



## NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

Fairfax County Courthouse  
4110 Chain Bridge Road  
Fairfax, Virginia 22030-4009

703-246-2221 • Fax: 703-246-5496 • TDD: 703-352-4139

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CITY OF FAIRFAX

December 31, 2014

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Marvin D. Miller, Esq.  
The Law Offices of Marvin D. Miller  
1203 Duke Street  
Alexandria, Virginia 22314

Steven A. Witmer, Esq.  
Senior Assistant Attorney General  
Office of the Attorney General  
900 East Main Street  
Richmond, Virginia 23219

Re: Zeeshan Sarwar v. Harold W. Clarke, Director, Virginia  
Department of Corrections, Case No. CL-2014-9354

Dear Counsel:

This matter is before the court on the petitioner's "Petition for a Writ of Habeas Corpus," the respondent's "Motion to Dismiss," the petitioner's "Opposition to the Motion to Dismiss," and the respondent's "Motion to Strike." For the following reasons, the Motion to Dismiss will be granted.

### Background

The petitioner is Zeeshan Sarwar ("Mr. Sarwar"). Following a jury trial, Mr. Sarwar was convicted in this court in 2011 of the offense of speeding to elude in violation of Va. Code Ann. § 46.2-817. The court later imposed the jury's sentence of five years of incarceration. In his petition,

# OPINION LETTER

Mr. Sarwar asks that he be granted a hearing on his claim that his conviction should be set aside because of ineffective assistance of counsel. Specifically, Mr. Sarwar claims that his counsel was ineffective for failing to object when, before the presentation of evidence, the trial judge gave a preliminary instruction to the jury on the elements of the offense charged.

At Mr. Sarwar's trial, after the jury was impaneled and before opening statements, the trial judge gave the following preliminary instruction to the jury panel:<sup>1</sup>

I am going to give you a complete set of jury instructions at the conclusions of all the evidence. I'm just going to have several instructions for you to give you some guidance on how to do the – determine the credibility of the witnesses, for example, and what the burden of proof is, and attempt to define what beyond a reasonable doubt is, but in the meantime, in an effort not to keep you in the dark, I'm going to give you an instruction now of the basic elements of the offense that the defendant is charged with so you know what to listen for. And I'll give you this again at the end of all of the instructions and you're to consider all the instructions in the case.

[T]he defendant is charged with the crime of disregarding a signal by a law enforcement officer to stop. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

1. That the defendant received a visible or audible signal from a law enforcement officer to bring his motor vehicle to a stop; and

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<sup>1</sup> The court had previously been instructed during voir dire of such matters as the presumption of innocence, the burden of proof, and the right of the defendant not to testify. See generally "Suggested Questions for Judge to Pose on Voir Dire," Virginia Criminal Benchbook for Judges and Lawyers, Appendix § 3 (2014-2015). In addition, the court had given the preliminary instruction to the jury. See generally "Preliminary Instruction to Civil Jury," Virginia Criminal Benchbook for Judges and Lawyers," Intro.05 (2013-2014). See also Virginia Model Jury Instructions—Criminal, Instruction No. 2.050 (LexisNexis Matthew Bender).

2. That the defendant drove such motor vehicle in a willful and wanton disregard of such signal so as to interfere with or endanger the operation of the law enforcement vehicle or endanger a person.

And those are the elements of the crime and the Commonwealth has to prove each of those beyond a reasonable doubt. And, again, I'll give you that instruction at the end of all the evidence in that case.

Trial Transcript at pp. 64-65.

Neither the defense counsel nor the prosecutor objected to the court's preliminary instruction to the jury, although the trial court informed counsel at a bench conference of her intention to read the instruction to the jury before opening statements. Trial Transcript at pp. 63-64.

Mr. Sarwar contends that it was error for the court to give the preliminary instruction outlining the elements of the charged offense before the presentation of the evidence, that the error was a structural defect requiring reversal of his conviction. Further, Mr. Sarwar argues that the timing of the instruction was prejudicial and that his defense counsel was ineffective for failing to object. The respondent opposes the petition, arguing that the petitioner has not made a sufficient showing for habeas relief.

### **Discussion**

It is in the Court's discretion to give instruction before or after presentation of the evidence. Rule 3A:16 of the Virginia Supreme Court states that "[i]n a felony case, the instructions shall be reduced to writing. In all cases the court shall instruct the jury before arguments of counsel to the jury." Va. Sup. Ct. R. 3A:16(a) (2014). The Rule does not preclude giving a preliminary instruction to the jury before the evidence is presented.

Mr. Sarwar argues that the timing of the jury instruction was a structural defect in the trial procedure and therefore requires automatic reversal rather than a review under the harmless error standard. He cites Neder v. United States, 527 U.S. 1 (1999), for this proposition. Neder, however, is inapposite. Neder stands for the proposition that a trial defect

which deprives a defendant of basic protections or which vitiate the jury's findings may call for an automatic reversal, rather than harmless error review. Id. at 9, 11. Neder held that an omission of an element in a jury instruction is subject to harmless error review, not automatic reversal. Id. at 10.

Mr. Sarwar relies on Sullivan v. Louisiana, 508 U.S. 275 (1993), to support his argument that the jury instruction in his case was a structural defect. Mr. Sarwar's reliance on Sullivan is misplaced. As the Neder court explained, the trial court in Sullivan had given a defective reasonable doubt instruction that vitiated all of the jury's findings. See Neder, 527 U.S. at 10.

In the present case, the jury instruction was not defective,<sup>2</sup> nor does the jury learning the elements of the charge before the presentation of evidence fundamentally deprive the defendant of his basic protections or vitiate all of the jury's findings.

Academic research focused on American juries explains that juries often have trouble understanding jury instructions.<sup>3</sup> One solution posited is to provide jury instructions at the beginning of the trial.<sup>4</sup> Instructions given earlier can provide a basic framework by which the jurors can understand the issues.<sup>5</sup> One commentator has described the practice of instructing juries only at the end of the trial as akin to "telling jurors to watch a baseball game and [then] decide who won without telling them the rules until the end of the game."<sup>6</sup>

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<sup>2</sup> The instruction is question is Virginia Model Jury Instructions—Criminal, Instruction No. G45-300 (LexisNexis Matthew Bender).

<sup>3</sup> Nancy S. Marder, Bringing Jury Instructions into the Twenty-First Century, 81 NOTRE DAME L. REV. 449, 454 (2006).

<sup>4</sup> Ellen Chilton & Patricia Henley, Jury instruction: Helping Jurors Understand the Evidence and the Law, PLRI Reports (Spring 1996) University of California, Hastings College of the Law, Public Law Research Institute. Available at <http://gov.uchastings.edu/public-law/docs/plri/juryinst.pdf>

<sup>5</sup> Id.

<sup>6</sup> William W. Schwarzer, Reforming Jury Trials, 1990 U. CHI. LEGAL F. 119, 130 (1990).

Mr. Sarwar argues further that his trial counsel was ineffective for failing to object to the preliminary instruction. To determine whether counsel's representation was deficient to the extent that the defendant was denied his constitutionally-protected right to counsel, the court must apply the two-pronged test enunciated by Strickland v. Washington, 466 U.S. 668 (1984). First:

[A] court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct. A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance. In making that determination, the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case. At the same time, the court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.

Strickland, 466 U.S. at 690. Secondly, "[c]onflict of interest claims aside, actual ineffectiveness claims alleging a deficiency in attorney performance are subject to a general requirement that the defendant affirmatively prove prejudice." Id. at 693. To prove prejudice,

[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

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Id. at 694.

Mr. Sarwar fails to meet either prong of the Strickland standard. He cites no authority that supports his argument that it is error for a jury to be given a preliminary instruction before the presentation of evidence.

Mr. Sarwar also fails to show any prejudice to his case. He presents no evidence that there would have been a different outcome but for the timing of the jury instruction. The evidence of Mr. Sarwar's guilt was overwhelming.

### **Conclusion**

For these reasons, the Motion to Dismiss will be granted and the Petition for Writ of Habeas Corpus will be dismissed. I have entered an order reflecting this ruling.

Sincerely,

A solid black rectangular box redacting the signature of Jane Marum Roush.

Jane Marum Roush

cc: David Bernhard, Esq.

**OPINION LETTER**

**VIRGINIA:**

**IN THE CIRCUIT COURT OF FAIRFAX COUNTY**

Zeeshan Sarwar, )  
 )  
 ) Petitioner, )  
 )  
 v. ) Case No. CL-2014-0014605  
 )  
 ) Harold W. Clarke, Director )  
 ) Virginia Dep't of Corrections )  
 )  
 ) Respondent. )

**FINAL ORDER**

This matter came before the Court on petitioner's Petition for a Writ of Habeas Corpus and the respondent's Motion to Dismiss. For the reasons stated in this Court's opinion letter dated this date, which is incorporated herein, it is hereby

**ADJUDGED, ORDERED and DECREED** that the Motion to Dismiss is granted and the Petition for Writ of Habeas Corpus is dismissed.

ENTERED this 31st day of December 2014.



Jane Marum Roush  
Judge

Signature of counsel of record waived pursuant to Va. Sup. Ct. R. 1:13.