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IN THE

SUPREME COURT OF VIRGINIA

RECORD NO. 180179

OSWALDO ELIAS MARTINEZ,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

BRIEF OF THE COMMONWEALTH

MARK R. HERRING,
Attorney General of Virginia

MATTHEW P. DULLAGHAN
Assistant Attorney General
Virginia Bar No. 22164

OFFICE OF THE ATTORNEY GENERAL
202 North Main Street
Richmond, Virginia 23219
(804) 786-2071 phone
(804) 786-1108 facsimile
oagcriminallitigation@oag.state.va.us

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BRIEF OF THE COMMONWEALTH

STATEMENT OF THE CASE

On February 18, 2005, Oswaldo Elias Martinez was arrested for the January 2, 2005 rape and murder of 16-year-old B.B.[1] After his arrest, Martinez moved for an evaluation of his competency to stand trial.[2] On May 18, 2005, the court-

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[1] JA 733.

[2] JA 1-2.

appointed expert opined that Martinez was not competent to stand trial "due to severe deficits in expressive and receptive language."[3]

On May 19, 2005, a grand jury returned true bills of indictment charging Martinez with five offenses, all alleged to have occurred on or about January 2, 2005: (i) capital murder, in violation of Code § 18.2-31(4); (ii) capital murder, in violation of Code § 18.2-31(5); (iii) robbery, in violation of Code § 18.2-58; (iv) rape, in violation of Code § 18.2-61; and (v) forcible sodomy, in violation of Code §18.2-67.1.[4] On June 9, 2005, the circuit court referred Martinez to the Commissioner of the then-named Department of Mental Health, Mental Retardation and Substance Abuse Services for evaluation of his competency to stand trial.[5] The circuit court received a report dated July 13, 2005, which, again opined that Martinez was not competent to stand trial.[6]

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.[7] The agency reported that "[i]mmersion in a signing environment

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[3] JA 15.

[4] JA 3-4, 16.

[5] JA 16. Effective July 1, 2009, the agency became the Department of Behavioral Health and Developmental Services. *See* 2009 Acts of Assembly cc. 813, 840.

[6] JA 28.

[7] JA 30.

is the 'gold standard' for attempts to develop sign language in a person who grew up without a reliable formal communication system."[8]

The circuit court conducted the periodic reviews required by Code § 19.2-169.3(B), each time finding that Martinez remained incompetent to stand trial and directing his continued hospitalization to attempt to restore his competency. On June 19, 2013, the circuit court ordered that the non-capital indictments be dismissed pursuant to Code § 19.2-169.3(D), finding that more than five years had passed without Martinez being restored to competency.[9] On September 19, 2013, the circuit court found that Martinez was incompetent to stand trial and was likely to remain incompetent for the foreseeable future.[10] The circuit court continued to conduct the periodic reviews required for the capital charges under Code § 19.2-169.3(F), each time finding that Martinez remained incompetent to stand trial and directing his continued hospitalization and treatment.[11]

On April 26, 2016, Martinez filed a motion to dismiss the capital indictments.[12] Martinez previously had submitted a memorandum arguing that the ordered treatment was not medical in nature and that it was not "medically

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[8] JA 31.

[9] JA 155.

[10] JA 170-71, 172-74.

[11] JA 254, 459, 491, and 498.

[12] JA 246-49.

appropriate" under Code § 19.2-169.3(F).[13] The circuit court denied the motion.[14] On November 4, 2016, Martinez filed a second motion to dismiss, arguing that Code § 19.2-169.3(F) was unconstitutional because it violated Martinez's rights to Due Process, Equal Protection and a Speedy Trial.[15] The circuit court denied the second motion to dismiss.[16] Martinez moved the circuit court to reconsider the denial of the second motion, arguing in part that the section violated the Equal Protection Clause because it did not provide Martinez a right to seek direct appellate review of the circuit court's decision.[17] By order dated November 2, 2017, the circuit court denied the motion for reconsideration.[18]

On November 2, 2017, the circuit court also conducted the next required six-month review hearing and again found that Martinez met the criteria of Code § 19.2-169.3(F) for continued treatment.[19] Martinez noted an appeal from that order. The Court granted the appeal by order dated June 4, 2018.

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[13] JA 179-209.

[14] JA 254-55; *see* JA 252-53.

[15] JA 258-64; *see* JA 265-87.

[16] JA 491.

[17] JA 463.

[18] JA 500; *see* JA 495.

[19] JA 498-99.

ASSIGNMENTS OF ERROR

Martinez assigns two errors:

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) because sign language education is not "medical" treatment.

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.[20]

In addition, in its order granting the appeal, this Court directed the parties "to address in their briefs whether this Court has jurisdiction over this case."

SUMMARY OF ARGUMENT

Martinez seeks to take an interlocutory appeal of a pre-trial treatment order in a pending criminal case. No statute grants this Court (or the Court of Appeals of Virginia) the authority to hear such an appeal. To the contrary, the decisions of this Court confirm that no appellate court can consider the merits of Martinez's assigned errors at this juncture.

Although his pleadings in the circuit court raised various constitutional arguments, Martinez's assignments of error raise only questions of statutory

[20] Defendant's Opening Br. at 5-6.

interpretation. Code § 19.2-169.2(A) does not limit treatments to restore a criminal defendant to competency to medical procedures, and the circuit court did not err in ordering a non-medical treatment recommended by the expert who evaluated Martinez. Nor does Section 19.2-169.3(F)'s requirment that continued treatemt be "medically appropriate" require a finding that the treatment will be succeessful. Instead, the provision guards against continuing treatment that poses an unacceptable risk of harm to the defendant and here no evidence suggests that continued treatment poses any risk of harm to Martinez.

ARGUMENT

I. Standard of Review

As to the jurisdictional question presented by the Court, "it is a familiar principle that a 'court always has jurisdiction to determine its own jurisdiction.'"[21] To the extent resolution of the question requires "statutory interpretation, it is a question of law reviewed *de novo* on appeal."[22]

Because Martinez's assignments of error argue only questions of statutory interpretation, those issues also would be reviewed *de novo*, if they are capable of review at all in this forum, at this time.

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[21] *CVAS 2, LLC v. City of Fredericksburg*, 289 Va. 100, 108, 766 S.E.2d 912, 914 (2015) (quoting *Rutter v. Oakwood Living Ctrs. of Va., Inc.*, 282 Va. 4, 13, 710 S.E.2d 460, 464 (2011) (collecting cases) (internal quotation marks omitted)).

[22] *Grimes v. Commonwealth*, 288 Va. 314, 318, 764 S.E.2d 262, 264 (2014).

II. The Court does not have jurisdiction to decide Martinez's assignments of error.

In its letter opinion overruling Martinez's motion to dismiss the indictments filed against him, the circuit court held that Martinez was not detained under a "criminal conviction order,"[23] citing this Court's decision in *In re Vauter*.[24] The court also held that the order could not be appealed to the Court of Appeals of Virginia under Code §§ 17.1-405 or 17.1-406.[25] The circuit court nevertheless determined that Martinez could appeal the commitment order to this Court because "The commitment order in a civil case is appealable as provided in Section 8.01-670(A)(3)."[26]

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[23] JA 495.

[24] 292 Va. 761, 793 S.E.2d 793 (2016).

[25] JA 495. Code § 17.1-405 allows appeals to the Court of Appeals of Virginia from decisions by administrative agencies, by the Virginia Workers' Compensation Commission, and by circuit courts in domestic relations matters. Code § 17.1-406(A) allows appeals to that court "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, (ii) any final decision of a circuit court on an application for a concealed weapons permit pursuant to Article 6.1 (§ 18.2-307.1 et seq.) of Chapter 7 of Title 18.2, (iii) any final order of a circuit court involving involuntary treatment of prisoners pursuant to § 53.1-40.1, or (iv) any final order for declaratory or injunctive relief under§ 57-2.02." (Code § 57-2.02 deal with relief under the Virginia Act for Religious Freedom.) Code § 17.1-406(B) excludes from that court's jurisdiction appeals from sentences of death, from circuit court orders in habeas corpus proceedings, from orders of the State Corporation Commission, and from proceedings concerning attorney discipline or complaints by the Judicial Inquiry and Review Commission.

[26] *Id.*

In the court below, Martinez rejected the circuit court's reasoning. Specifically, Martinez argued that "*Vauter* in no way held, or even suggested, that the hearing pursuant to Virginia Code § 19.2-169.3(F) in which [a capital murder defendant] was found to be unrestorably incompetent was a civil proceeding."[27] He also argued that the proceedings in the circuit court were inescapably criminal in nature. "The 'cases' at issue herein are criminal, specifically two capital murder cases. The Order(s) at issue (the ones entered pursuant to Virginia Code-§ 19.2-169.3(F))) are part of those criminal cases, not a separate civil proceeding." And Martinez conceded that the periodic orders entered pursuant to § 19.2-169.3(F) were not final, in part because the statute requires a review hearing every six months.[28]

Martinez's present contention that this Court has the jurisdiction necessary to reach his assignments of error is contrary to the position he took before the

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[27] JA 504.

[28] JA 505 (citing *Blevins v. Dept. of Social Services*, 61 Va. App. 94, 733 S.E.2d 674 (2012) ("a dispositional order is not a 'final order' in the conventional sense of the term, *i.e.,* one that 'disposes of the whole subject' and 'leaves nothing to be done,' because Code § 16.1-278.2 contemplates the possibility of further review by the J&DR court.").

circuit court. While this Court necessarily decides its own jurisdiction *de novo*,[29] Martinez's contrary arguments in the circuit court correctly stated the law.

The only statutory basis for appellate jurisdiction Martinez now cites[30] is Code § 8.01-670(A)(3), which provides:

> A. Except as provided by § 17.1-405, any person may present a petition for an appeal to the Supreme Court if he believes himself aggrieved: . . .
>
> 3. By a final judgment in any other civil case.[31]

Martinez, however, is not appealing a final judgment in a civil case.

In *Commonwealth v. Southerly*,[32] this Court held that an "appeal is criminal in nature" *whenever* a criminal defendant submits "an appeal from the conviction itself or from action on motions filed and disposed of while the trial court retains jurisdiction over the case."[33] Martinez acknowledges that he is held under criminal process and that the circuit court has, and continues to exercise, jurisdiction over

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[29] *See Tuggle v. Commonwealth*, 230 Va. 99, 111 n.5, 334 S.E.2d 838, 846 (1985) ("This court, however, is not bound to accept the suggestion of a party concerning a question of law.").

[30] Defendant's Opening Br. at 20-21.

[31] Va. Code Ann. § 8.01-670. The other subparts of § 8.01-670 deal with appeals of specifically identified civil proceedings (§§ 8.01-607(A)(1) and (A)(2)), appeals of certain equitable claims (§ 8.1-607(B)), and interlocutory appeals under § 8.01-607.1 (§ 8.01-607(C)).

[32] 262 Va. 294, 551 S.E.2d 650 (2001).

[33] 262 Va. at 299, 551 S.E.2d at 652.

the criminal charges pending against him.[34] The order from which Martinez seeks to appeal also was entered under a statute whose application is limited to criminal defendants[35]. There can be no question that the order which Martinez seeks to appeal is criminal in nature. *Vauter*'s distinction, for purposes of habeas corpus jurisdiction, that a pre-trial detainee is not held under a criminal "conviction,"[36] makes no difference to the pertinent analysis under *Southerly* that the challenged order was entered pursuant to the circuit court's exercise of tis jurisdiction over the criminal charges.

While Martinez quotes *Southerly*, he does not apply its clear standard. Instead, Martinez argues his own assessment that the proceedings on the challenged order are somehow "analogous" or "akin to a civil trial within the criminal case."[37] He cites *Southerly*, *Daily Press, Inc. v. Commonwealth*,[38] as well as *Green v. Commonwealth*,[39] only as support for the broad proposition that this

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[34] Defendant's Opening Br. at 1, 3.

[35] *See* § 19.2-169.3(F)(" In any case when an incompetent defendant is charged with capital murder, . . .).

[36] 292 Va. at 771, 793 S.E.2d at 798.

[37] Defendant's Opening Br. at 25-26.

[38] 60 Va. App. 213, 725 S.E.2d 737 (2012).

[39] 263 Va. 191, 557 S.E.2d 230 (2002).

Court has previously held that a decision may be civil in nature, even if the "underlying case" was criminal.[40]

But Martinez's appeal shares none of the essential characteristics of those decisions. To the contrary, Martinez's appeal is criminal under *Southerly*'s clear standard that the challenged order was entered "while the trial court retains jurisdiction over the case."[41] *Daily Press* involved a challenge by a stranger to the criminal prosecution to the circuit court's decision to seal a portion of the court file from the public, not from the defendant.[42] The Court of Appeals found that this action "was neither a continuation of the criminal prosecution . . . nor a process that '[was] purely criminal in nature.'"[43] And *Green* confirmed that the appeal of a revocation of suspended sentence was criminal – because the circuit court retained jurisdiction to revoke.[44]

Moreover, the challenged order is not a final disposition of the criminal case against Martinez. Indeed, it is not even a final disposition of the proceedings under § 19.2-169.3. The appeal Martinez wishes to pursue therefore is interlocutory in

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[40] Defendant's Opening Br. at 22-24.

[41] 262 Va. at 299, 551 S.E.2d at 652.

[42] 60 Va. App. at 215, 725 S.E.2d at 737.

[43] *Id.* at 222, 725 S.E.2d at 741.

[44] 263 Va. at 195-96, 557 S.E.2d at 233.

nature. This Court consistently has held "that criminal appeals to this Court lie only to final judgments."[45]

While the General Assembly has provided a procedure allowing parties to petition for an interlocutory appeal in certain civil matters, it has not extended that rule to orders entered in criminal cases.[46] And despite Martinez's assertion that his appeal is "civil in nature," he also did not follow that statutory procedure that would be applicable if this were a civil case, including filing "a statement of reasons why an immediate interlocutory appeal should be permitted."[47]

Martinez closes his argument by urging that, if this Court concludes that it lacks jurisdiction to hear this appeal, it can simply transfer the case to the Court of

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[45] *West v. Commonwealth*, 249 Va. 241, 242, 455 S.E.2d 1, 1 (1995) (citing *Sturgil v. Commonwealth*, 175 Va. 584, 7 S.E.2d 141 (1940); *Saunders v. Commonwealth*, 79 Va. 522 (1884) (dismissing appeal of denial of plea of former jeopardy because no final judgment entered); and *Abney v. United States*, 431 U.S. 651, 656 (1977) (no Constitutional right to appeal; appeals are creatures of statute)).

[46] Va. Code Ann. § 8.01-670.1.

[47] Va. Code Ann. § 8.01-670.1 provides in part as follows:

> When, prior to the commencement of trial, the circuit court has entered in any pending civil action, except any matters appealable to the Court of Appeals pursuant to § 17.1-405, an order or decree that is not otherwise appealable, any party may file in the circuit court a statement of the reasons why an immediate interlocutory appeal should be permitted. . . . If the appellate court determines that the certification by the circuit court has sufficient merit, it may, in its discretion, permit an appeal to be taken from the interlocutory order or decree and shall notify the certifying circuit court and counsel for the parties of its decision.

Appeals of Virginia.[48] His argument incorrectly assumes that if this Court does not have jurisdiction, then the Court of Appeals must. But, as Martinez himself recognizes, the jurisdiction of the Court of Appeals is limited only to those matters expressly authorized by statute,[49] and no statute grants the Court of Appeals jurisdiction over such an interlocutory criminal appeal either.[50]

Martinez's assignment of error does not question whether appellate review at this stage of the proceedings is constitutionally required, nor does his brief argue that it is.[51] Martinez advances no reason to conclude that some court necessarily would have jurisdiction to hear his desired appeal at this juncture.

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[48] Defendant's Opening Br. at 26.

[49] *Id.* at 21 (quoting *Lewis v. Lewis*, 271 Va. 520, 524, 628 S.E.2d 314, 316 (2006)).

[50] To be sure, the General Assembly does not have to provide for appellate review, even when there is a final judgment. *See Harvey v. Warden*, 268 Va. 5, 6, 597 S.E.2d 58, 59 (2004) (proceedings under § 19.2-327.1 are not reviewable by the Supreme Court of Virginia either by direct appeal or petition for writ of habeas corpus).

[51] The circuit court's holding responded to Martinez's argument before that court that 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." Defendant's Opening Br. at 20 (citing JA 463-68). But Martinez did not appeal that ruling, and it is not included in either of his assignments of error, so the constitutionality of not providing an interlocutory appeal is not before this court.

III. Martinez misreads the pertinent portions of Code § 19.2-169.3(F) and incorrectly argues that the circuit court was required to make findings that the statute does not demand.

In resolving questions of statutory interpretation, this Court "give[s] statutory language its plain meaning."[52] On appellate review, reviewing courts "assume that the legislature chose, with care, the words it used when it enacted the relevant statute."[53] "When bound by the plain meaning of the language used, appellate courts are not permitted 'to add or subtract from the words used in the statute.'"[54]

Although penal statutes are strictly construed against the Commonwealth, "[t]he plain, obvious, and rational meaning of a statute is always preferred to any curious, narrow or strained construction," and "a statute should never be construed so that it leads to absurd results."[55] Statutes addressing the same subject are to be

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[52] *Davenport v. Little-Bowser*, 269 Va. 546, 555, 611 S.E.2d 366, 371 (2005) (citing *Jackson v. Fidelity & Deposit Co.*, 269 Va. 303, 313, 608 S.E.2d 901, 904 (2005)).

[53] *Alger v. Commonwealth*, 267 Va. 255, 261, 590 S.E.2d 563, 566 (2004) (internal quotation marks and citation omitted).

[54] *Nicholson v. Commonwealth*, 56 Va. App. 491, 503, 694 S.E.2d 788, 794 (2010) (quoting *Posey v. Commonwealth*, 123 Va. 551, 553, 96 S.E. 771, 771 (1918)).

[55] *Meeks v. Commonwealth*, 274 Va. 798, 802, 651 S.E.2d 637, 639 (2007) (citing cases) (internal quotations omitted), *see also Branch v. Commonwealth*, 14 Va. App. 836, 839, 419 S.E.2d 422, 424 (1992).

read *in pari materia*.[56] Thus, "statutes are not to be considered as isolated fragments of law, but as a whole, or as parts of a great, connected homogeneous system, or a single and complete statutory arrangement."[57]

A. Section 19.2-169.3(F)(iii) does not require a finding that the ordered treatment is a medical procedure.

Martinez argues that the trial court erred in its application of the statutory phrase "medically appropriate."[58] But his arguments do not take sufficient account of the context of the phrase.

Code § 19.2-169.3(F) provides as follows:

> In 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.

The term "treatment" is not defined in the challenged section; it instead refers back to Code § 19.2-169.2(A), which provides in pertinent part as follows:

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[56] *See Lillard v. Fairfax County Airport Authority*, 208 Va. 8, 12, 155 S.E.2d 338, 342 (1967).

[57] *Id.*

[58] Defendant's Opening Br. at 31-32.

> A. Upon finding pursuant to subsection E of § 19.2-169.1 that the defendant, including a juvenile transferred pursuant to § 16.1-269.1, is incompetent, the court shall order that the defendant receive treatment to restore his competency on an outpatient basis or, if the court specifically finds that the defendant requires inpatient hospital treatment, at a hospital designated by the Commissioner of Behavioral Health and Developmental Services as appropriate for treatment of persons under criminal charge. . . .

Nothing in either section states that the "treatment to restore his competency" must be medical in nature. In addition, Martinez does not identify any point where he made any contemporaneous objection to the initial recommendation that "[i]mmersion in a signing environment is the 'gold standard' for attempts to develop sign language in a person who grew up without a reliable formal communication system."[59] He cannot do so for the first time on appeal.[60]

Martinez also argues that Code § 19.2-163(F) "does not cover" his "situation,"[61] because the General Assembly "never envisioned" a case where a criminal defendant might be found incompetent absent a treatable "mental disease or defect."[62] But Martinez identifies nothing in the statute which would so limit the protection of a criminal defendant's right to assist in his own defense.

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[59] JA 31.

[60] Va. Sup. Ct. R. 5:25.

[61] Defendant's Opening Br. at 33.

[62] *Id.* at 32.

What is more, the United States Supreme Court's decisions require protection of a broader class of defendants that those found incompetent because of a "mental disease or defect." In *Godinez v. Moran*,[63] the Court stated that "the 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.'"[64] There was no error under the plain language of the statute, either in finding that Martinez's lack of language skills left him unable to consult with his counsel, or in ordering the "gold standard" of available treatment reasonably calculated to address that inability.

B. Section 19.2-169.3(F)(iii) does not require a finding that continuation of the treatment will be medically beneficial; instead, particularly when the treatment itself is not a medical procedure, the court must ensure only that the treatment is not medically inappropriate.

Martinez argues that "there is a dearth of law interpreting the term 'medically appropriate.'"[65] And even the two cases Martinez does cite are not on

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[63] 509 U.S. 389 (1993).

[64] 509 U.S. at 396 (quoting *Dusky v. United States*, 362 U.S. 402, 402 (1960) *(per curiam)*, and citing *Drope v. Missouri*, 420 U.S. 162, 171 (1975)). *See Orndorff v. Commonwealth*, 271 Va. 486, 500, 628 S.E.2d 344, 351 (2006) (applying *Godinez* standard).

[65] Defendant's Opening Br. at 32.

all fours with his situation because both *Sell v. United States*[66] and *United States v. Evans*[67] involved the forced medication of a mentally-ill defendant. Those cases identified four criteria that must be satisfied before authorizing such an intrusive procedure.

- "First, a court must find that *important* governmental interests are at stake."[68]
- "Second, the court must conclude that involuntary medication will *significantly further* those concomitant state interests."[69]
- "Third, the court must conclude that involuntary medication is *necessary* to further those interests."[70]
- "Fourth, as we have said, the court must conclude that administration of the drugs is *medically appropriate, i.e.*, in the patient's best medical interest in light of his medical condition."[71]

Sell's fourth factor drew on the Court's reference to "medically appropriate" treatment in *Riggins v. Nevada*.[72] In particular, *Sell* highlighted Justice Kennedy's concurrence in *Riggins*, which "emphasized that antipsychotic drugs might have side effects that would interfere with the defendant's ability to receive a fair

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[66] 539 U.S. 166 (2003) .

[67] 404 F.3d 227 (4th Cir. 2005).

[68] 539 U.S. at 180.

[69] *Id.* at 181.

[70] *Id.*

[71] *Id.*

[72] 504 U.S. 127 (1992).

trial."[73] *Sell* built on that observation to require courts to consider that '[t]he specific kinds of drugs at issue may matter here as elsewhere. Different kinds of antipsychotic drugs may produce different side effects and enjoy different levels of success."[74]

Even in those cases—which involved the Federal Constitution rather than the interpretation of the Code of Virginia—"medically appropriate" was not intended to measure the efficacy of the treatment; those considerations were addressed in the previous two factors. Nothing in the forced-medication cases makes the factors applicable to cases, like Martinez's, where the court has not ordered any forcible intervention and the defendant cooperates with the treatment.[75] The fourth factor, considered alone, required a court to consider side effects and other possible, albeit unintended, risks that the involuntarily treated defendant would face.

The same logic applies to the General Assembly's selection of the same term. Martinez argues that the circuit court was required to find that continued treatment was likely to succeed in restoring him to competency before it can find

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[73] *Sell*, 539 U.S. at 181 (citing *Riggins*, 504 U.S. at 145 (Kennedy, J, concurring)).

[74] 539 U.S. at 181.

[75] *See*, *e.g.*, JA 38 ("Globally, Mr. Martinez has been responsive and cooperative with restoration attempts."); JA 178 ("He has been cooperative and compliant with restoration services.").

that the treatment is "medically appropriate."[76] But where nothing in the statutes requires that all treatments must be medical in nature, it cannot have been the legislature's intent to require the circuit court to ensure the treatment is medically efficacious. Instead, as in *Sell*, the concern must be that the treatment should not create an unnecessary risk of harm to the defendant.

Nothing in the record suggests that the ordered treatment posed any risks to Martinez. In any case, nothing in the record suggests any treatment had a greater likelihood of success. The circuit court did not err in finding that that continued treatment was "medically appropriate."

[76] Defendant's Opening Br. at 34-35.

CONCLUSION

The appeal should be dismissed for want of jurisdiction. If the Court determines it has jurisdiction, the judgment of the circuit court should be affirmed.

Respectfully submitted,

COMMONWEALTH OF VIRGINIA
Appellee herein.

MARK R. HERRING
Attorney General of Virginia

/s/

MATTHEW P. DULLAGHAN
Senior Assistant Attorney General
Virginia State Bar No. 22164
Counsel for the Appellee
OFFICE OF THE ATTORNEY GENERAL
202 North Ninth Street
Richmond, Virginia 23219
(804) 786-4073 phone
(804) 786-1108 facsimile
mdullaghan@oag.state.va.us

CERTIFICATE

On August 27, 2018, the required number of copies of this brief were hand-delivered and emailed to the Clerk of this Court and mailed and emailed to counsel for the appellant, Timothy G. Clancy, Esquire, and Lisa A. Mallory, Esquire, CLANCY & WALTER, P.L.L.C., 544 Settlers Landing Road, Hampton, Virginia 23669, at tclancy@clancywalterlaw.com and lmallory@clancywalterlaw.com.

In accordance with Rule 5:6, I certify that this document contains 4,367 words, in compliance with Rules 5:26(b) and 5:28.

The Commonwealth desires to present oral argument in this case.

/s/
Matthew P. Dullaghan
Senior Assistant Attorney General