden of proving by a preponderance of the evidence the defendant's incompetency." Code § 19.2-169.1(E). Such evidence would include the information contained in the competency report and/or testimony as to the defendant's alleged medical and/or psychological condition and recommended medical treatment (or in this case his educational limitations and educational plan). In this case, because the Defendant is charged with capital offenses and has been found to be incompetent and likely to remain so for the foreseeable future, Virginia Code § 19.2-169.3(F) applies. Said

section requires the § 19.2-169.1(E) hearing to be held every six months and the trial court to make the findings that the defendant remains incompetent, that continued treatment is medically appropriate and that the defendant presents a danger to himself or others. Virginia Code § 19.2-169.3(F). There is nothing about the proceedings required by Virginia Code § 19.2-169.3(F) that is criminal in nature. Instead, these proceedings are more analogous to the commitment proceedings under Virginia's involuntary civil commitment statute contained in Virginia Code § 37.2-800 *et seq*. Thus, it is Defendant's position that jurisdiction to hear this appeal does lie with this Court pursuant to Virginia Code § 8.01-670(A)(3).

However, if this Honorable Court finds that it does not have jurisdiction to hear the appeal because jurisdiction lies with the Court of Appeals of Virginia, this Court is not required to dismiss the appeal but may transfer the appeal to the Court of Appeals of Virginia pursuant to Virginia Code § 8.01-677.1. Said code section provides "if an appeal is otherwise proper and timely but the appellate court in which it is filed rules it should have been filed in the other appellate court, the court so ruling shall transfer the appeal to the other court." Southerly, 262 Va. at 299, 551 S.E.2d at 653.

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.

A. Standard of Review.

Issues of statutory interpretation are pure questions of law which are reviewed *de novo*. Department of Corrections v. Surovell, 290 Va. 255, 776 S.E.2d 579 (2015); Eberhardt v. Fairfax Cnty. Emps. Ret. Sys., 283 Va. 190, 194, 721 S.E.2d 524, 526 (2012). The appellate court should "look to the words of the statute to determine its meaning, and [the appellate court should] consider the entire statute to 'place its terms in context.'" Id. The appellate court's duty is "to interpret the several parts of a statute as a consistent and harmonious whole so as to effectuate the legislative goal." VEPCO v. Board of Cnty. Supervisors, 226 Va. 382, 387-88, 309 S.E.2d 308, 311 (1983); REVI, LLC v. Chicago Title Insurance Co., 290 Va. 203, 776 S.E.2d 808 (2015).

B. Argument.

The law is well-settled that a criminal defendant cannot be tried unless he is competent. Godinez v. Moran, 509 U.S. 389, 396 (1993); Pate v. Robinson, 383 U.S. 375, 378 (1966). "[T]he standard for competence to stand trial is whether the defendant has 'sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding' and has

'a rational as well as factual understanding of the proceedings against him.'" Godinez, 509 U.S. at 396 (quoting Dusky v. United States, 362 U.S. 402, 402 (1960)); Orndorff v. Commonwealth, 45 Va. App. 822, 845, 613 S.E.2d 876, 887 (2005). As the Godinez court found, "[r]equiring that a criminal defendant be competent has a modest aim: It seeks to ensure that he has the capacity to understand the proceedings and to assist counsel." Godinez, 509 U.S. at 402.

In this case, the Defendant is currently being detained pursuant to Virginia Code § 19.2-169.3(F) which provides that

> [i]n any case when an **incompetent** defendant is charged with capital murder, notwithstanding any other provision of this section, the charge shall not be dismissed and the court having jurisdiction over the capital murder case may order that the defendant receive continued treatment under subsection A of § 19.2-169.2 for additional six-month periods without limitation, provided that (i) a hearing pursuant to subsection E of § 19.2-169.1 is held at the completion of each such period, (ii) the defendant remains incompetent, (iii) the court finds continued treatment to be medically appropriate, and (iv) the defendant presents a danger to himself or others.

Virginia Code § 19.2-169.3(F). (Emphasis added). It is the third prong - requiring continued treatment to be medically appropriate - that is the issue in this case. Virginia Code § 19.2-169.3(F) does not contain a definition of "medically appropriate". "Ordinarily, when a particular word in a statute is not

defined therein, a court must give it its ordinary meaning." Moyer v. Commonwealth, 33 Va. App. 8, 34-36, 531 S.E.2d 580, 593 (2000) (*en banc)*. "Medically" is an adverb of "medical" which is defined as "of or connected with medicine or the practice or study of medicine." Webster's New World College Dictionary 908 (5th ed. 2014). "Medicine" is defined as "(1) the science and art of diagnosing, treating, curing, and preventing disease, relieving pain, and improving and preserving health, (2) the branch of this science and art that makes use of drugs, diet, etc., as distinguished esp. from surgery and obstetrics. . . ." Webster's New World College Dictionary 908 (5th ed. 2014). See also Black's Law Dictionary 982 (6th ed. 1990) (defining "medical" as "pertaining, relating or belonging to the study and practice of medicine, or the science and art of the investigation, prevention, cure, and alleviation of disease."). "Sign language" is defined as "(1) communication of thoughts or ideas by means of manual signs and gestures, esp. between two people who have no language in common (2) a language used as by the deaf, consisting of a system of signs and gestures." Webster's New World College Dictionary 1352 (5th ed. 2014).

The term "medically appropriate" was defined in Sell v. United States, 539 U.S. 166, 181 (2003) as "in the patient's best medical interest in light of

his medical condition." In Sell, the Supreme Court was determining "whether the Constitution permits the Government to administer antipsychotic drugs involuntarily to a mentally ill criminal defendant - in order to render that defendant competent to stand trial for serious, but nonviolent, crimes." Id. at 169. In discussing medically appropriate treatment, the Supreme Court noted, "[d]ifferent kinds of antipsychotic drugs may produce different side effects and enjoy different levels of success." Id. at 181. Thus, in Sell, the Supreme Court was suggesting use of a balancing test to determine what was medically appropriate, i.e., does the side effects of the medicine outweigh the benefit of the level of success achieved by the medicine's administration.

In United States v. Evans, 404 F.3d 227 (4th Cir. 2005), another case addressing the medication of a mentally-ill defendant against his will to restore him to competency in order to try him, the Fourth Circuit discussed the "medically appropriate" prong of the Sell's test. In doing so, the Fourth Circuit held that in order to show its proposed treatment plan is medically appropriate

> the government must spell out why it proposed the particular course of treatment, . . . provide the estimated time the proposed treatment plan will take to restore the defendant's competence and the criteria it will apply when deciding when to discontinue the treatment, describe the plan's probable benefits and side effect risks for the defendant's particular medical condition . . .show how

> it will deal with the plan's possible side effects, and explain why, in its view, the benefits of the treatment plan outweigh the costs of its side effects.

Evans, 404 F.3d at 242 (footnotes omitted).

It is respectfully submitted that when the facts of this case are considered in light of the foregoing law, it becomes apparent that the treatment Martinez is receiving is not medical in nature at all. No evaluation of Martinez has ever reflected that he has been diagnosed with a major mental illness or intellectual disability. (J.A. 175-178, 244-245, 925-926, 256-257, 928-929, 496-497). He is also not prescribed any psychiatric medications. (J.A. 175-178, 244-245, 925-926, 256-257, 928-929, 496-497). On the contrary, Martinez was declared incompetent to stand trial, not because of a medical condition, but because of a language deficiency. In Dr. Corbett's first report issued on May 18, 2005, it was determined that Martinez was "incompetent to stand trial due to severe deficits in expressive and receptive language." (J.A. 15, 922). Likewise, Dr. Haskins, the Commonwealth's expert, determined Martinez was incompetent to stand trial. (J.A. 28). While Dr. Haskins did not specify the nature of the condition causing the incompetence, her report made only recommendations for expanding Martinez's language repertoire. (J.A. 28). In fact, the only

recommendations that have ever been made to attempt to restore Martinez to competency have centered around providing him with language training and education. (J.A. 31-35, 38-43, 46-52, 76-81, 84-85B, 89-91, 112-115, 56-70, 94-111, 130-141, 118-125, 916-923, 144-154, 157-169). Moreover, Martinez's evaluators properly characterized all the past efforts to restore his competency as sign language training. (J.A. 31-35, 38-43, 46-52, 76-81, 84-85B, 89-91, 112-115, 56-70, 94-111, 130-141, 118-125, 916-923, 144-154, 157-169). Teaching sign language is not medical treatment. It in no way relates to diagnosing, treating, curing, or preventing disease, relieving pain, or improving and preserving health. The individuals teaching are not required to hold medical degrees nor are they directly supervised by a licensed medical doctor.

An examination of Virginia Code § 19.2-169.3 clearly reveals the legislature never envisioned a situation where an individual would be declared incompetent to stand trial in which the person did not have a mental disease or defect necessitating psychiatric treatment from a licensed medical provider. The statute does not apply to a person whose sole defect is a language barrier caused by deafness and a lack of proper sign language education

when he was a child.[5] Virginia Code § 19.2-169.3 simply does not cover Martinez's situation. In summary, the Defendant does not have a medical problem causing his incompetency and further treatment of him is not "medically appropriate" because the treatment being rendered is not medical in nature. Providing sign language training can only be described as educational in nature. Moreover, the attempts to restore him are completely hopeless as all evaluators agree that he has had minimal improvements with ten (10) years of treatment and has plateaued.

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.

A. Standard of Review.

The standard of review applicable to this Assignment of Error is the same as the standard of review set forth above under Assignment of Error I,

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[5] As Dr. Haskins noted, "[i]ndividuals who are not exposed to meaningful language systems until adulthood . . . may **never** learn the rules of grammar which allow them to express ideas in a way any observer can find comprehensible." (J.A. 31) (emphasis added). This concern was also expressed by Dr. Corbett who opined Martinez may not be able to "make significant gains" due to his "age and cognitive limitations." (J.A. 15).

and said content is incorporated herein by reference as if fully set forth herein.

B. Argument.

As indicated above, there is a dearth of law interpreting the term "medically appropriate." The law that does exist is from federal proceedings. As noted above, the Fourth Circuit has created guidelines to assist the trial court in deciding what treatment is medically appropriate. See Evans, 404 F.3d at 242.

It is respectfully submitted that applying the Evans' test to this case demonstrates that the treatment of Martinez is not medically appropriate. Under the facts of this case, *inter alia,* the Commonwealth cannot provide an estimated time the continued attempts at increasing Martinez's language repertoire will take to restore him to competence. In fact, both the Commonwealth's and defense experts agree that not only can Martinez's competency not be restored in the foreseeable future but that he has "plateaued" and is **incapable** of ever achieving competence. (J.A. 636, 165).

Dr. Corbett explained that part of the reason Martinez will, in her opinion, **never** be competent to stand trial is because he does not have a first language. (J.A. 636). She explained that even as an adult a person can learn American Sign Language, although not fluently, if he/she has a first

language. (J.A. 636). This is because the person has an understanding of grammar and rules which he/she can then use to apply with American Sign Language. (J.A. 636). She confirmed that in this case, the actions with Martinez are not really an attempt to restore him; rather, they are trying to create something that never existed. (J.A. 644). This Defendant has been held since February 18, 2005. (J.A. 733). He underwent "treatment" from his arrival at Western State Hospital in October 2005 until he was declared unrestorably incompetent in September 2013. The more recent reports confirm that Martinez's current abilities are virtually the same as they were on February 21, 2013. (See Dr. Torres' 07/17/13 report finding Martinez unrestorably incompetent [J.A. 157-169] and Dr. Tinsley's 05/14/15 report confirming prior competency concerns still exist [J.A. 175-178]). Respectfully, it defies credulity to suggest that additional "treatment" in the form of teaching Martinez to use American Sign Language will ever restore him to competence. Dr. Corbett opined that Martinez "has reached his maximum level of sign language skill development." (J.A. 111, 141). Drs. Torres and Wolber stated that it appeared to them that Martinez's "language acquisition has plateaued, with minimal improvements made in his ability to convey competency related materials since at least July 2012." (J.A. 165). Drs.

Torres and Wolber later concluded that "over the course of several years of attempted restoration and communication education, his progress has been minimal and appears to have plateaued." (J.A. 169).

Consistent with finding Martinez plateaued, the experts do not believe additional efforts would be beneficial to competency restoration. Dr. Corbett opined that "even with continued instruction, he would not be able to obtain the level of language competency needed for competency to stand trial." (J.A. 111). Dr. Corbett found that "[a]fter seven years, Mr. Martinez has made some gains in learning individual signs but minimal gains in ASL grammar and syntax; therefore it is the examiner's opinion that he has no language foundation on which to build these skills." (J.A. 141). Likewise, Drs. Torres and Wolber opined that "[b]ecause of the lack of significant progress . . . it is not likely that he will be gain [sic] the requisite communication skills to be considered competent to stand trial and plead in the foreseeable future." (J.A. 169). These findings are consistent with what Drs. Corbett and Haskins stated from the time of their initial evaluations - that Defendant may not be able to "make significant gains" (J.A. 15) and 'it is impossible to say how much his language and knowledge repertoires can be expanded." (J.A. 28).

## CONCLUSION

For the reasons stated above, 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 the 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 had been held for over ten (10) years with virtually no improvement and he had 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.[6]

Respectfully submitted,
OSWALDO ELIAS MARTINEZ

By: /s/ Lisa A. Mallory
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[6] 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).

## 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 26th day of July, 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 26h day of July, 2018, an electronic version has also been delivered to opposing counsel via email to the following address:

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